Borders of Personhood

Ayten Gündoğdu

DOI:10.1093/acprof:oso/9780199370412.003.0004

Abstract and Keywords

This chapter examines the contemporary manifestations of rightlessness by discussing the precarious legal personhood of asylum seekers and undocumented immigrants. The human rights framework represents a shift from citizenship to personhood as the basis of entitlement to rights. To assess the significance and limits of this shift, the chapter turns to Arendt’s unique understanding of personhood as persona, which denotes an artificial mask that enables public appearance and allows one’s voice to sound through. Although personhood can no longer be officially taken away, it can be significantly undermined as a result of border control practices justified on the basis of territorial sovereignty. To make this point, the chapter analyzes two cases from the European Court of Human Rights: N. v. UK (2008) and Saadi v. UK (2008). These cases highlight that “the human person” at the heart of human rights law is subjected to various forms of
stratification in the context of deportation and immigration detention. However, this argument does not lead to the conclusion that personhood is a legal mechanism that necessarily engenders violent exclusion—a point made by several critical legal scholars. From an Arendtian perspective, human beings can become equals only through artificial conventions such as personhood.

**Keywords:** personhood, rightlessness, detention, deportation, territorial sovereignty, asylum seekers, undocumented immigrants, N. v. UK, Saadi v. UK

They live in camps surrounded by razor barbed wire. They tie plastic garbage bags to the sides of the building to keep the rain out. They sleep on cots and hang sheets to create some semblance of privacy. They are guarded by the military and are not permitted to leave the camp, except under military escort. The Haitian detainees have been subjected to predawn military sweeps as they sleep by as many as 400 soldiers dressed in full riot gear. They are confined like prisoners and are subject to detention in the brig without a hearing for camp rule infractions.¹

THESE were the words used by the US District Court Judge Sterling Johnson Jr. to describe the living conditions of migrants in Guantánamo Bay in his 1993 ruling declaring their detention in camps unconstitutional—a ruling vacated by the Supreme Court’s later review of the case. Long before Guantánamo made the headlines with the US government’s indefinite detention of “enemy combatants,” it was used as a “safe haven” or “shelter” for migrants from Haiti and Cuba. The US Coast Guard would capture these migrants on the high seas before they could reach the United States and send them to the US Naval Base in Guantánamo Bay to determine whether they had a credible fear of persecution and qualified for asylum.² Those who had a credible fear and tested negative for HIV would be sent as refugees to the United States. Those who qualified for refugee status but were HIV-positive were kept on the island as a threat to public health, isolated from others in a detention center called “Camp Bulkeley.”³ And those who could not establish a credible claim were forcefully returned to their countries of origin. Camp X-Ray, which became one of the most infamous symbols of the War on
Terror following the publication of photos of detainees in orange jumpsuits, was first established in 1994 for Cuban refugees who “posed serious and documented threats”; these refugees were “held indefinitely in open air cages in order to ‘avoid a breakdown or disruption of law, order and discipline in the camps.’”

The story of the migrants held in Guantánamo Bay highlights how the legal standing of certain subjects can be unmade to the effect of putting them “outside the pale of the law,” to use Arendt’s terms. Whereas the asylum seekers processed in the United States did have a right to independent review of their primary refugee determination, the asylum seekers held in Guantánamo Bay enjoyed no such right. In addition, the asylum seekers processed in the United States had a right to a lawyer present during their interviews; it was much more difficult for asylum seekers in Guantánamo Bay to enjoy this right to legal representation, as their lawyers were at times denied entry to the naval base. When a group of human rights lawyers and law students brought a case challenging the legality of the US policy of interdicting migrants on the high seas and detaining them in Guantánamo without access to legal counsel, the US government responded in ways that foreshadowed the arguments it presented later in defense of the indefinite detention of “enemy combatants.”

The Guantánamo example is by no means exceptional. In fact, Judge Johnson’s description of the conditions of detention at this US naval base provides an accurate representation of many sites where asylum seekers and undocumented immigrants can be confined with very limited, if any, access to law. We can think of, for example, the detention centers on thousands of Pacific islands excised from Australian sovereignty for the purposes of “offshore processing” of asylum claims, “waiting zones” and administrative retention centers established in France to evade the rights and protections under the rule of law, or various detention centers located in North Africa to hold the migrants.
intercepted in international waters by European countries such as Spain and Italy.\textsuperscript{11}

Multiplication of these sites within the context of contemporary immigration controls reveals the challenging problems that various categories of migrants encounter as they claim and exercise human rights. In this chapter and the next one, I analyze these problems by turning to one of the key arguments in Hannah Arendt’s reflections on statelessness in the first half of the twentieth century: The stateless found themselves in a “fundamental situation of rightlessness,” Arendt claims, as they lost not only their citizenship rights but also their human rights.\textsuperscript{12} In the absence of a political community that could recognize and guarantee their rights, the stateless were deprived of legal personhood as well as a right to action, opinion, and speech.

In an age characterized by unprecedented developments in the field of human rights, the term “rightlessness” is likely to strike us as an anachronism. As discussed in the Introduction to this book, one of the most crucial transformations since the time Arendt wrote her analysis of statelessness has been the shift from citizenship to legal personhood as the basis of an entitlement to rights. This shift is manifest, for example, in the Preamble of the International Covenant on Civil and Political Rights (ICCPR), which announces that human rights “derive from the inherent dignity of the human person.” Many scholars have interpreted this development as a dissociation of legal personhood from the status of citizenship and argued that it has allowed migrants to stand before the law and demand education, health care, family unification, and even political participation as fundamental human rights.\textsuperscript{13}

This chapter aims to offer a critical assessment of this historic development by rethinking Arendt’s arguments about the rightlessness of the stateless. It suggests that the gap between “man” and “citizen,” which was characteristic of the eighteenth-century idea of rights, has not been overcome by moving to the more universalistic concept of “human person.” International human rights law reinscribes that gap in many respects and often leaves migrants without effective
guarantees against the violent practices of border control. Although this critique insists on the need to examine how the existing inscriptions of personhood in human rights law can give rise to new divisions and stratifications within humanity, it diverges from some of the entirely negative assessments of personhood or legal standing as a mechanism that necessarily engenders violent exclusion. From an Arendtian perspective, personhood, or the artificial mask provided by law, is important, as it allows public appearance without the pervasive fear of arbitrary violence and enables rights claims to be articulated. Without this mask, one is relegated to a certain form of civil and social death.

But given that legal personhood is an artifact and not an inherent essence, it is also necessary to attend to how it can be effectively unmade or undermined in certain conditions. And because legal personhood is seen as “more fundamental, natural, essential, less of a construct, less subject to manipulation,” and hence taken to be much more secure than citizenship as the basis of rights, there is the danger of overlooking how it can be “subject to various forms of qualification and evasion.” Such possibilities of qualifying and evading personhood are nowhere more visible than in the cases of asylum and immigration, due to the centrality of the principle of territorial sovereignty to the ordering of the international system. Given these possibilities, “rightlessness” must be reconsidered as a critical concept that can alert us to various practices that undermine the legal personhood of migrants.

Once we attend to the nuances in Arendt’s account of statelessness and rethink her arguments by taking into consideration the more recent changes in the field of human rights, we come to understand “rightlessness” not as the absolute loss of rights but instead as a fundamental condition denoting the precarious legal, political, and human standing of migrants. The term “precarious,” with its Latin etymology, denotes “lives that are not guaranteed but bestowed in answer to prayer,” as Didier Fassin notes, and I use it to highlight the vulnerability of lives that are dependent on the favors, privileges, or discretions of compassionate others. I focus on
the legal dimensions of this predicament in this chapter and address issues related to political and human standing in the next, though these different aspects, as the discussion will reveal, are closely interrelated.

Human rights law can be seen as an attempt to address the problem of precarious legal standing, as it endows every individual with personhood and attaches to this status a set of universal, inalienable rights. These rights are not privileges granted to a “passive beneficiary” at the discretion of others; they are instead “entitlements” that authorize the rights-holder to press claims in cases where these rights are denied, and these claims should normally prevail over political and moral considerations such as utility, social welfare, national security, or public order. But as I highlight in this chapter, human rights law leaves various categories of migrants with quite insecure legal standing because it affirms the principle of territorial sovereignty. Border controls, justified as legitimate acts of sovereign statehood, end up creating divisions within humanity itself, thereby rendering the rights of migrants (asylum seekers and undocumented immigrants in particular) vulnerable to discretionary decisions and uncertain sentiments such as compassion.

Following a reconsideration of Arendt’s arguments about the rightlessness of the stateless, this chapter turns to her phenomenological reflections on personhood to grasp why she attributes such a crucial importance to equal standing before the law. This section aims to contribute to the growing literature on Arendt’s understanding of law by rethinking her conception of personhood and situating it in relation to some of the arguments in the critical legal scholarship on this topic. I then offer a close analysis of the limits and exclusions of the existing inscriptions of personhood in human rights law by examining two recent cases concerning immigration detention and deportation at the European Court of Human Rights (ECtHR or “the Court”). These cases underscore how rightlessness, understood as a precarious legal standing, persists despite the significant legal and normative changes in our conceptions of human rights. My choice of the ECtHR is intentional. Enforcement is often taken to be the greatest weakness of the existing human rights system, but as a
supranational court with the capacity to issue judgments that are binding for the members of the Council of Europe, the ECtHR is often taken to be one of the most promising institutions for detaching personhood from citizenship status. By examining the problems with regard to the personhood of migrants within the European context, I hope to make a stronger case for the argument that the perplexities of the Rights of Man, examined by Arendt, have not been fully resolved by moving to a universal discourse of human rights.

Statelessness and the Condition of Rightlessness

Arendt’s account of statelessness repetitively invokes the term “rightless” to describe how the loss of citizenship was accompanied by the loss of human rights, but what she means by this term is far from obvious. In Arendt’s rendering, the term aims to capture not specific violations of rights but rather a condition that can render void even the rights that one formally has. The stateless might be granted certain rights such as the rights to life, freedom of opinion or movement, she argues, but they are in a fundamental condition of rightlessness to the extent that they are dependent on the charity or goodwill of others who grant these rights. On the other hand, not every denial of rights amounts to rightlessness: Citizens can be deprived of certain rights, including the right to life (e.g., soldiers during a war), but they are not rightless as long as they have legal and political standing. Arendt explains this seemingly paradoxical situation by defining rightlessness as a condition arising from the “loss of polity,” which entails not only “the loss of government protection” and legal personhood but also the loss of home, or “a distinct place in the world” where one is judged by one’s actions and opinions.

Arendt’s understanding of rightlessness as a condition challenges conventional understandings of the plight of migrants in terms of the loss of specific rights. When we attempt to address the problem in these terms, we identify a specific violation for which we can hold an identifiable entity accountable, and the right that is violated can be restored even if the person who is denied this right continues to remain in the condition that systematically gives
rise to such violations in the first place. Those advocating the rights of migrants often adopt this approach because it would be practically impossible to redress violations of rights if the plight of migrants were to be understood as a fundamental condition arising from their de jure or de facto statelessness. As scholars working on human rights advocacy underscore, in order to be effective, human rights campaigns are compelled to present problems in “intentionalist frames” that assign causes to “the deliberate (intentional) actions of identifiable individuals.” Such framing is much more feasible if there is an identifiable rights violation and more difficult when it comes to structural problems such as poverty or patriarchy, which cannot be easily recounted in “a short and clear causal chain (or story) assigning responsibility.” This difficulty does not necessarily force activists to give up campaigning on these structural problems; in fact, they often try to reframe them in a more intentionalist, causal way, focusing on specific rights violations. For example, instead of tackling patriarchy as a structural problem, activists for women’s rights focus on violence against women and highlight bodily harm in order to be able to assign responsibility for identifiable violations. In the case of migrants, this conventional frame centers on problems such as the violation of a right to be free from indefinite and arbitrary detention, and as I discuss below, to make that argument, it can end up reasserting the legitimacy of the structure (i.e., territorial sovereignty) that systematically produces the problems faced by migrants. Arendt’s notion of “rightlessness,” highlighting a fundamental condition that can undermine the very possibility of claiming and exercising even the rights that one formally has, draws attention to what gets lost in this conventional frame and renders statelessness more comparable to structural problems such as poverty, racial inequality, and patriarchy.

Arendt’s account of statelessness draws attention to the multiple, interrelated dimensions of rightlessness. Legally speaking, the term denotes the loss of legal personhood that guarantees equal standing before the law. Politically, it captures the loss of an organized community where one’s actions, opinions, and speech are taken into account. In addition, the term also indicates the precarious human
standing of the stateless, highlighting their expulsion from the human world established and maintained through the activities of labor, work, and action. Protracted confinement in refugee camps, examined at length in the next chapter, is a concrete manifestation of this expulsion.

Arendt’s analysis of the legal dimension of rightlessness draws attention to the tight connection that the nation-state established between citizenship and legal personhood; within this institutional framework, those who were rendered stateless found themselves without any formal recognition of their rights and legal standing: “Their plight is not that they are not equal before the law, but that no law exists for them.” Incapable of being incorporated into the legal community of the receiving nation-states and deprived of rights in international law, the stateless were subjected to “a form of lawlessness, organized by the police.”

To explain what the loss of personhood entails, Arendt draws a very striking comparison between the stateless person and the criminal: Whereas the criminal has a legal standing in a political community, the stateless person is deprived of any recognition in the legal domain. The crime committed by the criminal will be punished according to “the normal juridical procedure in which a definite crime entails a predictable penalty.” Loss of personhood, Arendt argues, subjects the stateless to an arbitrary rule that imposes utterly unpredictable penalties in the absence of any definite crime; under these conditions, what the stateless endure has no relation to “what they do, did, or may do.” The punishment of the criminal results from “a deliberate act,” whereas the actions of the stateless have no impact on what they will endure. Without a right to residence or a right to work, the stateless constantly face the threat of internment or deportation for their mere presence or for attempting to make a living for themselves, and they have no right to appeal and challenge their internment or deportation. In the absence of these rights, they become completely dependent on compassion to merely meet their basic needs such as habitation or food, whereas the criminal has “jail and food . . . not out of charity but out of right.”
move, Arendt argues that committing a crime becomes the only way for the stateless person to acquire a legal standing:

Only an offender against the law can he gain protection from it. As long as his trial and his sentence last, he will be safe from that arbitrary police rule against which there are no lawyers and no appeals. . . . He is no longer the scum of the earth but important enough to be informed of all the details of the law under which he will be tried. He has become a respectable person.

By drawing a stark contrast between the criminal and the stateless person—a contrast that at times risks overlooking the formidable challenges that the accused can encounter in claiming and exercising their rights—Arendt aims to capture the distinctive predicaments characterizing statelessness. Both the criminal and the stateless are cast as exceptions to the norm in the juridical structure; but as different from the stateless, who is an “anomaly for whom there is no appropriate niche in the framework of the general law,” the criminal is a recognized exception, or an exception “provided for by law.” In some ways, Arendt’s comparison follows Hegel’s argument that punishment contains within itself a recognition of the criminal as a person capable of acting freely and entitled to rights, with the proviso that the punishment is proportionate to the crime: “[B]y being punished he is honoured as a rational being. He does not receive this due of honour unless the concept and measure of his punishment are derived from his own act.” In the case of the stateless, there is no such recognition; their confinement in an internment camp, for example, is not a punishment that is derived from and proportionate to their own acts. In addition, because they lack personhood, they cannot appear before the court, have legal representation, and demand to be heard; their actions and speech are rendered irrelevant. Instead, we have a situation comparable to civil and social death to the extent that the actions of the stateless are not taken into account by either the legal system or the political community and that their fate is entirely dependent on the workings of an arbitrary form of power.
The plight of the stateless in Arendt’s account is not unlike that of the inhabitants in “Nowheresville,” the fictitious world that Joel Feinberg depicts to explain what it means to lack recognition as a rights-bearing person. Nowheresville is characterized by a larger degree of benevolent, compassionate acts as well as conscientious duties compared to the actual world. It is also a place where inhabitants can be rewarded with gratuity if their actions are perceived as pleasing. There is even a legal order in which individuals fulfill certain obligations as duties owed to a sovereign power. Although this imaginary world might have more room for acts of goodwill, as Feinberg notes, it lacks the idea that each person has a “recognizable capacity to assert claims.” In other words, the inhabitants of Nowheresville, as different from the criminal in Arendt’s account, live in a condition of rightlessness because they are denied this capacity. Feinberg’s fictitious world illuminates Arendt’s argument, as it highlights that even if the stateless were to be surrounded by well-intentioned, compassionate individuals to offer them hospitality, conscientiously take care of their needs to fulfill duties of charity, and generously reward them with all sorts of gifts and favors, they would continue to remain in this condition as subjects who are not in a position to “look others in the eye” and demand to be treated equally as persons entitled to rights.

Arendt’s comparison between the stateless person and the criminal is worthy of attention not only because it sheds light on the distinctive aspects of the plight of the stateless but also because it reveals the crucial importance she attributes to the formal recognition of rights such as equality before the law, the right to trial, and the right to appeal. Even when the law fails to provide sufficient guarantees for rights and leaves one dependent on compassion, she argues in an article written for Aufbau in June 1944, one should not forgo the idea of equalization in and through the law in favor of an inherent human equality resting on the immediacy of compassion: “For as much as the eternal insufficiency of law relegates man to the compassion of his fellow man, all the less can one demand of him that he replace the law with compassion.” To understand why Arendt does not turn away from law in the
face of its insufficiency and insists on personhood, it is necessary to rethink her arguments about statelessness by engaging with her phenomenological reflections on persona in her several works.

**Persona, or the Artificial Mask of Law**

Toward the end of her discussion of statelessness in *The Origins of Totalitarianism*, Arendt invokes the notion of “legal personality” in a quite peculiar way:

> The human being who has lost his place in a community, his political status in the struggle of his time, and the legal personality which makes his actions and part of his destiny a consistent whole, is left with those qualities which usually can become articulate only in the sphere of private life and must remain unqualified, mere existence in all matters of public concern.41

The statement is striking not simply because it highlights rightlessness as a multifaceted condition denoting a precarious legal, political, and human standing but also because it proposes a puzzling explanation of what a legal person is. Taking us beyond the juridical meaning of the term as a right-and-duty-bearing subject, Arendt suggests that legal personhood endows one’s actions with a meaning that they would otherwise lack and gives some kind of unity to different aspects of one’s life story. It is not immediately clear why recognition as a person before the law has such existential consequences, and it is also difficult to understand why the lack of such recognition leaves one with “unqualified, mere existence.” To make sense of these perplexing claims, we need to reconsider Arendt’s reflections on the legal predicament of the stateless in *The Origins of Totalitarianism* in light of her phenomenological reflections on personhood in different contexts.

Personhood, as Arendt reminds us in *On Revolution* and several other works, derives from the Latin term *persona*, which denotes “the mask ancient actors used to wear in a play.”42 *Oxford English Dictionary* links this etymological origin with several interconnected meanings, including a
character in a dramatic role, a part played by a person in life, a character or individual personality, a juridical person, and a human being in general. Arendt captures these multiple meanings by describing *persona* as a mask “designed and determined by the play,” one that changes according to the role that the actor will assume in that particular play.\(^{43}\) She also notes that it was the Romans who first used *persona* in a metaphorical sense to draw a distinction between private individuals and citizens. They took personhood as a legal artifact, and not as an inherent quality of human beings in their natural condition: “The point was that ‘it is not the natural Ego which enters a court of law. It is a right-and-duty-bearing person, created by the law, which appears before the law.’”\(^ {44}\)

In some respects, Arendt’s discussion of the etymology and history of “person” is quite similar to the one provided by many legal scholars, who point to the Latin origins of the term to highlight the parallels between theatrical masks and the legal fiction of personhood, actors in a play and persons before the law, and theater stage and courtroom.\(^ {45}\) But Arendt’s analysis brings out certain elements that are left out of many legal discussions, especially when she suggests that this mask is characterized by “a broad opening at the place of the mouth through which the individual, undisguised voice of the actor could sound.”\(^ {46}\) Arendt highlights this particular characteristic by breaking down *persona* into *per-sonare*, which means to “sound through.” This dissection of personhood, though etymologically suspect, is crucial for understanding the two functions Arendt attributes to the artificial mask of *persona*: “it had to hide, or rather to replace the actor’s own face and countenance, but in a way that would make it possible for the voice to sound through.”\(^ {47}\)

Arendt’s discussion of personhood is key to understanding her arguments about statelessness and human rights in at least three respects. First, Arendt’s account of personhood, focusing on the theatrical origins and the Roman appropriation of the term, draws attention to how rights (and subjects of rights) are created by law. In this regard, her account differs from a metaphysical approach that looks for a real or essential person
antecedent to legal relations. Searching for “an inhering essence,” metaphysics of the person, as John Dewey noted in 1926, works with the assumption that “there must be a subject to which these legal relations belong or in which they inhere or to which, at all events, they are imputed.”\(^{48}\) Such a metaphysical approach grounds rights in the inherent properties of this essential person (e.g., reason, sanctity, dignity, autonomy).\(^{49}\) Especially with the rise of a human rights discourse, the idea that rights are attached to human beings by virtue of their nature has become widely accepted. This idea can be traced back to the religious notion of sanctity, which emphasizes the sacredness and inviolability of human life, though it has now found more secular formulations in the notion of human dignity.\(^{50}\) What we see here is a metaphysical understanding of personhood, suggesting that there is some intrinsic quality that makes human beings essentially fit to be entitled to a set of inherent and inalienable rights. This metaphysics, as Ngaire Naffine underscores, “[maps] legal rights onto an antecedent human subject.”\(^{51}\)

Arendt’s highly selective interpretation of the origins of personhood, tracing its lineage back to theatrical masks and the Roman law, conspicuously leaves out how this metaphysics originates in the theological debates on the question of Trinity. In fact, to a great extent, it was these debates that gave rise to the notion of “person” as “an individual, intransmissible (incommunicable), rational essence which is self-existent,”\(^{52}\) and it is this meaning that seems to be at work even in the more secular formulations of the metaphysical idea of person. Although Arendt does not mention the religious lineage of personhood, she targets the metaphysical idea that it gives rise to, as she argues that it is the artificial mask that makes a human being a person entitled to rights. In the absence of this mask, one appears to others as a “natural man” stripped of all political and legal rights and duties: “a human being or homo in the original meaning of the word, indicating someone outside the range of the law and the body politic of the citizens, as for instance a slave—but certainly a politically irrelevant being.”\(^{53}\) Deprived of the artificial mask provided by legal personhood, the stateless fall “outside the
pale of the law” and appear to others in their naked humanness or as “unqualified, mere existence.”

Arendt’s theatrical understanding of personhood as an artificial mask created by law and her distrust of the quest for a real essence hiding behind the mask are very much in accord with her phenomenological approach to politics, which calls into question the metaphysical tradition that privileges “being” and is suspect of “appearances.” This peculiar understanding of personhood also has much to share with “the Renaissance and eighteenth-century tradition of *theatrum mundi,*” as highlighted by Dana Villa, to the extent that it represents the world as a stage on which actors appear with their public masks. Arendt’s theatrical conception of personhood revitalizes this tradition, which comes under attack with the rise of Romanticism and its expressivist model of the self. This Romanticist notion of the self, best represented by Rousseau, looks for a true inner self from which our words and deeds spring and is distrustful of a politics centered on “the ideas of playacting, maskwearing, and a distinct public self.”

In her account of the French Revolution, Arendt highlights the lethal dangers of this metaphysical quest for a real, true, and essential being that is hidden behind the mask, that precedes it, and that is entitled to rights by virtue of its nature. She is especially critical of the revolutionaries who equated masks with hypocrisy and ended up “[t]earing away the mask of the *persona* as well” with their “passion for unmasking society.” These revolutionaries, Arendt insists, had “no respect” for the idea that we become equals through artificial inventions such as *persona,* or the idea that “everybody should be equally entitled to his legal personality, to be protected by it and, at the same time, to act almost literally ‘through’ it.”

Arendt highlights this danger again in her analysis of statelessness, as she underscores how those who are stripped of legal personhood are exposed to arbitrary forms of violence under police rule. The plight of the stateless epitomizes the collapse of a metaphysical vision that locates the ultimate source of rights in the sanctity of the being that comes prior to, and is hidden behind, the mask:
The conception of human rights, based upon the assumed existence of a human being as such, broke down at the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relationships—except that they were still human. The world found nothing sacred in the abstract nakedness of being human.58

Confronted with this problem, Arendt rejects the assumption that those who appear to others in their “mere givenness” or bare humanity, stripped of all political and social qualifications, will be recognized as equals. The plight of the stateless reveals that equality is not a given or natural condition but instead the result of legal and political efforts to achieve equalization among a community of actors: “We are not born equal; we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights.”59

If equality is not inherently given, it cannot be taken for granted and it needs to be established by, and continuously reinforced with, relatively stable institutional guarantees. Legal personhood is perhaps the most important of such guarantees to the extent that it allows equalization without obliterating the distinctiveness of each individual. The artificial mask of legal personhood is important, for Arendt, because it covers one’s face (or one’s “mere givenness,” understood as bare humanness) not to erase the differences among human beings but instead to make sure that they do not become justifications for naturalized stratifications and inequalities within a political community.60 According to this perspective, “man,” invoked as the subject of rights, does not precede these rights but instead arises out of them: “Man, as philosophy and theology know him, exists—or is realized—in politics only in the equal rights that those who are most different guarantee for each other.”61

Arendt’s peculiar etymology, stressing the Roman origins of legal personhood, deserves attention not simply because of its critique of the metaphysical ideas that attach rights to a pre-existing subject (“man”) and ground them in the sanctity of
human life. It is also important for drawing attention to the practices that go into the making and unmaking of personhood, and this brings me to my second point about the relevance of Arendt’s discussion of persona as mask to her analysis of the problem of statelessness. If personhood is an artifact, and not an inherently given essence—if there is no intrinsic overlap between humanness and personhood, in other words—then it is quite possible that not every human being is automatically recognized as a person. And even when one has the formal recognition, it is conceivable that personhood can be taken away, and if not completely taken away, it can be undermined so much so that some human beings might be effectively rendered semi-persons or non-persons.

(p.103) Roman law is helpful for understanding this second point. Although Arendt does not make explicit reference to it, her discussion of statelessness in terms of the loss of legal standing evokes the Roman practice of depersonalization, or capitis diminutio.62 There were three elements of caput, or legal standing, in Roman law: freedom, Roman citizenship, and membership in a Roman family. Correspondingly, there were three degrees of depersonalization. In its minimal form (capitis diminutio minima), the practice involved the loss of family rights; this occurred, for example, when a father gave his son up for adoption. In a certain sense, the stateless in Arendt’s account face this form of depersonalization as they leave behind or lose family members.63 A more comprehensive form of depersonalization (capitis diminutio media) involved the loss of citizenship. In the case of criminals facing banishment for life (deportatio), this loss entailed a life in isolation on an island near the Italian shore or an oasis in the Libyan desert.64 In either case, the criminal was banned from the possibility of sharing a common life with fellow citizens; if he were to return without permission, he was stripped of legal protection, and as an outlaw, he could be killed by anybody with impunity.65 This kind of civil death is at the heart of Arendt’s analysis of statelessness, which highlights the loss of membership in a political community. Finally, the most comprehensive form of depersonalization (capitis diminutio maxima) indicated a change from a condition of freedom to that of slavery and entailed the loss of liberty, citizenship, and family rights.
Arendt’s comparison of statelessness to slavery, which I discuss in the next chapter, suggests that rightlessness involves this most comprehensive form of depersonalization in a certain sense; both the slaves and the stateless, she argues, are denied even “the possibility of fighting for freedom.”

In light of capitis diminutio, Arendt’s Roman understanding of personhood exposes the fragility of this legal artifact. Refusing to treat personhood as an inherent attribute that cannot be stripped away, her analysis highlights the need to inquire into how legal standing can be unmade. It is quite tempting to think of the history of personhood as one of gradual expansion and to treat depersonalization as an archaic practice of a bygone era. But the history of personhood is also “one of persistent and shameful stereotyping and exclusions in which . . . the legal community of actors extended only grudgingly,” as Ngaire Naffine puts it. That history underscores the need to attend to the ways in which personhood can be curtailed even today; if personhood can no longer be officially taken away, as Linda Bosniak highlights, it may still be “diminished in its effect, evaded, effaced, diluted, displaced.” That danger is especially palpable in the case of asylum seekers and undocumented immigrants facing detention and deportation, as I discuss below.

This attentiveness to the fragility of personhood brings Arendt closer to some critical scholars who maintain that formal recognition of equality before the law can disguise, perpetuate, and justify various forms of inequality. However, Arendt’s phenomenological account sets her apart from many other critics of law, and this brings me to my third and final point about the implications of her analysis of personhood for rethinking the problems of rightlessness today. Arendt’s unique position is encapsulated in her peculiar dissection of persona as per-sonare, or as a mask allowing the voice to sound through, and her insistence on this highly improbable etymology is quite noteworthy. For Arendt, personhood is an artificial mask that not only disguises the countenance of its wearer but also allows the possibility of speaking and being heard. Those who are stripped of the protections of this mask appear to others in their “mere givenness” and become much
more vulnerable to arbitrary forms of violence. In addition, they lack the means to make their speech “sound through”; without the mask equalizing them with other actors, their speech either does not count or is rendered inaudible and unintelligible. By insisting on this peculiar etymology, tracing personhood to *per-sonare*, Arendt urges us to understand the legal recognition of personhood not merely as a juridical issue but also as a political one that is directly linked to the question of whose action and speech are taken into account in a given community; understood in these terms, personhood has significant implications for one’s political and human standing.

This phenomenological analysis of personhood, highlighting how legal fictions can enable public appearance, is quite different from critical accounts that see the law’s artifacts mainly in negative terms as mechanisms disguising, suppressing, and dividing humanity. Legal scholar and jurist John T. Noonan Jr. presents such a view when he describes masks as legal devices “classifying individual human beings so that their humanity is hidden and disavowed.” For Noonan, masks are dangerous “monsters,” showing how the “fiction-making capacity [of law] can run amok,” as they conceal real persons, or “ontological realities,” and displace them from the legal process. For Arendt, on the other hand, there is no person without the mask, and masks are the only ways in which persons can appear as equals before the law.

More recently, Giorgio Agamben has offered a scathing critique of human rights as biopolitical mechanisms that render human life vulnerable to sovereign violence, as I discussed in chapter 1. In his analysis of habeas corpus, for example, Agamben casts this writ, which is often taken as one of the most fundamental legal safeguards against arbitrary state action, as another reinscription of sovereign power on the human body. He highlights how modern democracy turns corpus, or the body, into the subject of rights with this writ: Compelling the physical presence of a human body before a court of law not only endows the political subject with rights but also renders it vulnerable to the violence of sovereign decision.
An Arendtian account of personhood also suggests that existing norms of human rights cannot be understood simply as protections against sovereign violence; in fact, as I discuss below, to the extent that these norms cast some forms of sovereign violence as legitimate, they can partake in the reproduction of rightlessness. However, in Agamben’s biopolitical account, personhood, as inscribed in legal inventions such as habeas corpus, is inextricably intertwined with the logic of sovereignty. Arendt’s phenomenological account, on the other hand, underscores that personhood is not merely a juridical tie between an individual and a state. More importantly, it is an artificial convention that institutes relationships among different individuals—in ways similar to the mask that establishes relationships between different actors on stage—and is a necessary, though by no means sufficient, condition for their equalization as distinct individuals. Underlying Arendt’s insistence on the importance of personhood is her Roman conception of law as *lex*, which takes legislation as a political activity that establishes relationships, connections, and ties between different entities.74

As this discussion highlights, personhood is not simply a juridical matter for Arendt; it has significant consequences for one’s political and human standing; it is that “which makes his [a human being’s] actions and part of his destiny a consistent whole,” to revisit the quote at the beginning of this section.75 What Arendt offers is nothing less than “a hermeneutic phenomenology of the person,” to use Paul Ricoeur’s terms, tying together how the person appears in language, action, narrative, and ethical life.76 The artificial mask of personhood is crucial for human beings to appear as speaking subjects and be recognized as such by their interlocutors, to become actors capable of designating themselves as the agents of their own actions, to establish themselves as the narrators of their own life stories that endow their identities with some cohesion throughout time, and finally, to situate themselves as participants in institutional frameworks enabling and guaranteeing reciprocity, equality, and justice.77
This phenomenological attention to the multiple dimensions of personhood refuses to sign on to a critique that sees legal artifacts simply as cunning devices producing injustice, oppression, and violence, although this is not to say that Arendt’s account has no critical insight to offer. In fact, her distinctive understanding of personhood as a mask that covers the face but also allows the individual voice to “sound through” and be perceived as intelligible speech can be mobilized as a critical framework in examining the existing institutional frameworks guaranteeing personhood: To what extent do the current formulations of personhood in international human rights law, for example, provide the asylum seekers and undocumented immigrants with artificial masks that can allow them to appear in public without the pervasive fear of being subjected to arbitrary violence? To what extent do these legal mechanisms cover their “face” and ward off the threat of being perceived as bare lives exposed in their “mere givenness”? And finally, to what extent do these artificial conventions allow these migrants to appear as equals before the law and let their rights claims “sound through”?

These questions are crucial starting points for understanding how rightlessness continues to haunt our present. Given the significant transformations in international human rights and humanitarian law, it has become very difficult to imagine how one can be deprived of legal standing. Arendt’s analysis of statelessness and her phenomenological understanding of personhood, however, raise caveats against the hasty conclusion that rightlessness becomes extinct in an era in which every human being is recognized as a person before the law. From an Arendtian perspective, a careful examination into the diverse and unpredictable effects of this recent institutionalization of human rights is needed to assess the extent to which this development enables the equalization of human beings regardless of citizenship status.

In the following section, I undertake such a critical inquiry as I examine different ways of diminishing personhood in the context of deportation and detention. This analysis rests on a slightly revised definition of “rightlessness.” At the time Arendt wrote her analysis, the term denoted the absence of any international legal recognition, especially for those who
were de facto stateless. In my reformulation, which draws on Arendt’s (p.107) emphasis on the fragility of the artificial mask provided by personhood, I take into account the post–World War II international legal developments and suggest that “rightlessness” denotes the fragility of these formal guarantees, which can be unmade in ways dispossessing various categories of migrants of their legal standing. Within this new context, the term alerts us to the precarious legal, political, and human standing of those who are juridically or effectively deprived of the protections of citizenship status. It draws attention to contemporary practices and processes that give rise to divisions, stratifications, and thresholds within the concept of universal personhood and render the rights of various categories of migrants dependent on quite unreliable sentiments and highly arbitrary decisions.

Rightlessness and Deportation

Only citizens have the unconditional right to enter and remain in the territory of a state, and those who are not citizens (including permanent residents) can be deported.78 Deportation, or the physical expulsion of an alien, has always been one of the mechanisms used by nation-states to exclude those deemed undesirable from the political community. It has been recognized as a practice in accordance with the sovereign state’s right to control entry to and residence in its territory, and conventionally its legitimacy has been judged within a legal framework centered on the international obligations that states have to each other.79 As Arendt reminds us, “sovereignty is nowhere more absolute than in matters of ‘emigration, naturalization, nationality, and expulsion,’” but the formal and informal agreements between states established some guarantees against mass denationalizations and deportations for most of modern history.80 Normalization of mass denationalizations and collective expulsions with the rise of totalitarianism revealed the fragility of these guarantees.

This state-centric picture has changed to some extent with the rise of human rights norms after World War II, and the discretionary power of sovereign states in making deportation decisions has been curtailed in certain respects. Collective or
mass expulsion of aliens, for example, is now prohibited, and there are procedural safeguards in place to protect migrants from arbitrary deportations and to ensure their right to individual assessment of their cases.\textsuperscript{81} There are also several norms, including those upholding the rights to life, bodily integrity, and freedom from cruel, inhuman, or degrading treatment, which can be invoked to challenge the conditions under which a deportation order is executed.\textsuperscript{82} In addition, the principle of non-refoulement, which prohibits refugees from being returned to places where their lives and freedoms could be threatened, has become one of the strongest norms in place to constrain the sovereign right of states to control their borders.\textsuperscript{83} It has even been suggested that this norm has achieved the status of \textit{jus cogens}—i.e., it has become a peremptory norm of international law from which no derogation is permissible.\textsuperscript{84} The institutionalization of these norms in international human rights law marks an important development in establishing the legal personhood of migrants, as it enables them to challenge the legitimacy of deportation decisions that were once deemed to be beyond the reach of the rule of law.

Yet, it is also important to understand the various ways in which these norms continue to reinstate the precarious legal standing of various categories of migrants, especially in the context of deportation. Even the principle of non-refoulement affirms sovereign power of states to control their borders, as it allows for exceptions on very ambiguous grounds that leave room for arbitrariness: According to the Refugee Convention, non-refoulement may not be applicable when there are “reasonable grounds” that the refugee in question constitutes “a danger to the security of the country” or “a danger to the community of that country.”\textsuperscript{85} These exceptions urge us to understand human rights norms not simply as instruments constraining the sovereign power of states but also as mechanisms legitimating that power in many respects. They also underscore that the perplexities of the Rights of Man analyzed by Arendt are not resolved but instead reconfigured in international human rights and humanitarian law. Especially important in this regard are the ways in which a desire to reassert “the old trinity of state-people-territory,” to
remember Arendt’s characterization of the nation-state framework, pervades existing international norms, as highlighted by their exception clauses.\textsuperscript{86} This trinity, which Arendt concluded to be untenable in the face of the crisis of statelessness in the twentieth century, continues to have a strong hold on the universalistic political and moral frameworks that attribute rights to the human person.

From an Arendtian perspective, there is a need to attend to the specific conditions that can enable or undermine the political possibilities of navigating the perplexities of human rights for the purposes of guaranteeing equalization regardless of nationality. Accordingly, it is important to take note\textsuperscript{[p.109]} of some of the worrisome developments that make it more and more difficult to invoke human rights norms to contest deportation decisions. Notable among these is the normalization of deportation within a new security discourse that depicts asylum and immigration in terms of a permanent crisis or state of emergency.\textsuperscript{87} Within this new context, deportation has come to be used as a symbolic tactic to produce an effect of sovereign power at a time when the authority of states seems to be undermined by various global processes and structures.\textsuperscript{88} The exception clause of non-refoulement, which was reserved for states of emergency (e.g., wartime) in the past, has been increasingly invoked by states to deport those deemed to be posing a threat to national security or public order. As a result, “a palpable sense of deportability,” to use Nicholas De Genova’s terms, has rendered the personhood of an ever-growing number of migrants increasingly precarious.\textsuperscript{89}

In what follows, I turn to a 2008 case from the European Court of Human Rights (ECtHR or “the Court”), \textit{N. v. UK}, to discuss how the existing inscriptions of personhood in international human rights law fail to provide effective guarantees against this condition of rightlessness, especially in the case of migrants without a regular status, including rejected asylum seekers and undocumented immigrants.\textsuperscript{90} My reading highlights the need to understand this condition in relation to the deeply embedded tensions between the principles of equal personhood and territorial sovereignty in human rights law. It
also points to how these tensions can be navigated in different ways, some leaving migrants with a more precarious personhood, and some others giving rise to possibilities of equalization regardless of citizenship status. By analyzing this case closely, I hope to underscore that human rights law has both “jurisgenerative” and “jurispathic” dimensions, to use Robert Cover’s terms.\textsuperscript{91} We become aware of the “jurisgenerative” dimension of law when existing rights are “reposited, resignified, and reappropriated by new and excluded groups,” as Seyla Benhabib notes.\textsuperscript{92} But it is equally important to look at how human rights law gives rise to “jurispathic” processes when its norms are invoked to affirm the sovereign right to detain or deport rejected asylum seekers and undocumented immigrants. At those moments, as Cover notes, we realize that legal interpretation is different from other fields of interpretation; it “takes place in a field of pain and death,” providing “justifications for violence which has already occurred or which is about to occur.”\textsuperscript{93}

\textit{N. v. UK} deserves attention as a case that underscores the equivocal effects of human rights law, which extends personhood to migrants with (p.110) its universal scope but also holds on to the principle of territorial sovereignty that can give rise to practices of unmaking that personhood. N., an asylum seeker from Uganda, applied for asylum in the UK in March 1998, claiming that her life was in danger if she returned to Uganda; because of her association with the Lord’s Resistance Army, she had been persecuted and raped by the government soldiers. N. was seriously ill when she arrived in the UK, and later she was diagnosed as HIV-positive. After treatment with antiretroviral drugs, her condition significantly improved, and in March 2001 a consultant physician prepared an expert report in support of her asylum application, suggesting that her life expectancy would be less than one year if the treatment were discontinued. Despite the report, the UK Secretary of State refused N.’s asylum application and decided that her deportation would not amount to “inhuman or degrading treatment,” according to Article 3 of the European Convention of Human Rights (ECHR). The government justified its position by arguing that the applicant could access AIDS treatment in
Uganda. After exhausting all domestic remedies, N. submitted an application to the ECtHR to challenge the deportation decision on the grounds that her return to Uganda would amount to a violation of not only Article 3 but also Article 8, which guarantees a right to private life. In May 2008, the Grand Chamber of the ECtHR ruled that there would be no violation of Articles 3 and 8 in case of N.’s return to Uganda.

*N. v. UK* reveals the continuing relevance of Arendt’s argument about the perplexities of human rights: N. has “a right to seek and enjoy asylum,” according to the Universal Declaration of Human Rights (UDHR), but she does not have a “right to be granted asylum,” as I mentioned in the Introduction. As a result, she is vulnerable to the highly unpredictable, even arbitrary, consequences of an asylum adjudication process. This vulnerability is further reinforced by the relatively subjective nature of decisions as to what constitutes a “well-founded fear” or what can be characterized as “persecution.”

In addition, the claims made by asylum seekers have come to be seen as increasingly dubious in a climate that has criminalized asylum and immigration by representing them as security threats. Their asylum applications can now be easily rejected for minor flaws or incoherence in the narrative of persecution, even though such problems are common in post-traumatic situations.

Unlike the stateless of the Arendtian world, today’s asylum seekers do have formal recognition of their legal standing; but their personhood is unlike that of any other subject standing before the law, as they are considered to be “guilty until proven innocent” and the whole process centers on the question of whether they are really the person they say they are.

As narratives of persecution have become suspect, the human body has become a crucial site for claiming rights, giving rise to what Didier Fassin aptly calls “biolegitimacy.” States, courts, and refugee advocates have increasingly turned to the suffering bodies of asylum seekers and other migrants to locate more irrefutable truths. This contemporary context is important for understanding why the appeal in *N. v. UK* is based not on N.’s political biography as a member of a
resistance group but on her biological condition as an HIV-positive patient. The case exemplifies the recent trend to turn to Article 3 of ECHR, which places an absolute prohibition on inhuman or degrading treatment, in an attempt to overcome the limits of asylum and non-refoulement. Read along with the principle of non-refoulement, this non-derogable right has been invoked to stop states from returning asylum seekers and refugees to places where they can be subjected to the kind of treatment prohibited by the ECHR. More recently, this argument has been extended to cases in which the person in question has a medical condition that cannot be treated in the country she or he is returned to. In a landmark case, D. v. UK (1997), ECtHR ruled that the deportation of a drug courier dying of AIDS to St. Kitts would violate Article 3, as having no family support and adequate medical treatment would hasten his death.

In some respects, these recent interpretations of human rights law are “jurisgenerative” processes, broadening the scope of the prohibition on inhuman and degrading treatment, resignifying the meaning of non-refoulement, and augmenting the personhood of migrants. But a closer analysis of N. v. UK reveals that these interpretations also end up exposing migrants to “jurispathic” processes that render their personhood extremely precarious. It shows that the turn to the prohibition on inhuman and degrading treatment as the basis of asylum claims does not put an end to the interpretive controversies arising from the perplexities of human rights but instead gives rise to new ones that demand decisions over life and death. The case also poses challenging questions in light of Arendt’s account of personhood, as it alerts us to the vulnerability of those who are forced to assume the guise of a bare humanity to make rights claims.

The Court’s judgment in N. v. UK highlights how the turn to the suffering body gives rise to highly volatile decisions about life and death, subjecting migrants to a new form of arbitrary rule. The majority of the judges agreed with the government’s position that the probability of significantly reduced life expectancy could not be invoked to challenge an expulsion order. The humanitarian exception could not be
granted in this case, the Court argued, since the applicant was not critically or terminally ill. In addition, she had family in Uganda, even though N. insisted that they would not be willing or able to take care of her. Finally, the antiretroviral medication was available in Uganda, the Court pointed out, ignoring the fact that only half of those who needed this medication could access it. In a very problematic move, the majority of the judges characterized the ECHR as a convention that is “essentially directed at the protection of civil and political rights,” agreeing in effect with the UK government’s claim that extending Article 3 in this case would amount to provision of social and economic rights that should be seen as aspirational. More strikingly, they represented their judgment as an attempt to balance individual rights with “the demands of the general interest of the community,” risking with this move to relativize the absolute prohibition against inhuman and degrading treatment in Article 3. They went so far as to portray the UK government as a generous but overburdened host that “provided the applicant with medical and social assistance at public expense.” But this generosity, they concluded, should not be seen as “entail[ing] a duty on the part of the respondent State to continue to provide for her.”

To understand how this ruling risks eroding the personhood of migrants, it is important to attend to the arbitrary distinctions it sets up in an attempt to adjudicate rights claims based on suffering bodies. Take, for example, the distinction between “ensuring a dignified death” and “prolonging life,” introduced by the UK government and affirmed by the majority of judges. Whereas the former was seen as the irrefutable basis of an absolute prohibition against deportation, the latter was cast as an unwarranted demand putting strains on the socioeconomic resources of a government. But the distinction was not clear-cut; even the descriptions used by those invoking this distinction reveal the arbitrariness of the line drawn. During the examination of N.’s appeal at the House of Lords, Lord Nicholls of Birkenhead compared N.’s situation in the case of a deportation to “having a life-support machine turned off.” The judges at the ECHR took note of this characterization in addition to the overwhelming evidence that if N. were to be deported to Uganda, she would have difficulty accessing
medical treatment and “her condition would rapidly
deteriorate and she would suffer ill health, discomfort, pain
and death within a few years.”104 Yet, despite all this
evidence, N.’s case was not seen as one that is so extreme as
to warrant a humanitarian exception to the sovereign right to
control borders. Though her case was seen as worthy of “one’s
sympathy on pressing grounds,” its “humanitarian appeal” was
not “so powerful that it could not in reason be resisted by the
authorities of a civilised State.”105

N. v. UK points to a new form of arbitrary rule faced by
migrants. Unlike the “form of lawlessness, organized by the
police,”106 which is at the heart of Arendt’s analysis, this new
arbitrariness is highly regulated by laws. Nevertheless, we can
still describe it as arbitrary to the extent that it renders
migrants’ rights vulnerable to the quite erratic decisions
based on ambiguous terms and distinctions. This new arbitrary
rule is directly related to the compassionate humanitarianism
discussed in the last chapter. As states, courts, and rights
advocates turn to compassion to make decisions about
suffering, they risk unmaking the equal personhood of
migrants, rendering their rights dependent on a capricious
moral sentiment. As a result, we are not too far away from
Arendt’s argument that the stateless find themselves in a
fundamental condition of rightlessness because of their
dependence on the goodwill or generosity of others: “The
prolongation of their lives is due to charity and not to right, for
no law exists which could force the nations to feed them.”107

In fact, the Court’s ruling suggested that there was no
violation of N.’s rights under Articles 3 and 8 precisely
because what she was demanding was “prolongation of her
life”; it was the generosity of the British government that
prolonged her life so far “at public expense,” but that in itself
could not be taken as the basis of rights imposing positive
duties on the UK.

The perplexities at the heart of the eighteenth-century
discourse of rights, especially those arising from the
simultaneous invocation of “man” and “citizen” as the subject
entitled to rights, have not been resolved with the move to the
inclusive notion of humanity. As the ECtHR ruling in N. v. UK
demonstrates, these perplexities are reinscribed in human rights norms; what cannot be denied as a fundamental right to citizens can be seen as dependent on the compassion of the “host” states in the case of migrants, which diminishes their personhood.

These perplexities can be navigated in different ways, however, and some of these can be more promising than others to establish migrants as equal persons before the law, as can be seen in the dissenting opinion of Judges Tulkens, Bonello, and Spielmann in *N. v. UK*. Criticizing the problematic hierarchy drawn between civil rights and socioeconomic rights, the dissenting judges argued instead that “there is no water-tight division separating that sphere [of social and economic rights] from the field covered by the Convention.”\(^\text{108}\) They were equally concerned about the utilitarian calculus that the Court set to weigh rights against their costs, warning that this reasoning makes the enjoyment of even non-derogable rights dependent on policy considerations.\(^\text{109}\) The dissenting opinion also questioned the Court’s quick dismissal of N.’s complaint under Article 8, which guarantees a right to respect for private and family life and has been interpreted to indicate “a person’s right to physical and social integrity.” Given that N. was being “sent to certain death,” the dissenting judges insisted, the Court’s refusal to examine the complaint under Article 8 was simply unjustifiable.\(^\text{110}\)

Despite all these important points, the dissenting opinion could not break away from the logic of humanitarian exception altogether. In fact, as the dissenting judges defended that N. should have a right to stay in the UK, they were affirming, not questioning, the logic that undermines the personhood of migrants by rendering their rights dependent on quite arbitrary decisions about suffering bodies. If the majority decided that N.’s case was significantly different from D.’s case as one concerning prolonging life, and not death with dignity, the dissenting judges insisted on the similarities of these two cases: Just like D., N. was a “very exceptional” case, they argued, given that she would not be able to survive more than a year or two if she were to be returned to Uganda.\(^\text{111}\)
is possible to see this attempt to depict N.’s case as a very exceptional one deserving protections under Article 3 as a strategic move—one that is easier to justify, for example, than a broader interpretation that could have described deprivation from adequate access to health care as “inhuman or degrading treatment.” Such an interpretation would have involved representative practices that could have established connections between things seen as unrelated (to recall the “political” approach to human rights discussed in chapter 2) and would have reframed what was perceived to be a social issue—health care—as a political problem that is inextricably linked to N.’s equal personhood. By challenging the deportation order on the grounds of a humanitarian exception reserved for those who are critically ill, the dissenting judges tried to avoid the controversies entailed by such an interpretation that would have effectively dismantled the distinction (p.115) between civil-political rights and socioeconomic rights; instead, they turned to the seemingly self-evident truth of a suffering body. But with that move, placing their dissent at the intersection of a moral economy centered on compassion and an administrative rationality directed at the management of vulnerable populations, they ended up subjecting the rights of asylum seekers to highly arbitrary decisions about the conditions under which a human life can be deemed to be worthy of special protections.

The rise of a humanitarian logic centered on the suffering body, as illustrated by the case of N. v. UK, poses significant challenges to establishing migrants as equal persons before the law. Arendt’s phenomenological account of personhood sheds critical light on these challenges. For Arendt, we become rights-and-duty-bearing subjects with the artificial mask of *persona*. As highlighted earlier, one of the crucial functions of this mask is that it covers the countenance of the human being so as to shield her “mere givenness” from an arbitrary violence to which she would otherwise be more likely to be exposed. The logic of humanitarian exception, on the other hand, risks unmaking the personhood of migrants precisely by forcing them to stand bare naked before the court, to become nothing but human, so as to make claims to human rights. But as Arendt reminds us, the stateless become
most vulnerable to arbitrary forms of rule and violence when they appear to others in their bare humanity, especially because their fate becomes dependent on the unpredictable sentiments of others.\textsuperscript{113} In very exceptional circumstances, that exposure can invoke a response extending them a set of rights; but in the majority of cases, it leads to the commonplace reaction that their plight is worthy of compassion but does not entitle them to the rights enjoyed by citizens. Compassion turns out to be a quite tenuous basis for human rights, as it does not imply any positive duties—even the officials in the UK government admitted that N.’s case demanded “sympathy,” without recognizing any obligations arising from her plight.\textsuperscript{114}

In addition, compassion, as the analysis in chapter 2 highlighted, is also a quite unreliable feeling, as it can end up sacrificing those who are cast as the most misfortunate in the name of the cause it glorifies. In fact, among the cases that both the UK and the ECtHR cited to support their position, we see a long list of such sacrificed lives for the purposes of upholding a humanitarian morality that makes exceptions only for those in extreme situations.\textsuperscript{115} If “death and pain are at the center of legal interpretation,” as Robert Cover argues, they are even more prominent in decisions related to humanitarian exception.\textsuperscript{116} To qualify for this exception, migrants must meet the “high threshold” set by the ECtHR in the interpretation of Article 3, but as the differing opinions in N.’s case reveal, it is not always clear where that “threshold” is, and it must be located in each case by making a new decision in response to challenging questions about life and death.\textsuperscript{117} These decisions “concerning the \textit{threshold} beyond which life ceases to be politically relevant,” to use Giorgio Agamben’s terms, have quite troubling effects:\textsuperscript{118} When the majority of the judges represented N.’s suffering as a problem related to social and economic rights, and not civil and political rights, her life “cease[d] to be politically relevant” in their eyes. Such discretionary decisions over life and death effectively turn migrants with physical and mental illness into \textit{homines sacri}, to use Agamben’s terms again, as subjects who could be subjected to sovereign violence (e.g., deportation) and left to die.\textsuperscript{119}
Approaching human rights on the basis of a humanitarian framework centered on suffering bodies is problematic not simply because it renders the personhood of migrants very precarious but also because it reinscribes their rightlessness as speechless subjects—a problem that I discuss at length in the next chapter. If the artificial mask of persona has an opening to allow the voice of the individual to “sound through,” as in Arendt’s characterization, an exclusive focus on suffering bodies in the adjudication of rights claims ends up depriving migrants of such a mask, as it ends up drowning their voices amidst the more authoritative statements made by medical, humanitarian, and legal experts. In an international environment that makes their narratives highly suspect, the bodies of migrants become material sites bearing witness to truths that seem to be beyond any dispute. As a result of this shift, it is no longer the migrants’ accounts of their suffering that count; it is experts who are “called on to speak the truth in their place.” From an Arendtian perspective, which urges us to ask the extent to which existing inscriptions of personhood in international human rights law allow migrants to speak and be heard, the shift from migrants’ narratives to expert testimony is troubling, as it ends up rendering migrants’ speech irrelevant.

Rightlessness and Immigration Detention

Similar to deportation, detention was mainly used as an exceptional measure in times of emergency (e.g., war), especially to confine those who were categorized as “terrorists” or “enemy aliens.” Since the 1990s, however, detention has been normalized as a legitimate tool used by states in immigration control, especially due to the increasing securitization and criminalization of asylum and immigration—a process that has intensified in the wake of 9/11. It has now become a routine administrative procedure to detain asylum seekers whose claims are being processed, unaccompanied minors who are waiting for their status to be regularized, undocumented immigrants and rejected asylum seekers, and non-citizens who have completed their criminal sentences and are awaiting deportation.
A brief look at the numbers in Europe confirms this troubling normalization of detention in the immigration context: From 2000 to 2012, the number of “camps” used for immigration detention in Europe and in the Mediterranean countries has increased from 324 to 473, according to the estimates of Migreurop, a European network of non-governmental foundations working on immigration detention. This estimate is quite conservative because it includes only permanent structures that can hold five or more people and excludes a plethora of other sites that can be temporarily utilized for immigration detention (e.g., waiting zones in airports). In France, for example, in addition to the 24 centres de rétention administrative (administrative detention centers) where detainees can be held up to 45 days in cases where immediate deportation is not possible, there are 150 locaux de rétention administrative (administrative detention facilities) where detention is limited to 48 hours and 85 zones d’attentes (waiting zones) that are located at various ports of entry and can be used to detain individuals up to 20 days by a court order. The number of people detained by the French government in these sites rose from 28,220 in 2003 to 35,008 in 2007.

In many respects, we are confronted with a situation that is quite similar to the one that Arendt described in her account of statelessness, as what was once exceptional has been normalized as “the routine solution” and internment camp, in its several guises, has become “the only practical substitute for a nonexistent homeland.” Those who can be characterized as de facto stateless, including asylum seekers and undocumented immigrants, are now again “liable to jail sentences without ever committing a crime,” and confined to these sites, they can rarely access the protections guaranteed to other detainees under the rule of law.

Many of these detention sites bear an eerie resemblance to the structure of internment camps used to contain the stateless in a space of lawlessness, always subject to an arbitrary rule of discretionary decrees. Although these sites serve administrative purposes and are supposed to be non-penitentiary, they are regulated by a very disciplinary regime.
reminiscent of ordinary prisons. There are fixed eating
times, designated hours for recreation, and mandatory
curfews. If detainees violate the rules that regulate their daily
routine, they can be subject to various forms of punishment,
including solitary confinement. In addition to the formal
rules in place, detainees’ lives are regulated by a set of
informal rules that create an environment of arbitrariness,
uncertainty, and vulnerability. The arbitrariness of the
system has become even more worrisome with the more
recent move to privatize immigration detention in many
countries. As states are increasingly transferring responsibility
to private prison management companies, it has become more
difficult to ensure accountability in cases of human rights
violations.

Despite the important similarities, the picture is also different
from the one Arendt painted in certain respects as a result of
developments in the field of international human rights and
humanitarian law. Article 31 of the Refugee Convention
forbids states from imposing any penalties on asylum seekers
and refugees on account of their unauthorized entry or
presence, “provided they present themselves without delay to
the authorities and show good cause for their illegal entry or
presence,” and it limits restrictions on their freedom of
movement to only “those which are necessary.” The United
Nations High Commissioner for Refugees (UNHCR) stipulates
that asylum seekers and refugees should not be detained
unless there are exceptional grounds such as verifying
identity, conducting a preliminary assessment of asylum claim,
dealing with cases involving fraudulent documents, and
protecting national security and public order. In addition,
Article 9 of International Covenant on Civil and Political Rights
(ICCPR) guarantees “the right to liberty and security of
person,” regardless of citizenship status, and forbids arbitrary
arrest and detention; it demands states to inform those who
are arrested of the reasons for their arrest. It also prohibits
mandatory and indefinite detention and guarantees access to
courts for those who are detained to determine the lawfulness
of their detention.

In what ways do these human rights norms protect migrants
against the lawlessness that Arendt criticized and allow
migrants to make claims to rights as equal persons before the law? To what extent do these norms ensure the personhood of migrants in the context of detention and provide them with an artificial mask that can protect them against arbitrary forms of rule and violence? In what respects do these human rights norms reconfigure the perplexities that Arendt pointed to in her account of statelessness? And how do different actors, including states, migrants, lawyers, and rights advocacy groups, navigate these perplexities when it comes to detention? Saadi v. UK, a 2008 case from the ECtHR in which an asylum seeker challenged his detention, offers crucial insights into these questions.130

Shayan Baram Saadi fled the Kurdish Autonomous Region of Iraq in December 2000; as a hospital doctor, he treated three fellow members of the Iraqi Workers’ Communist Party who had been injured in an attack and then facilitated their escape. Upon his arrival at Heathrow Airport on December 30, 2000, Saadi immediately claimed asylum and was given “temporary admission.” Although he reported to the airport as required in the next three days, he was arrested on January 2, 2001, and transferred to Oakington Reception Center for detention. On January 8, Saadi’s asylum claim was rejected, but the next day he was released from Oakington and granted temporary admission pending the determination of his appeal. On January 14, 2003, Saadi’s appeal was allowed and he was granted asylum. Saadi and his lawyers challenged his detention at the ECTHR. They claimed that his detention was in violation of Article 5 (1) of ECHR, which guarantees “the right to liberty and security of person” and prohibits the deprivation from liberty except in cases of arrest or detention on permissible grounds.

Saadi v. UK was a landmark case because it was the first time the ECtHR was called upon to make a decision on the permissibility of detention in cases of unauthorized entry.131 The UK government argued that the detention of Saadi was lawful, as it aimed at the prevention of unauthorized entry in accordance with the Article 5 (1) of the ECTHR.132 It also challenged the claim that the detention was arbitrary by highlighting that Saadi was detained in order to enable the
speedy examination of his asylum claim and that he was held in a “relaxed regime” with access to legal advice and other facilities for only seven days.\textsuperscript{133} Saadi’s lawyers contested the lawfulness of the detention by underscoring that there was no unauthorized entry since his temporary admission would make his presence in the UK lawful. In addition, in the absence of any risk of absconding, they argued, Saadi was detained purely for the purposes of administrative convenience and expediency.\textsuperscript{134} The Court found no violation of Article 5 (1) and endorsed the short-term detention of asylum seekers for the purposes of processing their claims speedily.

The reasoning adopted by the majority of judges in \textit{Saadi v. UK} highlights that “personhood operates . . . in the shadow of the border” in the context of asylum and immigration and “has often found itself stunted as a result.”\textsuperscript{135} Precarious personhood of migrants in international human rights law can be seen in the Court’s argument that states enjoy an “undeniable sovereign right to control aliens’ entry into and residence in their territory.” On the basis of this strong endorsement of the principle of territorial sovereignty, the majority of judges declared any entry not explicitly authorized by the state in question to be “unauthorized,” even in cases where the individual claims asylum upon arrival.\textsuperscript{136} They argued that Saadi’s detention was not arbitrary, since it was carried out in good faith to quickly assess his asylum application and he was detained for only seven days under conditions that were specifically adapted to the needs of asylum seekers.\textsuperscript{137} In a move justifying detention undertaken simply for administrative expediency, the Court concluded that Saadi’s detention was not in violation of the right to liberty given the “administrative problems” faced by the UK in the face of “increasingly high numbers of asylum-seekers.”\textsuperscript{138} The Court found only a violation of Article 5 (2), which requires the authorities to promptly inform those who are detained of the reasons for their arrest and charges against them.

\textit{Saadi v. UK} provides a justification for detention as a routine administrative procedure to be used against those who have entered states without prior authorization. In addition, the judgment risks endowing detention with a humanitarian aura
when it presents it as a legitimate measure benefiting the interests of the asylum seekers.\textsuperscript{139} It also confers this aura on detention centers such as Oakington. Highlighting how this center meets the specific needs of asylum seekers, including “recreation, religious observance, medical care and, importantly, legal assistance,” the judgment ends up obscuring the surveillance functions of facilities such as Oakington:\textsuperscript{140} Oakington is located in the former army barracks, and just like the refugee camps located on Guantánamo mentioned at the beginning of this chapter, it is a highly securitized space used for the confinement of those who are cast as undesirables: “It has high perimeter fences, locked gates and twenty-four hour security guards.” Detainees have no privacy and they need to comply with strict rules: “Detainees must open their correspondence in front of the security guards and produce identification if requested, comply with roll-calls and other orders.” There are rules stipulating fixed times for eating and returning to rooms.\textsuperscript{141}

In many respects, Oakington resembles the internment camps in Arendt’s analysis, revealing the precarious legal, political, and human standing of its inhabitants as subjects who can be interned without committing a crime and become dependent on the benevolence of their captors. Sites such as Oakington, where even the most basic human activities (e.g., eating, walking, sleeping) are always undertaken in the shadow of a perpetual threat of punishment, confirm Arendt’s argument that a fundamental condition of rightlessness can persist even when there is no explicit violation of specific human rights.

Normalization of detention in the context of asylum and immigration demonstrates that the perplexities of human rights have not been fully resolved with their codification in law. To the extent that international human rights law affirms not only equal personhood but also territorial sovereignty, it reinscribes these perplexities in new ways. I have already mentioned the peculiar formulation of the right to asylum as “a right to seek and enjoy asylum,” as opposed to “a right to be granted asylum,” to highlight this point. In addition, the exception clauses of various human rights norms, including the right to liberty and security of person, render the
personhood of migrants precarious, as they allow for detention to prevent unauthorized entry. Finally, although there are human rights norms regulating the conditions of detention and prohibiting arbitrary and indefinite detention, there is still an ongoing legal debate on the maximum duration of detention and what constitutes arbitrariness in the context of immigration-related detention. As highlighted in the Saadi judgment, the ECtHR has not “formulated a global definition as to what types of conduct on the part of the authorities might constitute ‘arbitrariness,’” and the UN Human Rights Treaty monitoring bodies have yet to establish clearly articulated, globally recognized guidelines. In the absence of such guidelines, an EU Directive adopted in 2008 has stipulated that the initial detention period can be as long as six months, and that period can be extended further up to 12 months. Saadi’s detention was much shorter, but his case is important for understanding the indeterminate nature of the line that is drawn in decisions related to arbitrary detention: The Court ruled that the seven-day period “cannot be said to have exceeded that reasonably required for the purpose pursued,” but there are no explicitly stated and generally recognized rules defining what would be a “reasonably required” detention period for the purposes of assessing the validity of an asylum claim.

Saadi v. UK was a very controversial case, and several international and non-governmental actors have taken issue with the judgment. The criticisms raised by the dissenting judges in particular deserve attention, as they highlight how the perplexities of human rights could have been navigated differently to ensure more robust guarantees for the personhood of asylum seekers. The partly dissenting opinion called into question the Court’s characterization of the detention regime in Oakington as a humanitarian one when it instead highlighted the administrative functions of the site (i.e., “speedy resolution” of asylum claims), and took issue with the dangerous claim that “detention is in the interests of the person concerned.” This instrumentalist logic, the dissenting judges argued, amounted to a blanket justification of detention as a legitimate means toward the humanitarian end of asylum—a small price to be paid for the rights to be
In addition, they were particularly worried that justification of detention on the grounds of administrative expediency would subject asylum seekers to an arbitrary rule and undermine their personhood:

Such a situation creates great legal uncertainty for asylum seekers, stemming from the fact that they could be detained at any time during examination of their application without their being able to take the necessary action to avoid detention. Hence, the asylum seeker becomes an object rather than a subject of law.

This possibility of being relegated to an “object” of law explains why the legal personhood of various categories of migrants remains precarious despite significant transformations in the field of human rights since the time Arendt completed her analysis of statelessness. Asylum seekers still find themselves in a fundamental condition of rightlessness to the extent that they can be subjected to detention given the monopoly that states continue to have on the legitimate means of movement. As different from the case in Arendt’s time, they can challenge their detention conditions if there are specific human rights violations. But as the Saadi ruling suggests, in the absence of any such violation, they cannot contest the detention itself, or take action to avoid detention during their asylum determination process. Without the possibility of such action, however, it is difficult to speak of equal personhood of migrants before the law. To recall Arendt’s words, “[p]rivileges in some cases, injustices in most, blessings and doom are meted out to them according to accident and without any relation whatsoever to what they do, did, or may do.”

If the Saadi judgment highlights the continuing relevance of Arendt’s argument about the rightlessness of the stateless, the dissenting opinion points to the promising possibilities of interpreting human rights in ways that question rightlessness. These possibilities become manifest, for example, in the concluding remarks of the dissenting judges who questioned the privileges attached to citizenship as they refused to accept
the idea that asylum seekers have a necessarily diminished personhood given their status as foreigners:

Ultimately, are we now also to accept that Article 5 of the Convention, which has played a major role in ensuring controls of arbitrary detention, should afford a lower level of protection as regards asylum and immigration which, in social and human terms, are the most crucial issues facing us in the years to come? Is it a crime to be a foreigner? We do not think so.\textsuperscript{150}

Although the dissenting opinion was important for contesting the condition of rightlessness created by the \textit{Saadi} judgment to a certain extent, it had some crucial limits. In fact, the criticisms raised by both the dissenting judges and the third-party interveners also reveal the normative, institutional, and discursive constraints that can hinder or undermine the possibilities of interpreting human rights in ways ensuring equal personhood for everyone regardless of citizenship status. These criticisms failed to fully attend to the underlying conditions perpetuating contemporary forms of rightlessness faced by migrants, and in certain instances, they risked reproducing these conditions by reinforcing problematic categories and creating hierarchies within “personhood.”

As they articulated their criticisms of the \textit{Saadi v. UK} decision, the dissenting judges, the UNHCR, and several human rights organizations refrained from taking issue with detention as a legitimate practice of territorial sovereignty in migration control. They attacked the decision mainly for blurring the distinctions between asylum seekers and other migrants:

\begin{quote}
[T]he judgment does not hesitate to treat completely without distinction all categories of non-nationals in all situations—illegal immigrants, persons liable to be deported and those who have committed offences—including them without qualification under the general heading of immigration control, which falls within the scope of States’ \textit{unlimited sovereignty}.\textsuperscript{151}
\end{quote}

This position fails to confront how these distinctions themselves are at the root of the problem, as they allow the
states to legitimize detention as a necessary and effective measure taken to determine which migrants are entitled to asylum and which ones are not. By insisting on distinguishing asylum seekers from other migrants, the dissenting opinion ends up justifying the problematic categories that cast some as undeserving intruders who can be treated differently in accordance with the “unlimited sovereignty” of states in the field of immigration control. Appeals to human rights on the basis of such categorical distinctions risk turning asylum into a “filtering process” that “keeps migration exclusion morally defensible while protecting the global gatekeeping operation as a whole,” as Jacqueline Bhabha highlights. These distinctions turn personhood into a stratified category, as they draw hierarchical divisions within humanity. They end up relegating the majority of migrants to a fundamental condition of rightlessness as subjects who can be rendered vulnerable to various forms of violence that can be justified as legitimate in accordance with the state’s sovereign prerogative to control its borders. The predicament of these migrants, who find themselves stranded in “the indefinite space that opens like a kind [of] a trap door below the person,” to use Roberto Esposito’s terms, brings to light the haunting presence of semi-persons, and even non-persons, in an age of rights.

The universal discourse of human rights introduces personhood as the basis of entitlement to equal rights. With this move, it aims to “fill in the chasm between man and citizen left gaping since 1789.” It is quite tempting to think that the shift from citizenship to personhood resolves the fundamental problem of rightlessness that Arendt examined in her discussion of statelessness. After all, one of the defining features of this condition, according to Arendt’s account, was the loss of legal personhood. In a nation-state framework tying legal standing to citizenship, those who were rendered stateless effectively became non-persons relegated to lawlessness. That problem can no longer exist, one might conclude, once personhood is ascribed to every human being regardless of citizenship status.

What arises out of this chapter is an equivocal picture of this novel development, highlighting not only its political and
normative significance but also its limits and problems. The rise of a universal discourse of human rights, centered on legal personhood, is a welcome development to the extent that it allows migrants to have a standing before the law and make claims to rights. As Arendt’s phenomenological account of personhood highlights, such formal recognition is not simply a juridical matter. As an artificial mask that enables equalization of different actors, legal personhood is inextricably tied to one’s political and human standing. However, Arendt’s account also brings to light the fragility of personhood and urges us to look into the various practices and conditions that can end up undermining and diminishing it. As the discussion of deportation and immigration detention underscores, human rights norms do not provide robust guarantees against this troubling possibility. To the extent that they affirm not only the principle of equal personhood but also that of territorial sovereignty, these norms are not completely free from “the perplexities of the Rights of Man” analyzed by Arendt.

“Rightlessness” becomes a crucial critical concept in examining the contemporary practices and conditions that can render the legal standing of migrants precarious. This precarity cannot be understood as a condition that is created simply by external factors, though such factors do need to be taken into account, as the discussion of the contemporary normalization of detention and deportation points out. Rightlessness needs to be understood also as a condition symptomatic of the perplexities of human rights. As the detention and deportation cases from the ECtHR underscore, some of the clauses in international human rights law can give rise to the possibilities of eroding the personhood of migrants and rendering their rights dependent on discretionary decisions. These cases indicate the need to conduct critical inquiries into international human rights law to see how “it leaves open the possibility of its own retraction” in certain circumstances.155

This argument does not suggest that rightlessness, understood as depersonalization, is inevitable given the tensions between equal personhood and territorial sovereignty. In fact, as highlighted by both of the ECtHR cases, there are different
ways of navigating the perplexities of human rights, and some of these ways are more promising than others for the purposes of establishing migrants as equal persons before the law. Attending carefully to these different possibilities, an Arendtian framework refrains from the conclusion that human rights norms are doomed to perpetuate problems of depersonalization or that depersonalization is intrinsic to the concept of personhood.\footnote{156}

One of the crucial reasons for rethinking “rightlessness” as a critical concept in an age of rights, then, is the fragility of the guarantees offered by existing inscriptions of legal personhood in international human rights norms. As Arendt’s analysis of statelessness highlights, however, what is at stake in rightlessness is not merely an unmaking of one’s legal status. Rightlessness also denotes a precarious political and human standing. The next chapter aims to make the case for rethinking “rightlessness” as a critical concept for understanding the plight of asylum seekers and refugees who are confined in camps that deny them the possibilities of participating in the ongoing constitution of a political and human community through their labor, work, and action.

Notes:


(3) For the detention of asylum seekers, undocumented migrants, and HIV-positive refugees on Guantánamo, see Dastyari, “Refugees on Guantanamo Bay”; Wilsher, \textit{Immigration Detention}, 240–242. For the marginalization of HIV-positive refugees on Guantánamo, see Shemak, \textit{Asylum Speakers}, 66–69. The 1987 statute barring the HIV-positive foreigners as “inadmissible undesirables” from entering the United States was not repealed until 2010.

blueprint.pdf. Guantánamo has long been used as a site for containing undesirables, as highlighted in this report: “The unique qualities of the site—its legal ambiguity, political isolation and geographic proximity, and architectures of confinement—have been used and reused to detain people who fall between the boundaries of legal protections and political imperatives” (3).


(6) Dastyari, “Refugees on Guantanamo Bay,” 7. For the legal challenges faced by asylum seekers in Guantánamo, see also Shemak, *Asylum Speakers*, 52–60.


(9) On the so-called “Pacific Solution,” see Hyndman and Mountz, “Another Brick in the Wall?”; Rajaram and Grundy-Warr, “The Irregular Migrant as Homo Sacer.” It can be argued that Guantánamo served as an example for Australian policies; see Dastyari, “Refugees on Guantanamo Bay.”

(10) See, for example, Basaran, *Security, Law and Borders*, chap. 3; Makaremi, “Governing Borders in France”; Bigo, “Detention of Foreigners.”
(11) Andrijasevic, “From Exception to Excess”; Klepp, “A Contested Asylum System”; Human Rights Watch, Pushed Back, Pushed Around. For an Arendtian critique of some of these border control practices, see, for example, Hayden, “From Exclusion to Containment.”


(13) On the shift from citizenship status to legal personhood as the basis of rights within a human rights framework, see, among others, Benhabib, The Rights of Others; Cohen, “Changing Paradigms of Citizenship” and “Dilemmas of Arendtian Republicanism”; Jacobson, Rights Across Borders; Sassen, “Repositioning of Citizenship”; Soysal, Limits of Citizenship. There are notable differences among these scholars, as noted in the Introduction. For a detailed account of the crucial developments regarding migrants’ human rights, see in particular Grant, “Rights of Migrants”; Weissbrodt, Human Rights of Non-Citizens.

(14) See, for example, Agamben, Homo Sacer; Esposito, Third Person.


(16) Fassin, Humanitarian Reason, 4; see also 264–265n.

(17) See Donnelly, Universal Human Rights, 8. For an understanding of rights in terms of “the recognizable capacity to assert claims,” see also Waldron, Dignity, Rank, and Rights, 50.

(18) See, for example, Bohman, “Citizens and Persons,” 331.

(19) See the use of the term “rightless” in The Origins of Totalitarianism, 267, 279, 288n, 290, 293, 294, 295, 300; for “rightlessness,” see The Origins of Totalitarianism, 295, 296.

(20) Arendt, The Origins of Totalitarianism, 296.


(22) Arendt, The Origins of Totalitarianism, 293–294; see also 296–297.


(27) Arendt, *The Origins of Totalitarianism*, 288. Arendt revisits her argument about the precarious legal personhood of the stateless in her discussion of Eichmann’s capture in Argentina and prosecution in Israel: “[It] was Eichmann’s de facto statelessness, and nothing else, that enabled the Jerusalem court to sit in judgment on him. Eichmann, though no legal expert, should have been able to appreciate that, for he knew from his own career that one could do as one pleased only with stateless people; the Jews had to lose their nationality before they could be exterminated.” *Arendt, Eichmann in Jerusalem*, 240.


(30) Arendt, “Statelessness,” 2; see also *The Origins of Totalitarianism*, 296.


(32) Arendt, “Statelessness,” 2; see also *The Origins of Totalitarianism*, 296.

(33) Arendt, *The Origins of Totalitarianism*, 286–287; see also 295.

(34) For this point, see, for example, Guenther, *Solitary Confinement*, xxiv.


(37) On civil and social death, see Guenther, *Solitary Confinement*, xviii-xxvii. Arendt’s distinction between the stateless and the criminal has achieved a new salience in the contemporary setting. In the so-called War on Terror, the US government detained many of the suspects by referring to violations of immigration law (e.g., overstaying a visa). As David Cole notes, the government’s goal was “to avoid those constitutional rights and safeguards that accompany the criminal process but that do not apply in the immigration setting.” Cole, *Enemy Aliens*, 34. See also Wilsher, *Immigration Detention*, chap. 5.


(40) Arendt, “Guests from No-Man’s-Land,” 212.

(41) Arendt, *The Origins of Totalitarianism*, 301; emphasis added.

(42) Arendt, *On Revolution*, 106; see also “Prologue,” 12; *Denktagebuch*, vol. 1, 8. For a detailed, illuminating analysis of Arendt’s account of persona as mask, see Moruzzi, *Speaking through the Mask*, especially chap. 3. Moruzzi’s analysis centers on questions of social identity and does not go into the topic of legal personhood.


(47) Arendt, *On Revolution*, 106. This etymology of persona is quite contested; see, for example, Trendelenburg, *History of the Word Person*, 6–8. For the etymology of persona, see also Mauss, “Category of the Human Mind,” 14–15. Arendt is quite aware of the problems with this etymology, which makes her
insistence on using it even more worthy of attention:

“Although the etymological root of persona seems to derive from per-zonare, from the Greek ξωνη, and hence to mean originally ‘disguise,’ one is tempted to believe that the word carried for Latin ears the significance of per-sonare, ‘to sound through.’” Arendt, On Revolution, 293n.


(49) See the discussion in Naffine, Law’s Meaning of Life, 29–30; see also Naffine, “Who are Law’s Persons?,” 349–350.

(50) Naffine, Law’s Meaning of Life, chap. 7. James Griffin’s work, deriving human rights from the dignity of human beings as normative agents, can serve as a contemporary example. It is important to note that one of the sources that Griffin draws on is the fifteenth-century Italian philosopher Giovanni Pico della Mirandola’s Oration on the Dignity of Man, which rests on theological assumptions about human dignity, especially the idea that it is God who left man “free to determine his own nature.” See Griffin, On Human Rights, 31; see also 152. Griffin’s secular formulation of dignity as normative agency no longer makes reference to God but still holds on to the idea of an inherent human attribute to which rights are attached. For the theological background of human dignity, see Habermas, “Concept of Human Dignity,” 474; McCrudden, “Human Dignity,” 658–659.

(51) Naffine, Law’s Meaning of Life, 358. Even post-metaphysical understandings of human dignity have a tendency to derive human rights from some intrinsically and uniquely human qualities. This idea can be seen in George Kateb’s existential understanding of human dignity, which is rooted in the idea that human beings are superior to other species because of their distinctive capacity to serve as the stewards of nature. Kateb, Human Dignity; see in particular chap. 3. For an alternative account that takes issue with the efforts to derive human dignity from inherent human attributes, see Waldron, Dignity, Rank, and Rights. Waldron underscores the origins of dignity in the idea of rank or status and proposes rethinking the modern notion of human dignity in terms of the universalization of a high-ranking status that
was reserved for only the nobility in the past. To highlight the crucial role that law plays in this universalization, Waldron draws on Arendt’s understanding of personhood as an artifice created by law. See Waldron, *Dignity, Rank, and Rights*, 20.


(54) Arendt, *The Origins of Totalitarianism*, 277, 301; see also “Guests From No-Man’s-Land,” 212.


(59) Arendt, *The Origins of Totalitarianism*, 301.

(60) In her critical analysis of Israeli citizenship, Leora Bilsky makes a similar point about Arendt’s understanding of personhood as an artificial mask: “The mask equalizes by covering the face of the actor. This characteristic of the mask highlights Arendt’s inversion of the modern understanding of equality as a natural condition of human beings.” Bilsky, “Citizenship as Mask,” 74.

(61) Arendt, “Introduction into Politics,” 94. For a similar interpretation of Arendt in this regard, see Balibar, “(De)constructing the Human,” 733–734.


(64) See the entry on “deportatio” in Berger, Encyclopedic Dictionary of Roman Law, 432.

(65) See the entry on “interdicere aqua et igni” in Berger, Encyclopedic Dictionary of Roman Law, 507.

(66) Arendt, The Origins of Totalitarianism, 297.

(67) For the possibilities of unmaking and diminishing personhood, often through the use of categories and hierarchies established by law, see, for example, Dayan, The Law is a White Dog, 40; Guenther, Solitary Confinement, 46–47.

(68) Naffine, Law’s Meaning of Life, 12.


(71) Noonan, Persons and the Masks of Law, 19.

(72) Noonan, Persons and the Masks of Law, 26, 27.

(73) Agamben, Homo Sacer, 123–125.


(75) Arendt, The Origins of Totalitarianism, 301.

(76) Ricoeur, “Approaching the Human Person,” 45.

(77) This sentence draws on Ricoeur’s formulations of personhood; see “Approaching the Human Person.” Axel Honneth offers a similar understanding of personhood, as he
suggests that the denial of rights entails not simply “the forcible restriction of personal autonomy” but also the “loss of self-respect, of the ability to relate to oneself as a legally equal interaction partner with all fellow humans.” Honneth, *Struggles for Recognition*, 133, 134.

(78) Brubaker, *Citizenship and Nationhood*, 24. For an analysis demonstrating the problems of denying long-term residents the right not to be deported, see Carens, *Ethics of Immigration*, 100–106.

(79) Walters, “Deportation, Expulsion,” 277; see also Gibney, “Is Deportation a Form of Forced Migration?”


(81) European Convention of Human Rights (ECHR) has an explicitly stated prohibition against collective expulsion of aliens (Protocol No. 4, Article 4). ICCPR does not have such an explicit prohibition, but collective expulsion has come to be interpreted as a measure in violation of Article 13, which entitles an alien lawfully present in the territory of a state to an expulsion decision reached in accordance with law. For further discussion, see Office of the High Commissioner for Human Rights (OHCHR), “Expulsions of Aliens in International Human Rights Law,” September 2006, accessed May 21, 2012, www2.ohchr.org/english/issues/migration/taskforce/docs/Discussion-paper-expulsions.pdf.


(85) See Article 33 (2) of the Refugee Convention.

(87) On the securitization of asylum and immigration, see, for example, Bigo, “Security and Immigration”; Huysmans, Politics of Insecurity.

(88) Normalization of deportation plays a role similar to the construction of walls in this regard. For an analysis of walls as symptoms of a waning sovereignty, see Brown, Walled States.


(91) Cover, “Foreword: Nomos and Narrative.”

(92) Seyla Benhabib, Another Cosmopolitanism, 70; see also 48–49.


(94) See, for example, Bohmer and Shuman, Rejecting Refugees; Tuit, False Images.

(95) See Shuman and Bohmer, “Representing Trauma”; Bohmer and Shuman, “Producing Epistemologies of Ignorance.”

(96) Bohmer and Shuman, Rejecting Refugees, 11. For the challenges that asylum seekers face in authorizing their testimonies, see also Shemak, Asylum Speakers, chap. 1; Simmons, Human Rights Law, chap. 6; Tuit, False Images, chap. 5.

(97) Fassin, “Compassion and Repression,” 372. See also Fassin, Humanitarian Reason; Ticktin, Casualties of Care; Ticktin, “Where Ethics and Politics Meet”; Watters, “Refugees at Europe’s Borders.”

(98) For an analysis of this development, see, among others, Harvey, “Dissident Voices”; see also Fabbricotti, “Inhuman or Degrading Treatment.”
(99) N v. UK, §42.

(100) N v. UK, §47–50.

(101) N v. UK, §44.

(102) N v. UK, §49.

(103) Quoted in N v. UK, §17.

(104) N v. UK, §47.

(105) This statement is from the ruling of the Court of Appeal in the UK; quoted in N v. UK, §16.


(112) The dissenting judges ruled out this more promising possibility, as they stressed that they would not offer a different interpretation of the scope of Article 3; they argued that N.’s case concerned civil rights, not socioeconomic rights. See N v. UK, Dissenting Opinion, §6 and §24.

(113) See, for example, Arendt, *The Origins of Totalitarianism*, 300–302.

(114) In this sense, today’s asylum seekers are similar to the refugees that Arendt wrote about: “No one really knows what to do with them once compassion asserted its just claim and reached its inevitable end.” Arendt, “Guests from No-Man’s-Land,” 212.


(116) Robert Cover, “Violence and the Word,” 1628. For an analysis that shows how a humanitarian framework cannot help but sacrifice lives as a result of “either a sorting that emphasizes survival . . . or one that emphasizes severity of need,” see Redfield, “Sacrifice, Triage, and Global Humanitarianism,” 205.

(117) See the references to this “high threshold” in N. v. UK, §38 and §43.

(118) Agamben, Homo Sacer, 139; emphasis added.

(119) See note 115 for the list of these cases. For Agamben’s appropriation of this Latin term, see in particular Homo Sacer, 71, 82, 139.

(120) Fassin, Humanitarian Reason, 119.


(124) Arendt, The Origins of Totalitarianism, 279, 284.

(125) Arendt, The Origins of Totalitarianism, 286.


(127) Jesuit Refugee Service-Europe, Becoming Vulnerable in Detention, 8, 43-45.


(129) UNHCR, “UNHCR’s Guidelines,” 3-5.


(131) Saadi v. UK, §61. In a previous case, Chahal v. UK (1996), the Court had already established that detention for the purposes of deportation was a legitimate measure even if there was no risk of absconding, provided that it was not indefinite.

(132) Sub-paragraph (f) of Article 5 (1) allows “the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.”

(133) Saadi v. UK, §47.

(134) Saadi v. UK, §51-53.

(136) Amuur v France quoted in Saadi v. UK, §64; for the
discussion of what constitutes “unauthorized” entry, see Saadi
v. UK, §65. On this point, see also Cornelisse, *Immigration
Detention and Human Rights*, 310–312.

(137) Saadi v. UK, §78; see also §76–77.

(138) Saadi v. UK, §80.

(139) The UK government justified detention of Saadi in these
terms; see Saadi v. UK, §18; the majority of the judges agreed
with this assessment (§77).

(140) Saadi v. UK, §78. The attempt to give Oakington a
humanitarian aura overlooks the fact that “any deprivation of
liberty involves the state’s monopoly on the use of violence, no
matter how ‘relaxed’ (!) the regime at a particular detention
centre may be.” Cornelisse, *Immigration Detention and
Human Rights*, 308; emphasis in the original.

(141) Saadi v. UK, §25.

(142) On the lack of generally recognized guidelines regarding
the maximum duration of detention, see Amnesty
International, *The Netherlands*, 23; on the lack of a global
definition of what “arbitrary” detention means, see Saadi v.
UK, §68.

of the Council of 16 December 2008 on Common Standards
and Procedures in Member States for Returning Illegally
Staying Third-Country Nationals.” Accessed November 21,

(144) Saadi v. UK, §79.

(145) Saadi v. UK, The Joint Partly Dissenting Opinion of
Judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann, and
Hirvelä, 33; hereafter Partly Dissenting Opinion.

(146) Saadi v. UK, Partly Dissenting Opinion, 33.

(147) Saadi v. UK, Partly Dissenting Opinion, 34; emphasis in
the original.
(148) Torpey, *Invention of the Passport*, 156.


(150) Saadi v. UK, Partly Dissenting Opinion, 36.

(151) Saadi v. UK, Partly Dissenting Opinion, 32; emphasis added.

(152) Bhabha, “Internationalist Gatekeepers?,” 161. It is also important to note that the distinctions that asylum advocates draw between “asylum seekers” and “undocumented immigrants” have come to be abused by states to undermine the credibility of asylum claims, as can be seen in the use of terms such as “bogus asylum seekers.” For states’ tendency to manipulate these distinctions, see, for example, Dummett, *On Immigration and Refugees*, 44-45.


(154) Esposito, *Third Person*, 74.


(156) For this view, see, for example, Esposito, “The Dispositif of the Person,” 24. As an alternative to “the personhood-deciding machine,” Esposito develops a theory of the “impersonal,” drawing on figures such as Simone Weil, Emmanuel Levinas, Michel Foucault, and Gilles Deleuze. Esposito, *Third Person*, 13; see also chap. 3.
The expansion of the international human rights regime since the end of World War II has introduced a significant shift in our understanding of rights: Personhood, which is taken to be a universally shared and inherent attribute of all human beings, has come to replace citizenship as the basis of entitlement to rights.¹ The Universal Declaration of Human Rights affirms “the dignity and worth of the human person,” and the International Covenant on Civil and Political Rights states that human rights “derive from the inherent dignity of the human person.” In a significant move, both documents declare that “everyone shall have the right to recognition everywhere as a person before the law.” These formulations signify, for many, a welcome development rendering rights inclusionary and much more secure. Whereas citizenship has been marred by various forms of exclusion throughout its history (e.g. women, working poor, immigrants), personhood as a fundamentally universalistic category holds the promise to overcome such exclusions and include all human beings under its protective umbrella. In

addition, unlike citizenship, which is a legal status that can be lost or stripped away, personhood is taken to be an intrinsic human quality that is inalienable.2

It is precisely this assumption—i.e. that personhood is a universalistic and innate quality—that is powerfully questioned by contemporary Italian theorist Roberto Esposito. Offering a critical genealogy of personhood, Esposito highlights that this assumption was not even held for most of human history; personhood, not unlike citizenship, had its exclusions, as attested by the condition of Roman slaves or the racial hierarchies espoused by modern sciences and upheld by legal systems. What is more, even after personhood has come to be championed as a universalistic basis for rights following the catastrophes of World War II, it has persistently failed to extend rights to all human beings and protect human life in all its dimensions (TP, 5).3

Against those who would explain this problem by pointing to the practical challenges of implementing human rights, Esposito asserts that “the essential failure of human rights” should instead be understood as an inevitable outcome of tying rights to personhood, which has always operated as an exclusionary apparatus (TP, 5; see also 68). This never-ending operation, which Esposito captures with the phrase “dispositif of the person,” establishes a separation “between the person as an artificial entity and the human as a natural being, whom the status of person may or may not befit” (TP, 9). Challenging the commonly held belief that personhood is an inherently given characteristic of all human beings, Esposito highlights that personhood is an artifact that can be granted and taken away, leaving always the possibility that not every human being is automatically recognized as a person entitled to rights.


This paper provides a critical engagement with Esposito’s analysis of personhood, discussing his distinctive contributions to our understanding of this concept that has come to occupy a pivotal place in our political and legal vocabulary, especially in the contemporary human rights discourse, and examining some of his problematic moves and conclusions. In the first section of the essay, I discuss why Esposito’s work deserves attention as a timely intervention drawing attention to the possibility that personhood can be much more exclusionary and fragile than it is often assumed to be. Compared to citizenship, personhood is often taken to be “more fundamental, essential, less of a construct, less subject to manipulation,” as Linda Bosniak points out. Esposito’s critique dispels this myth by bringing out not only the inescapable artificiality of personhood but also the disquieting figures of semi-persons and non-persons in our midst.

As I highlight in the second section, what undermines the illuminating insights of Esposito’s critical genealogy is ultimately his characterization of the “dispositif” of the person in terms of a uniform and negative function, which suggests that personhood is nothing other than a destructive apparatus doomed to produce exclusion and violence. This characterization is quite peculiar given that Esposito borrows “dispositif” from Foucault, who introduces this concept in order to rethink power in terms of a continuously shifting, heterogeneous field of forces. I argue that Esposito’s quite un-Foucauldian genealogy of personhood, which ends up overlooking the multiple, equivocal, and discontinuous effects of this legal artifact, results from a negative attitude towards representation in law and language. From Esposito’s perspective, just as language eliminates the singularity of whatever it aims to represent by turning it into a word (PT, 9), law abolishes the singular, corporeal existence of each human being that it represents as a person.

Representation in both cases—linguistic and legal—is a practice that necessarily entails loss, or

---

even destruction. Personhood, within this framework, is an artifact that gets in the way of reconciling human beings with other living beings and with their own concrete existence.

The third section of the essay calls into question Esposito’s conclusions about personhood—and more broadly, his position on representation in law and language—by revisiting a key moment in his critical genealogy: the Roman separation between *persona* and *homo*, or the legal person and the human being as such. For Esposito, this gap becomes manifest in the etymology of the term “person,” which refers to the “mask that adheres to the face of the actor, but without being identified with it” (*TP*, 8; see also 74-75). And it is this gap between the mask and the face, or the legal artifact and the human being as a corporeal, living entity, that is reinscribed, albeit in different ways, in later iterations of personhood in Christianity, natural law, modern liberalism, and contemporary human rights discourse. We are doomed to live with the legacy of the Roman law unless we find an alternative that could render the dispositif of the person inoperative, and Esposito names this alternative “the third person” or “the impersonal.” These terms remain quite vague in Esposito’s work, as I discuss below, but even if we were to accept his claim that his proposal does not amount to a philosophy that is opposed to and outside of the discourse of personhood altogether (*TP*, 14), it is evident that Esposito’s theory of “the third person” or “the impersonal” sets itself against the realm of legal artifacts, mediations, and representations, which, according to him, are bound to reproduce the Roman gap between *persona* and *homo*, or the mask and the face.

But what if the dispositif of the person, as defined by Esposito, is not all there is to Roman *persona*? To question the conclusions Esposito draws from his account of Roman law, I turn to a thinker who plays a central role in his critique of personhood, and more broadly, in his efforts to rethink politics: Hannah Arendt. For Esposito, Arendt is “[t]he only thinker who has come close to tackling the question” related to the failure of human rights to protect human life (*TP*, 68), as
she sees that the problem arises not simply from an inadequate enforcement of these rights but instead due to “an anomaly in the juridical procedure as such,” which consists of “the structurally exclusive mechanism of rights” (TP, 69). As a result, “the human being as such is precisely what law excludes from within its borders” (TP, 69). Esposito’s reading of Arendt as a theorist who sees law in terms of an essential failure is quite problematic; as I argue below, Arendt questions the widely shared modern assumptions about law, but she deems law indispensable to our efforts to establish relatively stable guarantees for equality and freedom. More strikingly, Arendt finds unexpected resources in the Romans, especially in their understanding of personhood as persona. If Roman persona denotes for Esposito a ruinous legacy to be inherited by Christians, liberals, and even Nazis, it offers for Arendt the possibilities of rethinking law and rights in the face of twentieth-century catastrophes. In fact, she embraces the idea of persona as mask—one that hides the face of the actor and allows the voice to sound through—in order to counter the common assumption that human beings are born equals entitled to a set of natural, inalienable rights. She insists that we can become equals only through artificial conventions, including legal personhood. Quite in line with her defense of representational practices in politics (a point that is missed in Esposito’s attempt to read her as a thinker critical of representation)⁵, Arendt affirms precisely the representational dimensions of personhood as an artifact mediating between human beings, establishing new relations among them, and instituting the possibilities for their ongoing recognition of each other as equals—an always incomplete and fragile achievement but by no means a negligible one.

On the basis of Arendt’s phenomenological reflections on personhood, it is possible to outline a different critical theory of personhood, one that shares with Esposito’s critique the goal of inquiring into whether the historical and current inscriptions of personhood allow the subjects

---

⁵ Esposito mistakes Arendt’s critique of the representative system for a blanket statement against representation.
they represent to stand before the law as equals whose rights claims can be heard and taken into account. But this critical framework would be quite different from Esposito’s in one crucial respect: From an Arendtian perspective, the very artificiality of personhood, overlooked by those who believe in its innateness and denounced by Esposito (and several other critics) as a ruse separating human beings from their own living bodies, might engender representations that are crucial not only for instituting equality here and now but also for setting into motion unpredictable reinventions of equality.

“Dispositif of the Person”: From Roman Persona to Modern Human Rights

We often assume that “human” and “person” are interchangeable terms, and this assumption has become even more entrenched as a result of the powerful hold that the human rights framework has come to have on our political and normative imagination. Esposito’s critique of personhood brings to light the gap between these terms, highlighting that not all human beings are recognized as persons, and various dimensions of human life can be left out of the protections associated with personhood. Establishing endless distinctions between persons and things, humans and animals, body and soul, personhood is an apparatus that creates separations among human beings and within each human being.

In order to capture these operations or the “performative” effects of personhood, Esposito works with the phrase “dispositif of the person” (TP, 9). He borrows the term “dispositif” from Foucault (“DP,” 20), who uses it to understand power in terms of a dynamic arrangement of relations established among “discourses, institutions, architectural forms, regulatory decisions, laws, administrative measures, scientific statements, philosophical, moral and philanthropic
The arrangement of these relations, Foucault’s argument implies, is key to understanding the exercise of power and processes of subjectification within any social field. Along similar lines, Esposito examines a wide range of materials, including philosophical arguments, anthropological, biological, and linguistic works, legal regulations, and administrative decisions, in order to understand the operations of personhood. He argues that the dispositif of the person is an apparatus or machine performing a recurrent function—i.e. maintaining a gap between the living human being and the artificial entity “construed as the site of legal, rational, and moral imputation” (TP, 97; see also TP, 9). Despite the transmutations that personhood undergoes throughout history, from the Roman law to Christianity to modern liberalism and post-war personalism, its definite feature remains to be this inevitable gap (TP, 80-81). I raise questions about this quite non-Foucauldian understanding of “dispositif” in the second section of the essay and criticize the uniformity that ultimately characterizes Esposito’s critical genealogy of personhood, but this criticism demands first a closer examination of the key moments in that genealogy.

Esposito draws attention to the “hybrid” descent of personhood as a concept originating from both the Roman law and Christian theology (TP, 74). The Roman law exposes us to the gap between persona and homo, between the legal fiction of personhood and the living reality of human being as such. Just as persona, or the mask that the actor wears, to recall the etymology of the term, is not identical with the face, personhood as a legal artifact is “not wholly coextensive” with the “living body” (TP, 8), or the concrete human existence in all its dimensions. Equally important for Esposito is how the Roman law institutes this gap in ways creating distinctions

---

among human beings, leaving some at the threshold between “person” and “thing” (e.g. slaves, children, women).

Esposito draws two important conclusions from his discussion of the Roman law: First, personhood always goes hand in hand with depersonalization; for some to experience the privilege of personhood, others have to be “push[ed] … to the edge of thingness” (*TP*, 10). Second, personhood is not something that can be attained once and for all; it is instead a fragile artifact, always vulnerable to destruction and diminution, as it is inherently subject to the volatile dynamic of personalization and depersonalization. The figure of the slave illustrates this “perpetual oscillatory movement between the extremes of person and thing” (*TP*, 9; see also 77); even manumission does not render personalization complete in this case, as the former slave, even after his independence is granted in accordance with the terms stipulated by the master, continues to be denied various rights, including the right to a will (*TP*, 78-79). Esposito also points to the Roman practice of *diminutio capitis*, which entailed the loss or diminishing of legal status as a form of punishment. This practice highlights that the specter of depersonalization haunts every human being, and not just the slave, because of the separation that the dispositif of the person introduces between *persona* and *homo*, legal representation and human life, fiction and reality (*TP*, 79).

If the Roman law is crucial for understanding the stratifications that personhood introduces among human beings, Christianity deserves attention for introducing divisions within each human being. This shift results from the spiritualization of personhood with the theological debates on Trinity (*TP*, 75). When the doctrine of Trinity, positing God as three persons with one substance or being, is utilized to understand the nature of human beings, there emerges “a distinction, in the human being, between an individual dimension with a moral, rational character and an impersonal dimension with an animal nature,” or a distinction between body
and soul (TP, 75; see also “PI,” 125). Although “these two distinct states … co-habitate in one person” (“DP,” 20), they are not equal; the bodily, material element, or what man shares with animals, has to be subordinated to the divine element. One can only be recognized as a person through such subordination, which, for Esposito, suggests that subjectivization always entails subjection (“DP,” 21). It is this “intricate web of humanization and dehumanization,” internalized within each human being, that defines the Christian understanding of personhood (“DP,” 21). But if this internalization sets Christianity apart from the Romans, what brings them together, despite all their differences, is the idea that personhood can be arrived at only at the cost of shutting out the living body.

Esposito suggests that the hybrid legacy of the Roman law and Christianity gets to be reproduced in later iterations of personhood despite some important changes. He acknowledges the crucial shift from an objectivist conception of law, which, as in Roman law, posits that the individual attains rights as a status-holder embedded in “an objective web of legal relations,” to a subjectivist one that takes the individual as a subject endowed with inherent rights (TP, 82). This shift emerges especially with the natural law jurists, and it is later reinforced by modern thinkers such as Hobbes and Leibniz; it becomes politically instituted with the French Revolution and its declaration of the equality of all human beings, and it has been fully entrenched in our era of human rights (TP, 11, 82). According to Esposito, it would be wrong to draw from this “epochal transition” the quite tempting conclusion that the Roman gap between homo and persona is finally closed (TP, 11). With the gradual move to the idea that personhood is an inherent attribute of each individual subject, the Roman distinction between the human being and the legal person, the face and the mask, or the reality and the legal fiction is reintroduced much more powerfully and insidiously, as it is transposed into each human being. Only “the rational and volitional or moral part of the individual,” as different from the biological body, comes to be the “site of legal
imputation” (TP, 82, 83). Just as the shift from an objectivist conception of law to a subjectivist one should not blind us to the continuing legacy of the Romans, Esposito underscores, gradual secularization of personhood should not make us lose sight of the persistent impact of the Christian distinction between body and soul. Even the secular understandings of personhood carry religious overtones to the extent that they derive personhood from the moral dimension of human beings as actors endowed with a rational will. In fact, what gives personhood its enduring power is its capacity to be simultaneously secular and theological (TP, 70).

Esposito’s emphasis on continuity in his critical genealogy of personhood, evident in his interpretation of the enduring legacy of Roman-Christian thinking, is most strikingly articulated in the surprising affinities he identifies between liberalism and Nazism. Drawing on Foucault (and pushing his argument to an extreme conclusion), Esposito positions both liberalism and Nazism within the horizon of modern biopolitics, as both share “the same imperative which is to manage life productively” (TP, 91). Both involve instrumentalization of life, according to Esposito, which ends up with “the animalization or reification of one area of the human over another” (TP, 91). Take, for example, the distinction that Nazi anthropology draws between bios and zoë, or form of life and formless life; since bios can only thrive if it could be freed from the contaminating effects of zoë, the latter must be eliminated, as underscored by various proposals to gas the criminals or the insane in the name of “[t]he development of human personality” (TP, 57). As Esposito underlines, Nazism turns biopolitics into thanatopolitics as it destroys the personhood of those reduced to their biological givens as members of a race, stripping them of their artificial masks (TP, 59). What is quite peculiar (and problematic, as I discuss below) is that Esposito invites us to understand this destruction not as a development antithetical to personhood; he insists that “what appears to be a negation of principle can take shape as a contrasting complementarity” (TP, 8). In other words, Nazis were able to abolish personhood of
those who are cast as racially inferior precisely because of how the dispositif of the person works as a mechanism that always establishes hierarchical distinctions within each human being and among human beings.

Before discussing the problematic moves and conclusions of this genealogy, it is important to note that Esposito’s work raises crucial questions about personhood at a time when this concept has come to achieve an unprecedented prominence with the global rise of human rights norms. Citizenship has often been seen as an exclusionary institution, but the universalistic conception of personhood, adopted by the human rights framework, seems to guarantee fundamental protections to every human being. Esposito challenges this widely shared assumption with his argument that there still remains a “dramatically gaping chasm between the concept of human being and that of citizen” (TP, 3). In order to inquire into how the concept of personhood at work in the human rights framework continues to act “as a separation filter or as a differential paradigm” (TP, 74), Esposito turns attention to the “personalism” of Jacques Maritain, whose ideas significantly shaped the drafting of the Universal Declaration of Human Rights.7 Responding to the Nazi destruction of personhood on the basis of a racial hierarchy, Maritain insisted on “the right of every human being to be treated as a person, not as a thing.”8 Drawing on Christianity and natural law, he argued that each human being possesses “an absolute dignity” as a person created in “the image of God.”9 Because the dignity of the human person is derived from a sacred, transcendental order, according to Maritain, it is “anterior to society” and it “necessarily transcends the state.”10

---

9 Maritain, The Rights of Man and Natural Law, 4.
10 Maritain, The Rights of Man and Natural Law, 20, 76.
reason,” the human person is capable of self-mastery or independence and is owed a set of fundamental rights precisely because of this “power to determine for himself the ends which he pursues.”\textsuperscript{11} Esposito underlines how Maritain’s personalism produces a division within each human being between the biological, animalistic part and the spiritual, rational one: “A human being is a person precisely because (and only if) it maintains full control over its animal nature” \textit{(TP}, 89; see also \textit{PT}, 31). Maritain’s ideas illustrate how the human rights framework continues to be shaped by the hybrid origins of personhood, borrowing from both the Christian distinction between body and soul and the Roman understanding of \textit{persona} as a possession that could be achieved or lost \textit{(PT}, 30).

Esposito’s arguments about Maritain can be helpful in critically assessing the more recent explorations of human rights. Take, for example, James Griffin’s argument in support of grounding human rights in personhood, which he takes to be the normative agency of human beings, or “our capacity to choose and to pursue our conception of a worthwhile life.”\textsuperscript{12} Griffin’s definition of human rights as protections that are necessary for leading “a characteristically human life”\textsuperscript{13} does not seem to have much in common with Maritain’s theological argument about personhood. But this secularized formulation manifests what Esposito calls “the dispositif of the person” in new ways as it grapples with the question of how to define the “human” in human rights. Given the widely shared assumption that the human rights framework has finally bridged the gap between \textit{homo} and \textit{persona}, we would expect the answer to be all members of the human species, but this gap reappears in Griffin’s account: “‘Human’ cannot there [in human rights] mean simply being a member of the species \textit{Homo sapiens}. Infants, the severely mentally

\textsuperscript{11} Maritain, \textit{The Rights of Man and Natural Law}, 20, 76; see also 7, 65, 80.
\textsuperscript{13} Griffin, \textit{On Human Rights}, 34.
retarded [sic], people in an irreversible coma, are all members of the species, but are not agents.”14

Personhood is to be understood as a status that could be reached by “the vast majority of adult mankind,” who reach a certain “threshold” as normative agents capable of pursuing “our conception of a worthwhile life,” and it is to this capacity to which we assign the type of dignity that we associate with human rights.15 Those who cannot pass this “threshold” are suspended in a strange limbo, as neither non-human nor fully human; they deserve some sort of dignity as members of the human species, yet this is not the kind of dignity that is to be associated with personhood.16 With this move, Griffin’s contemporary account reinstates a gap between the human being and the person and ends up reproducing the Roman dispositif. As Esposito powerfully captures, “the unyielding legacy” of this dispositif consists of not only “the production of thresholds within mankind” but even more so “the continual movement between them as well” (TP, 23; see also 9).

It is not only the Roman heritage that we see at work in contemporary accounts of human rights; equally important is the Christian one. Especially important in this regard is the increasing prominence given to the notion of “dignity,” which, as Griffin also underscores, has its origins in the religious idea of “the worth that comes of being made in God’s image.”17 Again, to remember Esposito, even the secular understandings of personhood, which have become prevalent in the modern era, carry theological overtones to the extent that they continue to distinguish a moral dimension of humanity, or an “element of ulteriority” that cannot be reduced to its “corporeal given” (TP, 71). Griffin’s emphasis on normative agency, not unlike Maritain’s understanding of personhood in terms of the power to determine the ends one pursues,

---

14 Griffin, On Human Rights, 34; emphasis in the original.
15 Griffin, On Human Rights, 44-45; see also 156.
16 Griffin, On Human Rights, 44-45.
17 Griffin, On Human Rights, 87; see also 155-56.
reintroduces the body/soul distinction to the effect of creating a threshold not only within humanity but also within each human being.

Esposito’s work helps us not only critically assess such contemporary theoretical accounts but also attend to the practical instantiations of the gap between humanity and personhood. As an example of this gap, Esposito briefly refers to the migrants stranded at sea and compares their condition to that of slavery: “Between a slave lashed to death in the provinces of the Roman Empire, in the Alabama of the nineteenth century, or today off the coast of Lampedusa, the most appalling event by far is the most recent one” (PT, 33). This argument must be understood in light of the various measures that restrict the right to freedom of movement and make it very difficult for migrants to access protections of human rights and the rule of law. Most recently, many immigrant-receiving states have adopted policies that prevent migrants from reaching their borders and push them back to a space that is purportedly outside of their territorial jurisdiction. We can think of, for example, Australia’s excision of Pacific islands from its territory for immigration purposes or interception of migrants on the high seas by countries such as Italy and Spain. These widespread practices aim at creating legal vacuums where the rule of law can be suspended and the personhood of migrants can be effectively destroyed. Esposito’s claim that this kind of depersonalization is more appalling than the one we see in slavery might at first seem odd, perhaps even exaggerated, but it has to be understood as an effort to illuminate the troubling implications of a problem that has come to be simply seen as an ordinary, albeit tragic, outcome of a world divided by territorial borders. What makes the condition of migrants even more appalling is perhaps the fact that, unlike the slaveholders in the Roman Empire and the

American South, we abide by the principle that all human beings are equally entitled to a set of fundamental, inalienable rights. In addition, precisely because of the well-established idea that personhood is an intrinsic human attribute, it has become all the more difficult for us to see how personhood can be taken away or undermined under certain conditions. Hence the timeliness of Esposito’s critique, which reminds us that not all human beings are automatically recognized as persons, that even those who have the recognition can find their personhood diminished under various conditions, and that the principle of universal personhood can paradoxically co-exist with the ghostly figures of semi-persons and non-persons in the twenty-first century.

Once we confront such challenging problems of depersonalization in our contemporary landscape with the help of Esposito’s critical genealogy, we are faced with the difficult question of how to proceed. In relation to the situation of migrants in Lampedusa, for example, one response might be to establish stronger protections of personhood in order to make sure that states cannot evade their obligations under international law by creating zones of exception. According to Esposito, such a response would fail to recognize that the underlying problem arises from the dispositif of the person: “[T]he failure of human rights is not to be conceptually traced to the limited extension of the ideology of the person but rather to its expansion; not to the fact that we have yet to enter fully into its regime of meaning, but to the fact that we have never really moved out of it” (TP, 5). Because the problem rests with the dispositif of the person, the more appropriate response from Esposito’s perspective would be to find an alternative that could render this dispositif inoperative, and he names this alternative “the impersonal” or “third person.” In what follows, I take issue with Esposito’s characterization of the dispositif of the person in terms of an unchanging, interminable function. Highlighting how this view is ultimately rooted in an opposition against representation in law and language, I also raise
questions about the legal and political implications of embracing “the impersonal” as an alternative to personhood.

**Beyond Personhood? Law, Language, and the Question of Representation**

Esposito borrows the term “dispositif” from Foucault to describe the performative effects of personhood throughout centuries. He uses the term to capture how the Roman separation between *homo* and *persona* came to be “reproduced, though a series of variations, throughout the entire course of the modern legal system” (*TP*, 80). Insisting that we should not let the discontinuities in the history of personhood get in the way of recognizing “the underlying conceptual framework that connects at a deep level seemingly very different terminological formulations” (*TP*, 81), Esposito uses “dispositif” to construct a critical genealogy that aims at uncovering what remains the same in personhood since the Roman antiquity. The genealogy that results from this emphasis on continuity seems to be quite at odds with Foucault’s stated goal to capture with “dispositif” a heterogeneous, dynamic social field. Arguably, Foucault’s term is open to quite divergent interpretations, as attested by the irreconcilable readings offered by Deleuze and Agamben. In this interpretive divide, Esposito stands much closer to Agamben, understanding dispositif primarily as an apparatus of control with an unchanging function.

In what follows, I first situate Esposito in this contemporary debate in order to attend to his distinctive understanding of the term “dispositif,” which is the key concept guiding his critical genealogy of personhood. I then argue that Esposito’s negative characterization of the dispositif of the person has to be understood in relation to his problematic opposition against representation in law and language. Personhood is necessarily destructive, for Esposito, given that it is an artifact that re-presents the “human,” offering a mask that stands for a face and getting in the way of an immediate encounter with the human being as such. Finally, I highlight
how this opposition against representation can be detected in Esposito’s vaguely formulated alternative: “the third person” or “the impersonal.” Esposito invokes a variety of influences in proposing this alternative, but Simone Weil’s critique of personhood seems to be particularly important. I discuss Weil’s impact on Esposito in order to underscore that, despite his pronouncements to the contrary, his philosophy arrives at a position that risks turning away from personhood altogether, a move that is very much in accordance with his critique of representation in the name of immediacy.

“Dispositif” is a term that Foucault uses from mid-1970s on in his efforts to understand how power is exercised and maintained in a society. As he explains in an interview given in 1977, his goal is to capture the “system of relations” within “a thoroughly heterogeneous ensemble consisting of discourses, institutions, architectural forms, regulatory decisions, laws, administrative measures, scientific statements, philosophical, moral and philanthropic propositions.”

Examining the dynamic interplay between the multitudinous elements in this complex constellation, which has the function of “responding to an urgent need,” is crucial for understanding how power is exercised at “a given historical moment.” Accordingly, Foucault uses the term “dispositif” in the first volume of The History of Sexuality, for example (i.e. “dispositif of sexuality”), in order to move away from the juridical model that associates power with the restrictive or prohibitive commands of the sovereign, to a strategic one that understands power in terms of a continuously shifting field of forces.

Foucault’s term has given rise to quite different interpretations. Gilles Deleuze, for instance, puts emphasis on dynamism and heterogeneity, as he describes “dispositif” in terms of moving lines that are “broken and subject to changes in direction, bifurcating and forked, and subject to drifting.” He highlights that there are no universals for Foucault to the extent that these shifting lines “do not even have constant co-ordinates.” In Deleuze’s rendering, “dispositif” is a term that captures the impossibility of understanding history in terms of unchanging formulas; putting emphasis on discontinuities, it shifts attention “away from the Eternal and towards the new.” This perpetually transforming ensemble suggests that we cannot come up with a single model or narrative that can chronicle the exercise of power and the production of subjects across time.

Esposito stands much closer to Agamben than Deleuze in his reading of Foucault. In ways similar to Agamben, the term “dispositif” takes him far beyond the 17th and 18th centuries, which were Foucault’s main focus, to early Christian debates on Trinity. Gazing into this remote past, Esposito also locates therein a hidden paradigm that holds the key to understanding a contemporary problem. If Agamben finds in the early theological debates on oikonomia the model of modern governmentality, Esposito discovers in these debates the possibility of “uncovering a first relation between the functioning of the dispositif and the doubling that is implicit in the idea of Person” (“DP,” 20). The theological efforts to articulate Trinity introduce us to the idea of a plurality residing within a unity. This idea, conjoined with the Roman distinction between homo

---

22 For different interpretations of Foucault’s notion of “dispositif,” see, for example, Jeffrey Bussolini, “What is a Dispositive?” *Foucault Studies*, no. 10 (November 2010): 85-107.
24 Deleuze, “What is a Dispositif?,” 162.
25 Deleuze, “What is a Dispositif?,” 163.
27 See Agamben, “What is an Apparatus?” 12.
and *persona*, will give rise to divisions within each human being (e.g. body/soul), animalizing or reifying certain dimensions of life and pushing them outside the protections of personhood. For both Agamben and Esposito then, “dispositif” is a concept that allows the possibility of locating an originary model that will be reinscribed, albeit with variations, across centuries. This emphasis on continuity is quite at odds with Foucault’s use of the term “dispositif” for the purposes of analyzing the emergence of a distinctive power-knowledge nexus at a given historical moment in response to specific needs.

Esposito’s characterization of the performative effects of personhood also underscores the similarities he shares with Agamben. Just as Agamben uses “dispositif” to name an apparatus of capture and control, Esposito attributes negative functions to the dispositif of the person. It is essential function is one of separation, as can be seen in Esposito’s striking descriptions of personhood as “a separation filter” or “a differential diaphragm” (*TP*, 74), “an artificial screen” (*TP*, 83), “a watershed” (*PT*, 2), or an “epochal hiatus” (“DP,” 19). This separation, which always involves a selection of what deserves protection of personhood, is necessarily exclusionary (“PI,” 126, 128, 132). Reminding his readers of the close connection between personhood and

28 Esposito’s argument about the reinscription of the Roman separation between *homo* and *persona* over centuries resonates with Agamben’s argument about dispositif: “I wish to propose to you nothing less than a general and massive partitioning of beings into two large groups or classes: on the one hand, living beings (or substances), and on the other, apparatuses in which living beings are incessantly captured.” Agamben, “What is an Apparatus?” 13. Esposito joins in many respects Agamben’s argument that these dispositifs or apparatuses (and we can cite “personhood” as an example here) “[separate] the living being from itself and from its immediate relationship with its environment.” Agamben, “What is an Apparatus?” 16.

29 See, for example, Agamben’s redefinition of “dispositif” as “anything that has in some way the capacity to capture, orient, determine, intercept, model, control, or secure the gestures, behaviors, opinions, or discourses of living beings.” Agamben, “What is an Apparatus?,” p. 14. Agamben’s negative characterization of dispositif as an apparatus of control is quite at odds with Foucault’s efforts to rethink power in terms of a dynamic network with heterogeneous effects; see, for example, Foucault’s following argument from *The History of Sexuality*, which centers on the concept of “dispos.” “We must make allowance for the complex and unstable process whereby discourse can be both an instrument and an effect of power, but also a hindrance, a stumbling-block, a point of resistance and a starting point for an opposing strategy. Discourse transmits and produces power; it reinforces it, but also undermines and exposes it, renders it fragile and makes it possible to thwart it.” Foucault, *The History of Sexuality: An Introduction*, 101.
property, encapsulated in Locke’s notion of property in one’s own person, Esposito also highlights dispossession as one of the effects of this dispositif (PT, 30).

This peculiar interpretation of Foucault’s notion of “dispositif” as a centuries-old apparatus of control drives Esposito’s critical genealogy of personhood and gives rise to an emphasis on continuity at the expense of discontinuity. We could recall at this point the affinities he draws between liberalism and Nazism, especially his argument that the thanatopolitical destruction of personhood in Nazism should be considered in relation to the very dispositif that is at work in liberal biopolitics as well (TP, 9, 139). In other contexts, Esposito highlights the need to understand Nazism as the culmination of the modern biopolitics that mobilizes an immunitary logic that strives to preserve life (individual or collective). \(^{30}\) Personhood, understood as a dispositif, necessarily functions as an exclusionary, violent mechanism that always carries within it the thanatopolitical possibility.

This conclusion underlies Esposito’s call for “a philosophy of the impersonal.” The negative prefix appears to imply a position against personhood, but Esposito underlines several times that “the impersonal” should not be understood as a concept that is set in opposition to or outside of “the personal;” to quote his somewhat vague caveat, “[t]he impersonal does not negate the personal frontally, as a philosophy of the anti-person would; rather, [it] calls it into question and overturns its prevailing meaning” (TP, 14). To articulate the alternative proposed by “the impersonal” or “the third person” (two terms used interchangeably), Esposito turns to a wide

---

\(^{30}\) In \textit{Bîos}, for example, Esposito makes this argument by resolving an ambiguity he identifies in Foucault’s work regarding the question of whether Nazism is continuous with modern biopolitics. According to Esposito, Foucault cannot explain how biopolitics can become thanatopolitical because he overlooks the “missing link” between the two—i.e. “the immunitary dynamic of the negative protection of life.” See Esposito, \textit{Bîos: Biopolitics and Philosophy}, trans. Timothy Campbell (Minneapolis: University of Minnesota Press, 2008), 9; see also 52-53, 111, 116. Esposito’s argument emphasizing the continuity between Nazism and modern biopolitics, especially as articulated in \textit{Third Person, Persons and Things}, and \textit{Bîos}, sits uneasily with his claim that “Nazism lies entirely outside not only modernity but the philosophical tradition of modernity.” See Esposito, \textit{Terms of the Political: Community, Immunity, Biopolitics}, trans. Rhiannon Noel Welch (Fordham University Press, 2013), 73.
range of thinkers, including Benveniste, Weil, Kojève, Levinas, Foucault, and Deleuze. To clarify what Esposito means by “the impersonal” or “the third person” and why this alternative does entail a renunciation of personhood altogether, despite his declared intentions, it is worth examining Esposito’s engagement with Simone Weil.

Esposito’s main focus is Weil’s 1943 essay, “Human Personality,” which targets the “personalism” advocated by Jacques Maritain (without naming him explicitly), whose ideas were very influential during the drafting of the Universal Declaration of Human Rights, as mentioned earlier.³¹ Weil offers a critique of the language of rights (especially the 1789 Declaration), faulting them for an “intrinsic inadequacy,” which results from their contestatory dimension that constantly pits one claim against another in a spirit of bargaining: “Thanks to this word, what should have been a cry of protest from the depth of the heart has been turned into a shrill nagging of claims and counter-claims, which is both impure and unpractical.”³² Rights introduce a practice of claims-making that gets in the way of attending to the inner cries of the afflicted, according to Weil, who locates the origins of the problem in the Romans: “It was from Rome that we inherited the notion of rights, and like everything else that comes from ancient Rome, who is the woman full of the names of blasphemy in the Apocalypse, it is pagan and unbaptized.”³³ The Roman conception of rights, based on property, turns human beings into property.³⁴ With these arguments, Weil challenges Maritain’s sacralization of personhood and introduces the term “impersonal” instead to name the sacred element that resides within each human being. She underscores that “the impersonal” stands for perfection, truth, and beauty,

³² Weil, “Human Personality,” 84.
³⁴ Weil, “Human Personality,” 82. Weil also draws an analogy between the Romans and Hitler, arguing that both dress power in ideas; see “Human Personality,” 81-82.
whereas “personality” denotes “error and sin.”\textsuperscript{35} In addition, she argues that “the impersonal” takes us beyond conventional understandings of individual and collective identity, or beyond “I” and “we.”\textsuperscript{36}

Esposito agrees with Weil’s critique of rights as a privative or exclusionary discourse that is inherently inadequate (\textit{TP}, 101). He is also drawn to her critique of Maritain and her proposal to understand the “impersonal” as the sacred element in each human being. He reinterprets the term to suggest that, “[t]he impersonal is not simply the opposite of the person – its direct negation – but something that, being of the person or in the person, stops the immune mechanism that introduces the ‘I’ into the simultaneously inclusive and exclusive circle of the ‘we’” (\textit{TP}, 102). Esposito embraces Weil’s term in order to rethink community without losing singularity, a task that is rendered impossible by the dispositif of the person as well as other immunitary apparatuses that set human beings against each other and create divisions within each human being (\textit{TP}, 103).

What shall we make of Esposito’s argument about “the impersonal,” which draws heavily on Weil’s critique of personalism? One way to understand “the impersonal” is that it is a concept that underscores the need to critically examine any legal-political order for the purposes of attending to its exclusions, stratifications, and hierarchies. Understood along these lines, “the impersonal” entails a critical inquiry that does not renounce personhood altogether but instead urges a careful analysis of its historical and contemporary articulations. Another possibility is that “the impersonal” names an alternative that parts company with personhood altogether. This second possibility is especially present in Esposito’s position against representation, which seems to be in accordance with Weil’s arguments against language. Perhaps what is at stake in “the

\textsuperscript{35} Weil, “Human Personality,” 75.
\textsuperscript{36} Weil, “Human Personality,” 75-76.
impersonal” is nothing less than a pervasive suspicion of representation—linguistic and legal—nurtured in the name of a politics centered on the immediate encounter with concrete human existence.

This last point requires recalling Weil’s critique of rights as a contestatory discourse that gets in the way of an “attentive silence” that is necessary to hear and understand the cries voiced from “the depth of the heart,” cries voiced against the infliction of evil.\textsuperscript{37} Weil’s argument highlights not only the limits of rights but also the limits of language, as she argues that language is of no use when it comes to understanding “affliction,” or “the state of extreme and total humiliation which is also the condition for passing over into the truth.”\textsuperscript{38} Weil describes those who are afflicted as mute, speechless, and inarticulate; we cannot attend to their condition if we remain within the bounds of language, which is a “prison” that confines the mind to mere “opinion” and gets in the way of attaining “truth.”\textsuperscript{39}

Esposito shares Weil’s negative characterization of language in many respects, even though he does not express it in theological terms; in fact, his critique of personhood, or legal representation, has to be understood in light of his critique of representation in language. Language, for Esposito, is necessarily destructive and disfiguring. This argument can be seen, for example, in his discussion of “things” in Person and Things: “By transforming the thing into a word, language empties it of reality and turns it into a pure sign” (\textit{PT}, 9). Linguistic signs end up negating the “real presence” and “living content” of things (\textit{PT}, 9, 74). The problem becomes especially acute in modernity when there is no longer any “similitude between being and its signs;” with the rise of a “new regime of meaning,” each sign comes to be understood in relation to its difference from other signs, as highlighted by Saussurean linguistics (\textit{PT}, 75). But the

\textsuperscript{37} Weil, “Human Personality,” 73, 84.
\textsuperscript{38} Weil, “Human Personality,” 90-91.
\textsuperscript{39} Weil, “Human Personality,” 89, 90.
negating effects of language are not limited to a particular episteme, according to Esposito: “The very moment the thing is named, it loses its content and is transferred into the insubstantial space of the sign. In this way, its possession by language coincides with its annihilation” (PT, 77).

Esposito challenges Foucault on this score and argues that “[t]he negative power of language is not, as Foucault viewed it, the result of a fracture in the order of discourse that was reached at a certain point, but an original given, traceable to its genesis” (PT, 79; emphasis added). Linguistic representation, far from making present what is absent, condemns everything to absence.

This animus toward language takes Esposito to the affirmation of a politics centered on immediacy, one that suggests that the singular, material, living existence of things and human beings cannot be captured by (and will necessarily be negated in) linguistic and legal representations. The emphasis on immediacy can be seen, for example, in his discussion of the recent democratic protests across the world at the very end of Persons and Things. De-emphasizing the political significance of the public demands the protestors make in different settings, Esposito highlights instead the collective movement of bodies as something that is “prior” to the articulation of claims: “Before being uttered, their words are embodied in bodies that move in unison, with the same rhythm, in a single wave of emotion” (PT, 146). Leaving aside the uniformity that is attributed to these heterogeneous groups, which does risk eliminating the singularity that Esposito aims to preserve in his turn away from representational practices and artifacts, what is striking here is his effort to characterize the materiality of the bodies in motion as something that is prior to (and perhaps even outside of) language. Esposito uses this argument against Arendt, who, according to him, fails to understand that articulating political demands “requires a mouth and a throat” and that the public space “must be filled by living bodies united by the same protests or by the same demands” (PT, 147).
Esposito’s arguments about language exemplify his turn away from representation altogether. They underscore that his effort to conceptualize “a philosophy of the impersonal” cannot help but end with a renunciation of personhood, which is intrinsically linked to representation in the legal realm. Personhood is after all the mask (persona) that the law provides, as Esposito emphasizes in his critical genealogy, and that mask apparently hinders us from seeing the face. For Esposito, just as a linguistic sign annihilates the real presence of a thing, the mask annihilates the real presence of the human being.

In what follows, I challenge Esposito’s negative characterization of persona—and along with it, his position against representation—by turning to the work of a thinker who paradoxically inspires his critique of personhood. As mentioned earlier, Esposito cites Arendt’s analysis of statelessness to support his claim that human rights are doomed to fail because of the “dispositif inherent in the juridical form itself” (TP, 68). He also adds that Arendt captures the necessarily exclusionary nature of rights despite the fact that she does not fully examine the dispositif of the person. But the brief discussion of Esposito’s comments on recent public protests signals an important point of divergence between two thinkers: Whereas Esposito insists on the immediate materiality of bodies as existing prior to linguistic and other forms of representation, Arendt affirms the crucial role of artifacts in establishing the possibilities of equalization among human beings in their efforts to live together in organized communities. She embraces precisely the representational dimensions of personhood as an artifact mediating between human beings.

40 In this paper, I put emphasis on Esposito’s critique of linguistic and legal representation, but it is important to note his position against political representation as well. In fact, when he defines his concept of “the impolitical,” he underscores that it should be understood as the opposite of not “the political” but instead “representation.” For Esposito, modern political representation, since its formulation in Hobbes, always entails “the reductio ad unum of the represented entities—the people, the nation, the state.” See Esposito, Categories of the Impolitical, trans. Connal Parsley (Fordham University Press, 2015), 9. Esposito cites Arendt as a theorist of the impolitical, suggesting that she sees plurality and natality as unrepresentable. This characterization is very much at odds with Arendt’s quite distinctive understanding (and positive appreciation) of a certain kind of representation that is very closely linked to politics; far from seeing representation in negative, destructive terms—i.e. annihilation of singularity and plurality—Arendt sees it as a crucial activity that makes present what is absent, enables political judgment, and sustains the human condition of plurality.
establishing new relations among them, and instituting the possibilities for their ongoing recognition of each other as equals. This position is particularly evident in Arendt’s quite positive remarks about the Roman conception of *persona* in her different works, which are not discussed by Esposito at all. I suggest that Arendt’s efforts to rethink personhood (especially in the face of statelessness, which revealed the plight of those who were deprived of any legal standing in domestic and international law) provides crucial resources for a critical theory that attends to various forms of depersonalization and affirms the political significance of personhood as a representative artifact that is crucial for equalization.

**Arendt on *Persona*, or the Artificial Mask of Law**

Arendt describes the plight of the stateless people as one of rightlessness, and she highlights three interrelated dimensions of this predicament: deprivation from legal personhood, loss of a political community in which one’s actions and opinions matter, and expulsion from the ordinary human world. Arendt is known as a theorist of political action and human plurality, and it is not surprising to see her describing the predicament of the stateless in terms of the loss of political and human community. Her arguments about the close connection between law and politics have often (until recently) been overlooked; as a result, it is quite striking to see that she devotes close attention to the legal predicament of the stateless. In what follows, I provide a brief overview of Arendt’s discussion of personhood in the context of statelessness, then situate that discussion in relation to her reflections on personhood (especially Roman *persona*) in several other

---

41 This section is primarily excerpted from the third chapter of my book, *Rightlessness in an Age of Rights: Hannah Arendt and the Contemporary Struggles of Migrants* (Oxford, 2015).


43 There is now a growing interest in this topic; see, for example, *Hannah Arendt and the Law*, ed. Marco Goldoni and Christopher McCorkindale (Oxford and Portland: Hart, 2012).
works, and finally, outline the main contours of an Arendtian critical inquiry of personhood by drawing some contrasts with Esposito.

Arendt’s analysis of statelessness provides crucial insights into why personhood matters. Especially important in this regard is the striking comparison she draws between the stateless and the criminal: Whereas the criminal has a legal standing in a political community, the stateless is deprived of any recognition in the legal domain. The crime committed by the criminal will be punished according to the “normal juridical procedure in which a definite crime entails a predictable penalty.”\(^{44}\) Loss of personhood, Arendt argues, subjects the stateless to an arbitrary rule that imposes utterly unpredictable penalties in the absence of any definite crime; under these conditions, what the stateless endure has no relation to “what they do, did, or may do.”\(^ {45}\) The punishment of the criminal results from a “deliberate act,” whereas the actions of the stateless have no impact on what they will endure.\(^ {46}\) Without a right to residence or right to work, the stateless constantly face the threat of internment or deportation for their mere presence or for attempting to make a living for themselves, and they have no right to appeal and challenge their internment or deportation.\(^ {47}\) In the absence of these rights, they become completely dependent on compassion even to meet their basic needs such as food or habitation whereas the criminal has “jail and food not out of charity but out of right.”\(^ {48}\) In a quite interesting move, Arendt argues that committing a crime indeed becomes the only way for the stateless to acquire a legal standing:

Only as an offender against the law can he gain protection from it. As long as his trial and his sentence last, he will be safe from that arbitrary police rule against which there are no

\(^{44}\) Arendt, *The Origins of Totalitarianism*, 447.
\(^{45}\) Arendt, *The Origins of Totalitarianism*, 296; see also 287-8.
\(^{46}\) Arendt, “Statelessness,” 2; see also *The Origins of Totalitarianism*, 296.
\(^{47}\) Arendt, *The Origins of Totalitarianism*, 286.
\(^{48}\) Arendt, “Statelessness,” 2; see also *The Origins of Totalitarianism*, 296.
lawyers and no appeals. … He is no longer the scum of the earth but important enough to be informed of all the details of the law under which he will be tried. He has become a respectable person.\textsuperscript{49}

By drawing a stark contrast between the criminal and the stateless—a contrast that at times risks overlooking the formidable challenges that the accused face as they claim and exercise their rights\textsuperscript{50}—Arendt aims to capture the distinctive aspects of the predicament shared by the stateless. Both the criminal and the stateless are cast as exceptions to the norm in the juridical structure; but as different from the stateless, who is an ‘anomaly for whom there is no appropriate niche in the framework of the general law,’ the criminal is a recognized exception, or an exception “provided for by law.”\textsuperscript{51} In some ways, Arendt’s comparison follows Hegel’s argument that punishment contains within itself a recognition of the criminal as a person capable of acting freely and entitled to rights, with the proviso that the punishment is proportionate to the crime: “[B]y being punished he is honoured as a rational being. He does not receive this honour unless the concept and measure of his punishment are derived from his own act.”\textsuperscript{52} In the case of the stateless, there is no such recognition; their confinement in an internment camp, for example, is not a punishment that is derived from and proportionate to their own acts. In addition, because they lack personhood, they cannot appear before the court, have legal representation, and demand to be heard; their actions and speech are rendered simply irrelevant. Instead, we have a situation comparable to civil and social death to the extent that the actions of the stateless are not

\textsuperscript{49} Arendt, \textit{The Origins of Totalitarianism}, 286-7; see also 295.

\textsuperscript{50} For this point, see, for example, Guenther, \textit{Solitary Confinement}, xxiv.

\textsuperscript{51} Arendt, \textit{The Origins of Totalitarianism}, 283, 286.

\textsuperscript{52} Hegel, \textit{Philosophy of Right}, 71. For the Hegelian elements in Arendt’s argument about personhood, see Tsao, “Arendt and the Modern State,” 127-8.
taken into account by either the legal system or the political community and that their fate is entirely dependent on the workings of an arbitrary form of power.\textsuperscript{53}

Arendt’s comparison between the stateless and the criminal is worthy of attention not only because it sheds light on the distinctive aspects of the plight of the stateless but also because it reveals the crucial importance she attributes to the formal recognition of rights such as equality before the law, right to trial, and right to appeal. Her position is quite different from Esposito who sees rights in entirely negative terms. Take, for example, Arendt’s following statement that attributes a political, and even existential, significance to legal personhood:

The human being who has lost his place in a community, his political status in the struggle of his time, and the legal personality which makes his actions and part of his destiny a consistent whole, is left with those qualities which usually can become articulate only in the sphere of private life and must remain unqualified, mere existence in all matters of public concern.\textsuperscript{54}

Arendt moves beyond the juridical meaning of the term as a right-and-duty-bearing subject here and suggests that legal personhood endows one’s actions with a meaning that they would otherwise lack and gives some kind of unity to different aspects of one’s life story. To understand why legal recognition has such vital consequences, there is a need to reconsider Arendt’s reflections on the legal predicament of the stateless in \textit{The Origins of Totalitarianism} in the light of her phenomenological reflections on personhood in different contexts.

Personhood, Arendt underscores, derives from the Latin term \textit{persona}, which denotes “the mask ancient actors used to wear in a play.”\textsuperscript{55} She also notes that it was Romans who first used

\begin{itemize}
\item \textsuperscript{53} On civil and social death, see Guenther, \textit{Solitary Confinement}, xviii-xxvii.
\item \textsuperscript{54} Arendt, \textit{The Origins of Totalitarianism}, 301; emphasis added.
\item \textsuperscript{55} Arendt, \textit{On Revolution}, 106; “Prologue,” 12. See also Arendt’s “thinking diary” entry from June 1950; \textit{Denktagebuch}, vol. 1, 8. For an illuminating analysis of Arendt’s account of \textit{persona} as mask, see Moruzzi, \textit{Speaking through the Mask}, especially chap. 3.
\end{itemize}
persona in a metaphorical sense to draw a distinction between private individuals and citizens. They took personhood as a legal artifact, and not as an inherent quality of human beings in their natural condition: “The point was that ‘it is not the natural Ego which enters court of law. It is a right-and-duty-bearing person, created by the law, which appears before the law.’” Arendt also adds that this mask has “a broad opening at the place of the mouth through which the individual, undisguised voice of the actor could sound.” She highlights this particular characteristic by breaking down persona into per-sonare, which means to “sound through.” This dissection of personhood as per-sonare, though etymologically suspect, is crucial for understanding the two functions Arendt attributes to the artificial mask of persona: “it had to hide, or rather to replace the actor’s own face and countenance, but in a way that would make it possible for the voice to sound through.”

Arendt’s discussion of persona highlights that rights and subjects of rights are created by law. In this regard, Arendt, similar to Esposito, calls into question a metaphysical approach that looks for a real or essential person antecedent to legal relations. Searching for “an inhering essence,” metaphysics of the person, as John Dewey noted in 1926, works with the assumption that “there must be a subject to which these legal relations belong or in which they inhere or to which, at all events, they are imputed.” Such a metaphysical approach grounds rights in the inherent properties of this essential person (e.g. reason, sanctity, dignity, autonomy), suggesting that there is some intrinsic quality that makes human beings essentially fit to be entitled to a set of

---

56 Arendt, On Revolution, 107; see also “Prologue,” 13.
57 Arendt, “Prologue,” 12.
58 Arendt, On Revolution, 106. This etymology of persona is quite contested; see, for example, Trendelenburg, History of the Word Person, 6-8. Arendt is quite aware of the problems with this etymology, which makes her insistence on using it even more worthy of attention: “Although the etymological root of persona seems to derive from per-sonare, from the Greek ξωνη, and hence to mean originally ‘disguise,’ one is tempted to believe that the word carried for Latin ears the significance of per-sonare, ‘to sound through.’” Arendt, On Revolution, 293n.
inherent and inalienable rights. In Ngaire Naflne’s terms, it “[maps] legal rights onto an antecedent human subject.” Arendt targets precisely this metaphysics and argues that it is the mask that makes a human being a person entitled to rights. In the absence of this mask, one appears to others as a “natural man” stripped of all political and legal rights and duties. Deprived of the artificial mask provided by legal personhood, the stateless fall “outside the pale of the law” and appear to others in their naked humanness or as “unqualified, mere existence.”

In addition, Arendt’s discussion of persona, similar to that of Esposito, draws attention to the practices that go into the making and unmaking of personhood. If personhood is an artifact, and not an inherently given essence—if there is no intrinsic overlap between humanness and personhood, in other words—then it is quite possible that not every human being is automatically recognized as a person. And even when one has the formal recognition, it is conceivable that personhood can be taken away, and if not completely taken away, it can be undermined so much so that some human beings might be effectively rendered semi-persons or non-persons. Arendt’s analysis of statelessness and Esposito’s remarks about migrants stranded in Lampedusa highlight this disquieting possibility.

These similarities notwithstanding, Arendt adopts a phenomenological approach that takes her to quite different conclusions about personhood, which might be much more helpful in thinking about problems of depersonalization today. For both Arendt and Esposito, persons are artificially created by law. But Esposito sees this artificiality in negative terms, as he depicts personhood as a representation that gets in the way of an immediate encounter with the living bodies of human beings. Arendt, on the other hand, affirms the theatrical understanding of

---

60 See the discussion in Naflne, Law’s Meaning of Life, 29-30; see also Naflne, “Who are Law’s Persons?,” 349-50.
63 Arendt, The Origins of Totalitarianism, 277, 301; see also “Guests From No-Man’s-Land,” 212.
personhood, and her distrust of the quest for a real essence hiding behind the mask is very much in accord with her phenomenological approach to politics, which calls into question the metaphysical tradition that privileges “being” and is suspect of “appearances.” This peculiar understanding of personhood has much to share with the Renaissance and eighteenth-century tradition of *theatrum mundi* to the extent that it represents the world as a stage on which actors appear with their public masks. From an Arendtian perspective, there is something deeply troubling in Esposito’s distrust of the artificial mask of personhood in the name of the “living body” that is hidden behind, and disfigured by, this mask (*TP*, 8).

For this last point, it is important to recall how Arendt’s etymology of *persona*, especially her dissection of the Latin term as *per-sonare*, emphasizes something that is missing in Esposito’s discussion: Personhood is a mask that not only disguises the countenance of its wearer but also allows the possibility of speaking and being heard; it allows the voice of the actor to sound through. Those who are stripped of the protections of this mask appear to others in their “mere givenness” and become much more vulnerable to arbitrary forms of violence, as Arendt’s analysis of statelessness highlights. In addition, they lack the means to make their speech “to sound through;” without the mask equalizing them with other actors, their speech either does not count or is rendered inaudible and unintelligible. By insisting on this dubious etymology, tracing personhood to *per-sonare*, Arendt urges us to understand the legal recognition of personhood not merely as a juridical issue but also as a political one that is directly linked to the question of whose action and speech are taken into account in a given community. Her analysis of personhood, highlighting how legal fictions can enable public appearance, is quite different from Esposito’s account of the dispositif of the person in entirely negative terms as an apparatus that

---

64 Villa, *Politics, Philosophy, Terror*, 119.
disguises the living body, suppresses human life, and creates divisions among human beings and within each human being.

This comparison highlights that personhood is not simply a juridical matter, for Arendt; it has significant consequences for one’s political and human standing; it is that “which makes his [a human being’s] actions and part of his destiny a consistent whole,” to recall her formulation. What Arendt offers is nothing less than “a hermeneutic phenomenology of personhood,” to use Paul Ricoeur’s terms, tying together how the person appears in language, action, narrative, and ethical life. The artificial mask of personhood is crucial for human beings to appear as speaking subjects and be recognized as such by their interlocutors, to become actors capable of designating themselves as the agents of their own actions, to establish themselves as the narrators of their own life stories that endow their identities with some cohesion throughout time, and to situate themselves as participants in institutional frameworks that offer relatively stable guarantees of equality.

Arendt’s phenomenological attention to the multiple dimensions of personhood refuses to sign on to a critique that sees legal artifacts simply as devices producing injustice, oppression, and violence, although this is not to say that her account has no critical insight to offer. In fact, her peculiar understanding of personhood as a mask that covers the face but also allows the individual voice to sound through can be mobilized as a critical framework in examining the existing institutional frameworks guaranteeing personhood. Her analysis of statelessness and critique of human rights take us to the following questions: To what extent do the current formulations of personhood in international human rights law provide various categories of migrants with artificial masks that can allow them to appear in public without the pervasive fear

---

65 Arendt, The Origins of Totalitarianism, 301.
67 This sentence draws on Ricoeur’s formulations of personhood; see “Approaching the Human Person.”
of being subjected to arbitrary violence? To what extent do these legal mechanisms cover their “face” and ward off the threat of being perceived as bare lives exposed in their “mere givenness”? And finally, to what extent do these artificial conventions allow these migrants to appear as equals before the law and let their rights claims to sound through? These questions are crucial starting points for understanding how personhood can be unmade or diminished even in an age of human rights that promise recognition of every human being as a person before the law.⁶⁸

---

⁶⁸ These questions guide the critical inquiry I undertake by examining the limits of human rights framework, especially the tenuous guarantees of personhood offered to asylum-seekers and undocumented immigrants in the contexts of detention and deportation, in *Rightlessness in an Age of Human Rights*, ch. 3.