

***Superfluosness, Institutional Failure and Immigration:
Citizenship and Human Rights in Conflict in North America***

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If a human being loses his political status, he should, according to the implications of the inborn and inalienable rights of man, come under exactly the situation for which the declarations of such general rights provided. Actually the opposite is the case. It seems that a man who is nothing but a man has lost the very qualities which make it possible for other people to treat him as a fellow-man.

Hannah Arendt (1966, 300)

Regional integration promised to open up borders, expand the mobility of persons and resources, institutionalize multilateral cooperation fostering security and prosperity, and multiply arenas of belonging, encouraging more inclusive collective identities. In the North American case that promise has rung increasingly hollow. Unequal relationships between states were built into regional agreements and the priority of national interests, especially security, often confounds cooperation leading to harsh attempts to re-solidify borders. In consequence, large groups remain excluded, are becoming progressively marginalized, or find themselves caught in a web of tensions created by the confrontation between transnational forces and reassertions of local or national sovereignty. Extricating such groups before they fall through the gaps is proving to be extremely difficult for national and transnational institutions. This is exacerbated by the exclusionary policies actively pursued by some national and subnational governments in their efforts to resist the incursions on their sovereignty brought by deterritorialization and global restructuring.

A growing literature has highlighted the institutional failures that contribute to such exclusions and continue to obstruct regional cooperation and its inclusive ideals of free movement across boundaries and equal access to resources and rights (see Ayres and MacDonald 2006; Studer and Wise (eds.) 2007; Gabriel and MacDonald 2007; Genna and Mayer-Foulkes (eds.) 2011; Kapling and Nossal 2009; Van Nijnatten 2007; Luccisano 2007). The conceptual confusions underpinning many of those failures are not a strong focus in the literature, however, particularly from the perspective of political philosophy. This is, in part, because the deep connections between the concepts of state, nation, citizen, human rights, and sovereignty make it challenging to discuss one in any depth without implicating all. It is nevertheless a challenge

worth accepting if an appropriate starting point can be found. In this respect, Hannah Arendt's critique of human rights and the notion of superfluousness emerging from it are invaluable for the additional light they shed on the exclusionary dimensions of immigration laws in North America. I argue that the clash between globalizing forces on one hand, and a reassertion of state sovereignty on the other, provides the conditions for systematic exclusions from the protections that human rights should deliver. In doing so, I consider some of the ways the paradox of rights Arendt theorized in the 1960s continues to beleaguer human rights today.

I first outline the conceptual confusions Arendt identified at the foundation of a deep rivalry between citizenship rights and human rights, a rivalry that lies at the heart of debates over the Arizona Immigration Law and similar legislation. I then sketch Arendt's notion of superfluousness before suggesting that several elements of her account appear in new and alarming form in recent U.S. immigration policy. Elsewhere, I have explored in detail Arendt's theoretical arguments on rights, superfluousness and the state as well as its potential application to several issues in contemporary politics (Norman 2009, 2011, 2012). To minimize covering the same ground, the following synopsis isolates the main points pertaining to immigration control issues.

The Paradox of Rights

In Arendt's view, the whole idea of grounding rights in a notion of humanity contains a paradox at its base that at certain historical junctures—for her in the aftermath of WWI and in totalitarian regimes, but also now in times of globalization—can make upholding human rights extremely challenging even when the political will to do so is very strong. To function as a protective safety net against government mistreatment or negligence, the Rights of Man were designed in a way that tied them to humanity: to people, not governments or states. It was thought that only this could render them truly "inalienable": irreducible to other rights and laws. "It is by no means certain," she argued, "whether this is possible" since the functioning of any rights system is predicated on the legal system, which requires the state system (Arendt 1966, 298). A catch-22 ensues: human rights are supposed to activate when the state fails in its duties to some or all of its people(s), but they simultaneously require the state system to be guaranteed and claimed. Human rights therefore do not undercut the sovereign state. They are altogether reliant on it. In consequence, although other states or international organizations can intervene on behalf of those whose human rights have been violated, the success of

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humanitarian intervention—and the system of human rights itself—has to contend with the continuing fact of state sovereignty (298).

For Arendt, the people affected most negatively by the paradox of rights were those made stateless almost overnight when the boundaries of Europe were redrawn after World War I. In the face of millions of refugees, the legal process of naturalization broke down internationally. Arendt's worry was that being stateless does not just deprive a person of belonging to a territory. It deprives them of occupying a clear "niche in the framework of the general law" (Arendt 1966, 283, citing Jermings 1939) the basis of which rests not on human rights, but on citizenship status and the political rights that accompany it. A fundamental conceptual confusion between *homme* and *citoyen* thus permeated the 1789 Declaration at its inception (Agamben 1998, 126), and was replicated in a similar confusion over the relation between the individual and the state in the 1948 Universal Declaration of Human Rights (UDHR). Article 15's lack of a clear definition of the right to citizenship and its relation to the right to nationality (Harrington 2009) clouds the conceptual picture further. It might make intuitive sense to consider the biological status and needs of humans as more fundamental than other statuses and privileges, including political ones. Yet if the protection of these needs is expressed in the form of rights, it is predicated on the *prior* existence of a functional legal and political artifice, not the other way around. Logically speaking, then, the exclusive concept of the citizen precedes and is necessary for articulating the inclusive concept of 'the human.' And, contrary to the reverse derivation in Enlightenment social contract theories, the state precedes and is necessary for conceiving—and protecting—'the individual.'

Arendt's work on totalitarianism stresses the grave practical consequences involved in placing human rights prior to political rights and the ensuing problems with conflating citizenship, nationality and humanity or basing conflicting conceptions of rights on any or all of these. In becoming stateless, she argued, persons are deprived of the only entity that could guarantee a set of minimum rights (Arendt 1966, 291-2), rendering them vulnerable to abuse, since they have no functional legal status in their own countries or abroad. The state has the last word on who has legal status to be protected, and whose rights will be suspended or deprioritized. Unable to send refugees back to their nonexistent homelands and unwilling to assimilate them into their own sovereign nations, after WWI the idea of internment camps for large groups of 'the unwanted' became (and in many

places still is¹) the "routine solution" along with a temptation to resort to excessive policing and arbitrary rule (287-8).

Human Superfluosity

Arendt's concept of human superfluosity is rooted in the inherent confusions of the paradox of rights and is a notion that remains highly pertinent today, though new contexts are generating it in diverse ways. The predicament of the stateless "is not that they are not equal before the law, but that no law exists for them" (Arendt 1966, 295-6). The absence of occupying a defined niche in the legal system means that the stateless are deprived of the most fundamental right of all: "the right to have rights" (296). Without it, human rights cease to function and the stateless are all but condemned to fall through a glaring crack in the legal system to the point where they are rendered superfluous—and treated accordingly. This may sound like a radical claim based on an equally radical and highly specific set of historical examples, yet its implications are profound and hold much contemporary significance when reflecting on the exclusionary features of recent immigration policy trends.

The stateless have no state to guarantee their human rights or to make claims against those who might violate them. They are consequently deprived of many basic things legally, politically and often socially: a place in the legal framework, a place in the world to belong to and call home, a state to claim human rights on their behalf, even their individuality and specific group identity is in danger of becoming blurred. They consequently vanish from our familiar juridico-socio-political map, slipping through the fissures between institutions, anomalies that no longer fit the ethico-legal-political framework the state system provides. If such groups cannot be assimilated, Arendt claimed, it is easier to view them as undeserving of the same kind of political attention and status that citizens enjoy, or even see them as threatening. The very existence of anomalous groups challenges the legal-political framework which, in Arendt's time, was already destabilized by the effects of WWI on the territories of Europe and sovereign authority of the defeated nations. In the interwar period, European states responded by soundly re-

¹ Administrative detention of refugees and asylum seekers is widespread in Europe and the U.S. in restrictive detention centers and frequently in prisons. For example, from 2001-2008 the Australian government shipped asylum seekers to offshore camps on Nauru and Manus Islands, Papua New Guinea. Both were shut in 2008, but the Christmas Island detention center remains to deal with Australia's policy of mandatory detention for unauthorized aliens.

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exerting their authority over the stateless. In a context where globalization is producing a concomitant challenge to the solidity and permanence of territorial boundaries and thus to state sovereignty, it is not difficult to see the Arizona Immigration Law or recent nationalist rhetoric in Europe (see Friedman 2010; Kuenssberg 2011) as clear responses to precisely the perceived 'threat' Arendt highlighted.

On Arendt's account, when groups are not claimed by a sovereign authority able or willing to enforce the protection of their rights, this can escalate to the point where they "are treated as if they no longer existed, as if what happened to them were no longer of any interest to anybody, as if they were already dead" (Arendt 1966, 445). And so she claims there was a certain logic to the progression from interment camps for stateless people in the interwar period to "perfect" or complete superfluousness (295-6). Arendt was referring to the dehumanization tactics that produced the 'living dead' of the Nazi annihilation camps where once-human individuals were turned into unremembered, replaceable nonpersons, indistinguishable from each other, and stripped of any solidarity. This unclaimed, unwanted, "superfluous human *materiel*" (443) was condemned to be shunted between authorities from one place to another, and ultimately liquidated if conditions were thought to require it. Nevertheless, the pertinence of many of her claims is not restricted to such extreme cases, or to the experiences of statelessness as these are traditionally understood—particularly in an increasingly deterritorialized world.

State Sovereignty, Superfluousness and Immigration in North America

The deterritorialization that accompanies globalization is impacting the ways the paradox of human rights can lead to contemporary variants of superfluousness that apply to more than those who have no state to return to. In North America since NAFTA, several reactions to the increased mobility of persons and resources (and violence and contraband) across porous borders and the decreasing control the three states have been able to exert over their denizens and territory reflect a desire to both resist deep integration at the political- and regional-identity level and reassert a traditional view of state sovereignty more consonant with the idea of territorialized, nationally based citizenship rights than it is with human rights. This is evident in recent U.S. and Canadian reassertions of authority concerning their right-recognized in international law—to determine who should be granted citizen status with the legal protection that goes with it and who should not. "It is in this respect that

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immigration has become central to the exercise of state sovereignty" (Gabriel and MacDonald 2007, 271) It has also become a site that is primed for the systematic generation of superfluosity that is proving difficult to counter at the institutional level for the very reasons Arendt identified.

The range and flexibility of labor, mobility and attendant expanded citizen rights built into European integration at its base was, and is, simply not present in the North American model. Inclusion is far from equal across the three states. For example, NAFTA's Chapter 16 permits temporary free mobility and labor rights across the region to a narrow group of skilled workers, traders or investors. There is no cap on the number of Canadians who can enter the U.S. under this visa. "For Mexicans, a limit was set at 5,500 initial approvals per year for a transition period of ten years (until 2004)" (Trade Compliance Center 2012).

Two further examples of the clampdown on mobility rights and privileges in the region brace the legal inequality. In the U.S., the June 2009 Western Hemisphere Travel Initiative made it mandatory for U.S. citizens (re-)entering the U.S. by land or sea to present a passport, passport card, Enhanced Driving License or Trusted Traveler Card. This has greatly affected many Mexican-Americans wishing to visit their families in Mexico, deposit remittances there or engage in other socioeconomic transactions. Canada followed suit a month later, backpedalling on its originally lenient immigration laws in response to a reported almost threefold rise in Mexican refugee claims since 2005. Immigration Minister Jason Kenney announced that, "In addition to creating significant delays and spiraling new costs in our refugee program, the sheer volume of these claims is undermining our ability to help people fleeing real persecution" (Citizenship and Immigration Canada 2009). A Temporary Residence visa is now required for all Mexicans entering the country.

The temporary visa effectively tightened the 2004 Canada-U.S. Safe Third Country Agreement controls on those attempting to claim refugee status at the Canadian border, essentially closing it to the vast majority of Mexican refugee claimants if they had already passed through a "safe" country (the U.S.) in which they could claim asylum from persecution, or a well-founded fear of it, at home. This agreement's institutional expression of shared bilateral responsibility over what to do about the influx of immigrants and refugees, and where to shunt them next, is only superficially promising, for the question of—and protection of—state sovereignty overshadows that of human rights here. It is manifestly problematic for Mexican refugee applicants to both countries. Their home state

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might be willing to to receive them, but it is in many cases unable to fully 'claim' them by guaranteeing their human rights in the face of overwhelming narcoviolence and institutionalized corruption. Tougher Canadian border controls have also contributed to the heightened perception of 'threat' that 'the unwanted' are generating in the United States. If no country in the region is prepared to fully claim the 'unwanted,' certain forms of superfluosness ensue despite the best efforts of nonstate human rights actors.

The current reassertion of state sovereignty has focused on stiffening control through the abundance of proposals and funding for more policing of North American borders (see Gunkel and González Wahl 2012). In the U.S., former anti-drug and immigration-crossing measures have been adapted to the drives of the war on terror, cementing the now-pervasive connection between immigration policy and security concerns. This is most symbolically expressed in the blatant effort to re-solidify territorial borders quite literally via the U.S.-Mexico border wall, 649 miles of which had been constructed in August 2011 (U.S. GAO 2011, 38). The combination of attempts by the undocumented to avoid falling foul of drug gang presence on one side, or greatly augmented patrols and new technologies on the other, seriously heightens the risk of death in the most inhospitable parts of the desert or in the sea around the coastal border area. The cumulative effect has been less of a deterrent to illegal crossing than it has been to actively force the use of the most perilous of routes. The connection of the basic objective of this policy to the logic of superfluosness is clear: one way or another, far fewer illegal immigrants should enter. Regarding the many shocking tales of deaths involved in crossing the Mexican-U.S. frontier, one remark from a retired U.S. Border Patrol sector chief is revealing of how superfluosness is generated today. "The strategy is a failure. All it's accomplished is killing people... But since these people are Mexicans, no one seems to care" (Gunkel and González Wahl 2012, 39, citing Moser 2003). The trails to the remaining gaps in the wall also channel the surviving undocumented migrants into certain areas *en masse*.

The 2010 Arizona Immigration Law (SB1070) and related legislation in other U.S. states have complemented this with a reassertion of the authoritative value of citizenship rights over the illegal immigrant community, coupled with giving heightened powers to state police—one symptom that Arendt correlated with the production of superfluosness in interwar Europe. "Theoretically," she wrote, "in the sphere of international law, it had always been true that sovereignty is nowhere more absolute than in matters of emigration, naturalization, nationality and expulsion" (Arendt 1966, 278).

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This led her to muse on such "weapon[s] of denaturalization" (279), again emphasizing the strong contemporary connection between security and immigration issues.

Illegal immigrants are not stateless in the sense Arendt discussed. They generally belong to an existing state to which they can be deported and, in the case of the 11 million Mexican illegal immigrants the recent U.S. laws have targeted, that state does not prohibit their return. However, the difficulties the Mexican government is experiencing in its ability and willingness to guarantee the observation of their human rights at home is not offering substantial incentives for the deported to remain in Mexico, or for those contemplating emigration because their basic needs are not being met. In the absence of such incentives, deterrents abroad are escalating in response. Recent U.S. legislative reactions to illegal immigration exemplify the ongoing rivalry between citizenship and human rights while also reflecting new forms of superfluosity that, despite their lower-grade character, remain insidious.

It is well known that SB1070, which criminalizes being in the state without applying for and carrying valid documentation, has perturbing implications for human rights by increasing the likelihood of arbitrary arrest and detention and promoting discrimination on the basis of racial appearance. It is in danger of contravening Article 9 of the UDHR concerning arbitrary arrest, detention and exile and also could transgress international law's stipulation that detention is "a measure of last resort"... deemed appropriate only when states can demonstrate that it is 'necessary and proportionate' to the objective being achieved" (Gunkel and González Wahl 2012, 40). It likewise risks not just blurring the distinction between civil and criminal law, but dispensing with it (39). The human rights of the most vulnerable—notably asylum seekers, human trafficking victims and women—are hit the hardest. Such cases also flag the institutional failures that spring from such control measures in the conflict between U.S. state immigration legislation and the prior responses that human rights institutions have established to protect the most susceptible.

SB1070 is unclear on what documents constitute valid proof of lawful presence in pending petitions for asylum. The broad latitude and lack of instructions to enforcement officials could result in the "unjustified detention of individuals who have initiated the process to legalize their status in the U.S... [which] contravenes Article 31 of the 1951 Convention Relating to the Status of Refugees, as modified by the 1967 Protocol" (Mayer et al. 2010, 31). A similar lack of clarity

applies to escaped victims of human trafficking. "By criminalizing the failure to produce this proof, the Act punishes the victims instead of the traffickers" while jeopardizing the effectiveness of the T and U visa programs the federal government offers to protect trafficking victims (31). Women are also less likely to report crimes to police (notably violent crimes and domestic abuse) if this would require them to produce documentation or lead to possible detention, criminal prosecution and deportation. This conflicts with the waiver furnished by the prior federal Immigration and Nationality Act intended to protect victims of domestic violence who enter the country illegally (31).

The conflict here between state interests, federal law provisions and international legal obligations is patent. So too is the conflict between citizenship rights and human rights, especially when prioritizing the former is used (bio)politically as an expression of state sovereignty (Agamben 1998). Such institutional failures don't necessarily imply the existence of a total legal void. Federal and international provisions are there. Illegal immigrants are not the 'forgotten' stateless, for whom there exists no juridical niche whatsoever. But undocumented persons are still 'the unwanted,' 'the outlawed,' and in many respects 'the unclaimed.' In Arizona and Alabama, federal and international laws created for their protection in precisely these cases are trumped by state laws created against them, making it more difficult for human rights institutions to extricate them from their position caught in the middle.

Part of the reason lies in the low level of cooperation between (and within) the North American states in resolving migration issues in the region which obstructs institutional success in "claiming" immigrants or rights on their behalf. The contrast with how European states reinforce regional accountability and conflicting national and regional policies is striking. When France expelled over 1,000 Roma in August 2010, for example, the instant widespread outcry led to the September 9th European Parliament Resolution calling for the immediate suspension of all deportations of the Roma. The European Commission launched infringement proceedings, setting a two-week deadline for the French government to cease violations of the 2004 European Directive on Freedom of Movement and the regional ban on ethnic discrimination in the European Charter of Fundamental Rights. France complied.²

² But only after claiming that the expulsions were based on questions of national security, not ethnicity (see Mayer *et al.* 2010, 36), paralleling similar defenses in the February 7, 2012 Arizona brief to the Supreme Court (see Winograd 2012).

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Recalling the opening quotation from Arendt, in this case at least, the regional government, the publics of member states and human rights organizations cooperated to "claim" the Roma as "fellow" Europeans—if not Arendt's "fellow men"—and their rights in a way that is proving far more difficult for institutions on the other side of the Atlantic.

The absence of a regional political identity and status in North America certainly indicates that it is harder to treat undocumented migrants as "fellow men" and women, and easier to treat them as superfluous nonpersons excluded from human solidarity. The policy of self-deportation, or attrition-through-enforcement, that has occupied recent debates in the run-up to the U.S. presidential election reinforces this. The strategy deliberately aims to render everyday life so wretched for unauthorized immigrants that they choose to go home regardless of how immersed they are in the community, as well as being a deterrent to those contemplating unlawful entry. *Intentionally* creating not just discomfort but misery lies at the base of the new Alabama law, which has already stimulated much fear and fleeing.

Unauthorized parents took their kids out of school, they refuse to seek medical services, fear going to church, they don't drive anywhere, their access to water service has been threatened. Some employers have refused to pay their workers, judges and court interpreters threatened to report suspected unauthorized immigrants. (Waslin 2012)

This policy of making life unbearable for illegal aliens is being packaged as a "kinder, gentler alternative to the harsh, expensive, and unworkable strategy of mass deportation" (Waslin 2012). An Arendtian reading belies this. The undocumented are seen as undeserving not merely of the same kind of political attention citizens enjoy, but of basic social needs and human consideration. In Arizona deportations have skyrocketed under Obama's presidency (Winograd 2012) and the projected increase of now-legal arrests and incarcerations exhibits disturbing parallels with Arendt's claim that "the interment camp...has become the routine solution for the problem of domicile of the 'displaced persons'" (Arendt 1966, 279). Administrative detainees are often jailed in the same spaces as convicted criminals, are similarly attired and restrained, and subject to the same risks of physical harm even though international law stipulates they should be separated for this reason (see Gunkel and González Wahl 2012, 40).

The fact that SB1070 has spurred cognate legislation in other states reinforces the gravity of Arendt's observation that, in the absence of political rights, the effective power of human

rights evaporates at the very moment they are needed the most. In the European case, transnational citizenship status has been employed as one way around this problem: regional political rights can be used as partial anchors for human rights and transnational solidarity if national political rights are withheld. However, the contemporary consensus is that too many differences exist between Europe and North America in the conditions and objectives of integration to contemplate the possibility of a shared regional citizenship in the latter case any time soon. Even if it were possible in the future, Arendt's paradox of rights is still likely to apply (see Norman 2012). If political status disappears, "human" status and solidarity apparently disappear with it. Bills proposed in the 2012 session in Missouri, Mississippi, Tennessee and Virginia suggest this disappearance will continue in North America, despite probable Supreme Court blocks of some of their more extreme tenets.

Conclusion

Several elements of globalization have meant superfluousness is no longer a condition restricted to the stateless, and capitalized on by totalitarian regimes in death camp scenarios. It is one tactic that can be utilized by otherwise democratic regimes in their attempts to reconcile the sovereignty requirements of the modern state system with globalized conditions of migration, economic and political interdependence, conflicting regional, national and local interests, international legal obligations and sanctions, and technological advances. The point to add here is that weak regional cooperation, self-interested unilateral or subnational problem solving, and radically unequal national status provide many conditions for the systematic proliferation of new forms of superfluousness. The forms being generated today are, for the most part, less extreme than those in Arendt's arguments. Yet this does little to detract from their insidious character or potential spread.

The quote from Arendt at the beginning of section one begs the question: what can encourage us to "treat a (hu)man" like a "fellow (hu)man"? This is one of the basic enquiries underpinning the kind of multilateral cooperation and regional integration that penetrates deeper than the mere optimization of national economic interests on the world stage. The present argument provides no positive answers. But it does indicate that a satisfactory response is unlikely to be found in human rights alone, however tenaciously they are fought for. Valuing and institutionalizing a regional respect for their equal application, and a political space to express it, is as

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crucial as providing functional institutional state and nonstate human rights enforcement. Insofar as Arendt's paradox of rights remains unresolved and the reassertion of state sovereignty continues in its present forms, it is doubtful that nonstate actors will be fully successful in stretching far enough across the fissures in the legal safety net that the rivalry between human rights and citizen rights create-fissures toward which so many illegal immigrants are now being deliberately herded.

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