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Article 1

WHY CITIZENSHIP?

Who Is the Citizen's Other? Considering the Heft of Citizenship

Audrey Macklin*

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Who Is the Citizen's Other? Considering the Heft of Citizenship

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The objective of this Article is to integrate legal and social conceptions of citizenship as they materialize at the geographic, political, and social border crossings that accompany transnational mobility. Rather than pose the question "who is the citizen?," I ask "who is the citizen's Other?," partly as a means of surfacing what we mean by citizenship by thinking about who we designate as its alterity. Against the current of most contemporary scholarship, I commend resurrecting the concept of statelessness as an antipodal reference point for citizenship. My intuition is that a version of statelessness still dwells in the substratum of much citizenship discourse, and that rendering a plausible account of it under contemporary conditions may prove helpful in linking conversations about legal and social citizenship. I supplement the conventional understanding of the stateless person (apatride) as one who lacks any citizenship in a state by also designating as stateless one who possesses citizenship but lacks a state.

My analysis draws on Hannah Arendt's famous exegesis on the relationship between the apatride, the refugee, and the condition of rightlessness, as well as contemporary refugee jurisprudence. I demonstrate how subject positions commonly identified as the citizen's Other, including the refugee, the alien and the second-class citizen, are better understood as nested within a larger matrix where the apatride represents the ultimate negation of citizenship. I then introduce the

* Faculty of Law, University of Toronto. audrey.macklin@utoronto.ca. The author warmly thanks Linda Bosniak, Guy Mundlak and the editors of *Theoretical Inquiries in Law* for their insightful and incisive comments. She also expresses her appreciation to participants at the Why Citizenship? workshop and the University of Toronto Law Faculty Workshop, and to Mariana Valverde for an early conversation that set this Article on track.

notion of the "heft" of citizenship as a method of assessing how legal citizenship and social citizenship interact to position an array of subjects between these stylized poles of citizenship and statelessness.

INTRODUCTION

Citizenship as an analytic category is remarkably capacious, as if self-consciously resisting the exclusionary impulses that historical practices of citizenship cannot. Scholarship in this field is hospitable to an array of descriptive, critical and normative projects across a range of academic disciplines. Citizenship describes status, rights, practices and performances. It applies at the level of the state (national citizenship), below the state (urban citizenship), across states (supranational citizenship), between states (transnational citizenship), beyond states (cosmopolitan and global citizenship), and in deterritorialized socio-political spaces (the market, terrorist networks, the internet). It specifies relationships between the state and individual or group identities (multicultural citizen, queer citizen, gendered citizen), denotes various degrees of membership (virtual citizen, full citizen, partial citizen, flexible citizen) and describes idealized subjects of governance (market citizen, neo-liberal citizen), and that is only a partial list. If citizenship were a home appliance, it would be the only one you would ever need.

Linda Bosniak recently appealed to scholars to "deepen the conversation between inward-looking and boundary conscious approaches to citizenship," and this Article takes up the invitation by promoting a bridging of social and legal conceptions of citizenship.¹ By legal citizenship, I refer to the formal status of membership in a state, or nationality as it is understood in international law. The rights common to legal citizenship in virtually all countries include the unconditional right to enter and remain in the territory, access to consular assistance and diplomatic protection, and the franchise. For present purposes, social citizenship encompasses the more voluminous package of rights, responsibilities, entitlements, duties, practices and attachments that define membership in a polity, and situate individuals within that community. Although it is conventional to dismiss legal citizenship as (merely) formal, in contrast to the more substantive character of social citizenship, these designations are potentially misleading. The rights usually

¹ LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 2 (2006).

reserved to legal citizens, especially the unconditional right of entry and residence, remain crucial in an era where lawful access to the territory of a state (rather than citizenship *per se*) is the pre-requisite to the exercise and enjoyment of most rights, entitlements and opportunities available inside the state.²

Indeed, I contend that citizenship scholarship would benefit from a turn toward a functional and interactive understanding of citizenship, rather than a focus on categorizing or labeling the type of citizenship under consideration. In this preliminary contribution, I am interested in uniting legal and social conceptions of citizenship as they materialize in the context of migration, and at the geographic, political, and social border crossings that accompany transnational mobility.

My argument approaches citizenship obliquely. Rather than pose the question "who is the citizen?," I begin by asking, "who is the citizen's Other?," partly as a means of surfacing what we mean by citizenship through thinking about who we designate as its alterity. Against the current of most contemporary scholarship, I commend resurrecting the concept of statelessness as an antipodal reference point for citizenship.³ In so doing, I supplement the conventional understanding of the stateless person as one who lacks citizenship in any state with the emergent figure of one who possesses citizenship but lacks a state.

This revival of statelessness may seem formalistic and downright anachronistic, for as Aihwa Ong asserts:

We have traveled far from the idea of citizenship as a legal status in a nation-state, and as a condition opposed to the condition of statelessness. Binary oppositions between citizenship and statelessness, between national territoriality and its absence, are not useful for thinking about the new configurations of spaces and new combination of factors that affect political mobilizations and claims. Rights and entitlements once associated with citizens are becoming dispersed among populations who can include non-citizens. Furthermore, the difference between having and not having

2 For further discussion of territoriality, see Linda Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants*, 8 THEORETICAL INQUIRIES L. 389 (2007).

3 Linda Kerber also contends that "the ultimate 'other' to citizenship lies in its absence, in lack, in statelessness," although she arrives at this position via a different route and attributes to statelessness a somewhat different meaning. See Linda Kerber, *Toward a History of Statelessness in America*, 57 AM. Q. 727, 731 (2005).

citizenship is becoming blurred as the territorialization of entitlements is increasingly made in spaces beyond the state.⁴

Yet, even as one concedes the detachment of most rights from citizenship status, disavows the state's monopoly over citizenship, and deploys citizenship in ways that transcend the bounds of territoriality, I contend that one ought not to equate the declining importance of citizenship in a particular state with a diminution in the value of membership in a state. Indeed, even proponents of cosmopolitan citizenship retain a place for state-based membership. My intuition is that a version of statelessness (not captured by the figure of the refugee in law) still dwells in the substratum of much citizenship discourse, and that rendering a plausible account of it in under contemporary conditions may prove helpful in linking conversations about legal and social citizenship.

My method involves retrieving statelessness from its tangled relationship with refugeehood. I begin with Hannah Arendt's conflation of the stateless person (*apatride*) into the refugee, whom she depicts as the contemporary embodiment of rightlessness. I describe how, at the very moment Arendt was publishing *The Origins of Totalitarianism*,⁵ international law was assiduously segregating statelessness from refugeehood, retaining only a small convergent zone between them. I next examine how refugee jurisprudence has negotiated this juridical overlap between statelessness and refugee status, with predictably problematic results.

I retain the focus on refugee law for purposes of developing a more expansive conception of statelessness which, while not labeled as such, is accommodated to a certain extent within refugee law as a condition worthy of protection. I refer here to the possession of citizenship in a polity that is effectively non-functional — a failed state. My reanimated version of statelessness thus includes the person without citizenship and the citizen without a state. Articulated in this way, I posit statelessness as the limit concept against which citizenship defines itself.

The second part of the Article demonstrates the analytical utility of statelessness as the citizen's Other. Rather than deploy a stark and totalizing binary of stateless/citizen, I suggest a heuristic derived from my analysis that would posit statelessness as the ultimate negation of citizenship. Statelessness is thus conceived as the void that citizenship fills to a greater or lesser degree, depending on an array of factors discussed in the latter part

4 Aihwa Ong, *(Re)articulations of Citizenship*, 38 PS: POL. SCI. & POL. 697 (2005).

5 HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* (Harcourt Brace & Co. 1978) (1951).

of this Article. In this sense, citizenship might be thought of in terms of a container that is seldom completely empty (statelessness) or completely full.

At this stage, my focus shifts from statelessness as a legal or empirical reality to consider how statelessness as a limit concept can clarify the array of more common and familiar subject positions that travel under the rubric of citizen. I introduce the notion of the "heft of citizenship" to describe the variability in the cumulative content of citizenship experienced by those whose citizenship container is somewhere between empty and full.

My inquiry is primarily sociological rather than normative. However, as others have noted, citizenship retains an intrinsically normative rhetorical component. I also concede that in framing citizenship by reference to the state, I appear to normatively privilege the state as the locus of citizenship. My response is that I regard the state at present as an inescapable repository of citizenship, but not the exclusive one.

I. WHO IS THE CITIZEN'S OTHER?

As Engin Isin observes, the discursive construction of citizen and Other emerges from a mutually constitutive dialogic process.⁶ Some of the more popular Others include the foreigner, the alien, the second-class citizen, the refugee, the stranger and the versatile yet anodyne "non-citizen." Each of these designations reflects certain presuppositions. For instance, the category of "second-class citizen" typically describes some form of inequality between those who are always already formal members of a bounded community (usually a state). Invocations of non-citizenship in this context usually signify a failure to vindicate, fulfill or respect the substantive entitlements of extant citizenship. This framework makes intelligible T.H. Marshall's account of citizenship as the product of rights acquisition. In contrast, Hannah Arendt regards citizenship as the pre-requisite to acquiring rights, as captured in her famous characterization of citizenship as "the right to have rights."⁷ As Linda

6 ENGIN F. ISIN, BEING POLITICAL: GENEALOGIES OF CITIZENSHIP 4 (2002).

7 ARENDT, *supra* note 5, at 296. Margaret Somers reconciles this apparent divergence between Marshall's and Arendt's accounts by developing the claim that "Marshall's priority of partaking in the social heritage and Arendt's ontological postulate of political belonging both make membership *as citizens* the foundational necessity, and right, of human personhood and identity." Margaret Somers, *Citizenship, Statelessness and Market Fundamentalism*, in MIGRATION, CITIZENSHIP, ETHNOS 35, 55 (Y. Michal Bodemann & Göçkce Yurdakul eds., 2006).

Bosniak also remarks, relying on the rhetorical force of citizenship to advance the interests of non-citizens within a polity is a problematic strategy.⁸ Indeed, advocating on behalf of non-citizens by framing their claims as access to (social) citizenship, or complaining that non-citizens are unjustly treated like second-class citizens, seems to invite the retort that they are, after all, *not* citizens.⁹

The designations "alien," "foreigner" or stranger draw the lens back from the interior of the community to the limning function of citizenship. As such, these categories avoid the erasure implied in the foregoing assumption of universal legal citizenship. They direct attention to exclusionary practices that persist in the face of the extension of rights to a subset of legal non-citizens. The vast literature on transnationalism demonstrates the multiple linkages across an array of dimensions (legal, social, kinship, economic, political) that create transnational social spaces within which individual migrants and diasporic groups constitute and perform their identity as members of communities that transcend state borders. Participation in these networks in turn becomes labeled as a form of citizenship unto itself.¹⁰

Attention to the specific potency of state citizenship has waned as the emanation of rights from supranational institutions alerts us to other sources of rights; the simultaneity of belonging along various non-legal dimensions also draws attention to other loci of membership. Nevertheless, an unarticulated (though empirically reasonable) assumption is that migrants

8 Linda Bosniak coins the oxymoronic term "the citizenship of aliens" to express the paradox, whereby aliens in fact do successfully claim rights associated with citizenship in its non-legal sense. BOSNIAK, *supra* note 1, at 2 *passim*. She also remarks that

the focus on the denial of rights to status citizens often renders the critique insensitive to the history of systematic denial of citizenship status itself to members of subordinated groups in this country This account, furthermore, obscures the ways in which a *lack* of the status of citizenship itself, in the form of alienage, sometimes serves as a basis for caste-like treatment and discrimination. *Id.* at 88.

9 In response to this objection, Bosniak replies that in practice, "many of citizenship's core attributes do not depend on formal citizenship status at all but are extended to individuals based on the facts of their personhood and national territorial presence." *Id.* at 3.

10 See generally RAINER BAUBÖCK, *TRANSNATIONAL CITIZENSHIP: MEMBERSHIP AND RIGHTS IN INTERNATIONAL MIGRATION* (1994); THOMAS FAIST, *THE VOLUME AND DYNAMICS OF INTERNATIONAL MIGRATION AND TRANSNATIONAL SOCIAL SPACES* (2000). For a critical survey of the various meanings ascribed to transnational citizenship, see Jonathan Fox, *Unpacking "Transnational Citizenship,"* 8 ANN. REV. POL. SCI. 171 (2005).

residing in one state will possess legal citizenship somewhere else. One may be an alien, a stranger, a denizen or a foreigner in many places, but one is presumptively a citizen *somewhere*.

The foregoing leads me to suggest that the various terms used to describe the citizen's Other are nested within a larger opposition between the one who is not merely an alien in relation to a particular state, but who is alienated from the global regime of territorially sovereign states as such. Here, of course, one harkens back to Hannah Arendt's classic exegesis, in which she identifies stateless people (*apatrides*) as "the most symptomatic group in contemporary politics."¹¹ The statelessness she describes arose through deliberate acts of mass denationalization and expulsion by totalitarian (or proto-totalitarian) regimes in the European inter-war and Nazi era. This temporal and geographic focus enabled Arendt to plausibly remark that "the core of statelessness . . . is identical with the refugee question."¹² Once stripped of her citizenship and territorially displaced, the *apatride*/refugee was exposed as merely human, and effectively rightless:

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.¹³

It bears observing that more than half a century after she delivered her indictment of the vacuity of universal human rights, and well into the evolution of the international human rights regime, Giorgio Agamben's figure of the refugee as "the limit concept that radically calls into question the fundamental categories of the nation state, from the birth-nation to the man-citizen link"¹⁴ owes an explicit debt to Arendt.¹⁵

11 ARENDT, *supra* note 5, at 277.

12 *Id.* at 279.

13 *Id.* at 299.

14 GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* 134 (1998).

15 Although it is tempting to evoke Agamben's bio-political "bare life" or *homo sacer* as the citizen's Other, doing so would distort Agamben's project in the service of what is (admittedly) a more conventional undertaking. Agamben's inquiry is directed at exposing how sovereignty, properly understood, inscribes "bare life" into political existence, and renders incoherent the very exercise of contrasting citizen and Other:

It is even possible that this limit [expressed in the figure of *homo sacer*], on which the politicization and the exception of natural life in the juridical order of

Arendt's conflation of statelessness into refugeehood had some basis in the desultory legal interventions of the inter-war years. However, the post-WWII international legal framework regarded statelessness and refugeehood as distinct categories for normative and institutional purposes. Not only is the *apatride* not the epitome of the refugee in law, statelessness is neither a necessary nor a sufficient condition for refugee status. The international legal order views statelessness primarily as an administrative anomaly in the global filing system that assigns every human being to at least one state. While the *apatride*'s "condition of infinite danger"¹⁶ is generally acknowledged as a sociological, political and humanitarian reality by international institutions, the existential rightlessness of the *apatride* remains an awkward concession for the international human rights regime to recognize in law. After all, the ideal of universal human rights predicated on personhood rather than citizenship remains an article of faith, even if no institution outside the state is actually able or willing to vindicate or enforce these rights.¹⁷ States may undertake obligations to reduce statelessness¹⁸ and to not create it,¹⁹ but the *apatride* in law — unlike the refugee — is not regarded as intrinsically abject.

A. Stateless Refugees and the Land of No Return

Historical and institutional contingencies resulted in the conceptual and institutional divergence between stateless persons and refugees in international law.²⁰ International law defines a stateless person as one "who

the state depends . . . has now — in the new biopolitical horizon of states with national sovereignty, moved inside every human life and every citizen. Bare life is no longer confined to a particular place or a definite category.

Id. at 140. Put in other terms, the other of Agamben's *homo sacer* is perhaps not the citizen, but the sovereign. *Id.* at 111.

16 MICHAEL WALZER, SPHERES OF JUSTICE 32-63 (1983).

17 The main exception is the European Court of Human Rights, a supranational tribunal that actually renders enforceable decisions.

18 Convention Relating to the Status of Stateless Persons, June 6, 1960, 360 U.N.T.S. 117.

19 Convention on the Reduction of Statelessness, art. 1, Aug. 30, 1961, 989 U.N.T.S. 175; European Convention on Nationality, art. 6, Nov. 6, 1997, Europ. T.S. No. 166; American Convention on Human Rights, art. 20, Nov. 22, 1969, 1144 U.N.T.S. 123; Convention on the Rights of the Child, art. 7, Nov. 20, 1989, 1577 U.N.T.S. 53. Notably, the treaties dealing explicitly with nationality and statelessness have attracted few signatories.

20 See Carol Batchelor, *Stateless Persons: Some Gaps in International Protection*, 7 INT'L J. REFUGEE L. 232 (1995).

is not considered as a national by any State under the operation of its law."²¹ It takes no account of how the condition was produced, nor does it attend to the quality of citizenship entailed. In this sense, statelessness expresses a purely formal lack of status. The main concession to the relation between the absence of formal status of citizenship and the functional attributes of citizenship is the recognition of *de facto* statelessness in addition to *de jure* statelessness, which covers situations where a state refuses to acknowledge the citizenship of a national abroad for purposes of diplomatic protection, consular assistance or repatriation.²² Notably, *de facto* statelessness speaks only to an external dimension of nationality, where the relationship between the state and its citizen implicate a third state.

In contrast, the refugee regime confers protection where states of nationality have failed to fulfill certain functional aspects of the citizenship relationship within the state. Central to the legitimacy of this evaluative exercise is the principle that the state owes a duty of protection to its nationals.²³ This duty extends far beyond the external provision of diplomatic or consular protection against third states. It addresses the nature of the relationship between state and citizen. Debates about the content of the duty owed by states to citizens are rehearsed in refugee jurisprudence through the interpretation of persecution and the criteria for state protection, but few dispute that persecution includes serious violations of fundamental civil and political rights.

Breach of this duty of protection entitles the national to seek refuge elsewhere, while the right against forcible return (*non-refoulement*) guaranteed by the 1951 U.N. Convention Relating to the Status of Refugees²⁴ supplies the "surrogate protection" replacing the genuine protection that only the state of citizenship owes. As the Supreme Court of Canada states in the *Ward* case,

International refugee law was formulated to serve as a back-up to the protection one expects from the state of which an individual is a

21 Convention Relating to the Status of Stateless Persons, *supra* note 17, art. 1.

22 See Niraj Nathwani, *The Purpose of Asylum*, 12 INT'L J. REFUGEE L. 354, 357-64 (2000); Carol Batchelor, *Statelessness and the Problem of Resolving Nationality Status*, 10 INT'L J. REFUGEE L. 156, 171-74 (1998).

23 This exchange of protection for a monopoly on force is a classic rationale for entry into the social contract and the legitimacy of sovereign rule.

24 Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 2545; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 8791.

national. It was meant to come into play only in situations when that protection is unavailable, and then only in certain situations.²⁵

The juridical incongruity between refugee status and statelessness becomes apparent within this legal framework, insofar as states owe no duty of protection to a non-national, and stateless people are non-nationals everywhere. In order to avoid the absurdity that would render stateless people ineligible for refugee status, the drafters of the Refugee Convention interpolated stateless persons into the refugee definition (article 1) through a modified test:

- "convention refugee" means any person who
- (a) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,
 - (i) is outside the country of the person's nationality and is unable or by reason of that fear, is unwilling to avail himself [sic] of the protection of that country, or
 - (ii) not having a country of nationality, is outside the country of the person's former habitual residence and is unable or, by reason of that fear, is unwilling to return to that country

Since the stateless person has no country of nationality, the refugee definition introduces "country of . . . former habitual residence" as a proxy.²⁶ The stateless asylum seeker cannot avail herself of the protection of her country of former habitual residence because, as a non-citizen, she is not entitled to it even in the default case where no other state owes her protection. Therefore, she need only demonstrate her inability or unwillingness to *return* to the country of former habitual residence.

The well-documented extension of many elements of social citizenship to non-citizens legally residing within Western states might support a hypothesis that many stateless persons enjoy a significant measure of security in countries of habitual residence, even absent a formal legal

25 Ward v. Canada, [1993] 2 S.C.R. 689, para. 25. Recognition of refugee status neither blames nor penalizes states of origin, though some states certainly take umbrage when their nationals are recognized as refugees by other countries. After all, the process of determining the existence of a well-founded fear of persecution implicitly opens up to normative scrutiny the practices of other states.

26 To the extent that most stateless people identify themselves as possessing a national identity in the non-legal sense, one might suggest that the stateless person is, perpetually, outside the country of her nationality.

duty of protection. This would buttress the rationale behind restricting refugee protection to that subset of stateless persons who are genuinely at risk of serious human rights violations. As it happens, however, the progressive expansion of rights to non-citizens commonly associated with the phenomenon of "post-national citizenship" has limited purchase in most *apatrides'* countries of habitual residence.

More important, however, is the refugee definition's implication that admission to a country is something other than an instantiation of that country's duty of protection. What happens if the state of former habitual residence refuses to re-admit a stateless person? The answer to this question exposes the incoherence produced by the suppression of statelessness as abjection. Cases that raise this issue characteristically concern stateless Palestinians claiming refugee status against an Arab state of the Middle-East.

In the usual case, the young male Palestinian refugee claimant was either born in the country of former habitual residence or moved there at a young age. The claimant possessed some form of residency permit, which he had either been unable to renew for reasons beyond his control, or which he had allowed to expire. In either case, the claimant was not legally entitled to re-enter and resume living in his country of former habitual residence. Despite the inability to return, these refugee claims usually fail. The following excerpt from the first level decision in *Altawil* conveys the sincerity of the Immigration and Refugee Board's commitment to the formal cleavage separating stateless person from the refugee:

It is unfortunate that the claimant, a stateless Palestinian, has nowhere to go and live a normal, productive life. He is in front of . . . the panel, seeking protection as a Convention Refugee, but he does not need protection. We have found that he does not have a well founded fear of persecution. He needs a place to live. He has no place to go legally, not even Qatar, his former country of former habitual residence. He is a prime example of a decent, well educated, stateless person, deserving of a country to live in, but this does not make him a Convention refugee.²⁷

The right to enter and remain is a virtual *sine qua non* of legal citizenship and for that very reason, admitting that denial of the right constitutes persecution would collapse statelessness into refugeehood. In *Thabet*, the Immigration and Refugee Board concluded that the refusal by Kuwait to readmit the claimant followed simply from his lack of a valid residency

²⁷ Quoted in *Altawil v. Canada*, [1996] 114 F.T.R. 241, para. 6 (Fed. Ct.).

permit and did not constitute an act of persecution against him as a Palestinian, noting that "since the Liberation of Kuwait and the normalization process, Palestinians . . . have received extensions of their residence permits and are not being deported as they were at the conclusion of the [1991] Gulf War."²⁸ The irony, of course, is that the tribunal's own findings evince the terminal precariousness of a stateless person without security of residence: His entitlement to enter and remain is a privilege and not a right, potentially revocable without notice or justification.

Higher courts have upheld the finding that refusal by a country of former habitual residence to permit the return of a stateless person simply results from the general application of a general law restricting the entry of non-citizens without valid residency permits, and so does not constitute persecution. For example, the Federal Court of Canada confirmed that although "a denial of a right to return [to a former habitual residence] may, in itself, constitute an act of persecution by a state . . . there must be something in the real circumstances which suggests persecutorial intent or conduct."²⁹

The end point of these jurisprudential maneuvers is that a stateless person is not necessarily a refugee from a country of habitual residence that refuses to re-admit her.³⁰ In so finding, courts effectively assimilate stateless persons into the category of alien vis-à-vis the country of former habitual residence. I mean by this that they efface the disproportionate impact of a refusal to permit return to a stateless resident by neglecting the fact that an alien, in principle, has somewhere else to go (the state of citizenship) while the stateless person does not. Another way of making the same point is to observe that the refugee definition protects persons from persecution on grounds of nationality; recognizing that a denial of re-entry to one devoid of nationality *is* persecutory remains outside the logic of the definition, despite (or perhaps because of) the fact that the refugee regime constitutes the lone international derogation from the conventional equation of territorial sovereignty with border control. The sovereign power of states to exclude non-citizens is thus

28 *Thabet v. Canada*, [1998] 160 D.L.R. 666, para. 32 (Fed. Ct. App.).

29 *Altawil*, [1996] 114 F.T.R. 241, para. 11. This reasoning was followed in *Thabet*.

30 As a practical matter, it may be impossible to deport the stateless person for the very reason that no country will accept her; furthermore, States Party to the 1954 Convention Relating to the Status of Stateless Persons, *supra* note 17, may provide relief to a stateless person as well. My present point, however, is that these remedies are discretionary and do not acknowledge the persecutory dimension of a refusal to readmit a stateless person.

depoliticized and reinscribed at the precise moment of international law's intervention.³¹

Where does this leave the stateless person who does not qualify as a refugee? The question is both literal and figurative. In Australia, the answer in law is indefinite detention. In *Al-Kateb v. Godwin*,³² a majority of the High Court of Australia affirmed mandatory, indefinite detention of a stateless Palestinian whose refugee claim was rejected and who was not returnable to Gaza or to Kuwait (his place of birth and former country of habitual residence respectively).³³ The answer in other jurisdictions is more speculative, to the extent that higher courts have only addressed the situation of a person who possesses citizenship status but for other reasons cannot be returned to the country of nationality. In *Zadvydas v. Davis*,³⁴ the United States Supreme Court came to the opposite conclusion from the High Court of Australia regarding non-removable non-citizens. The U.S. Supreme Court read into the relevant statute an implicit six-month limitation on detention pending removal, observing that indefinite detention would raise serious constitutional doubts. The UK decision in *A v. Secretary of State for the Home Department*³⁵ also ruled against indefinite detention where deportation of persons deemed threats to national security was impossible because of a substantial risk of torture by the state of nationality.³⁶ Although the litigants in the US and UK cases were not de jure stateless, they shared with *apatrides* the fact that there was no country that owed them a duty of protection and to which they could return.

The foregoing analysis generates the preliminary conclusion that the international legal regime, contra Arendt, remains averse to seeing statelessness as an existential condition of rightlessness. The refugee,

31 It is the singular irony of the Universal Declaration of Human Rights' solemn avowal that "everyone has the right to a nationality" stipulates no addressee. Universal Declaration of Human Rights, art. 15(1), G.A. Res. 217A (III), at 71, U.N. Doc A/810 (Dec. 12, 1948).

32 (2004) 208 A.L.R. 124 (Austl.).

33 A few months after the decision, Premier John Howard announced that non-deportable aliens would be released from detention on "removal pending bridging visas." Juliet Curtin, *Never Say Never*, 27 SYDNEY L. REV. 355, 370 (2005).

34 533 U.S. 678 (2001).

35 [2004] UKHL 56, [2005] 2 A.C. 68 (appeal taken from Eng.).

36 See also *Charkaoui v. Canada*, [2007] S.C.C. 9, where the Supreme Court of Canada upheld the constitutionality of "extended periods of detention pending deportation," but acknowledged that particular detentions may, at a certain point, constitute "cruel and unusual treatment" or be "inconsistent with the principles of fundamental justice," thereby infringing the Charter of Rights and Freedoms. *Id.* para 123.

defined as the one outside her country because of a well-founded fear of persecution, is the closest legal analog to the rightless person. In order to sustain this bifurcation between refugee and *apatride*, entry onto the territory of a country of former habitual residence cannot be characterized as a fundamental human right, because the effect of doing so would be to largely assimilate statelessness into refugeehood. The result is to consign stateless migrants into a legal abyss which, I suggest, evinces the persistent disruptiveness of statelessness today, even in an era when the discourse of universal human rights exerts greater allure than ever before.

Having argued for the continuing conceptual salience of statelessness (despite its juridical suppression in refugee law), I now turn to amending the conventional understanding of statelessness with a contemporary supplement, again drawing on refugee jurisprudence.

B. Citizen Without a State

For Arendt, the archetypal refugee-producing state is one which is capable of marshalling, manifesting and executing the sovereign power required to organize and execute mass denationalization. While acknowledging that the eruption of statelessness in inter-war Europe followed temporally from civil conflict, Arendt attributed mass denationalization to "a state structure which, if it was not yet fully totalitarian, at least would not tolerate any opposition and would rather lose its citizens than harbour people with different views."³⁷ This model of the state as the exclusive and direct source of persecution, and as a unitary formation capable of exercising total(itarian) control not only fit Nazi Germany, it proved serviceable for the main intended beneficiaries of the Refugee Convention, namely dissidents from the Soviet bloc.

By the late twentieth century, this model of mass denationalization was glaringly underinclusive of the major causes of statelessness or of refugee flows.³⁸ The vision of the totalitarian state that animated Arendt, possessing both capacity and will to extend or deny citizenship and its attendant rights,

³⁷ ARENDT, *supra* note 5, at 278.

³⁸ The most recent production of statelessness that resembles Arendt's model transpired in Latvia and Estonia in the 1990s. The re-emergence of the Baltic states upon the dissolution of the Soviet Union stranded hundreds of thousands of ethnic Russians who were survivors and descendents of Stalin's massive population transfers in the 1940s. The initial citizenship laws drafted by the successor/restored states of Latvia and Estonia automatically extended citizenship to pre-1940 residents and their descendents. This effectively excluded ethnic Russians from citizenship, leaving them stateless. Russia offered to grant Russian citizenship to these ethnic Russians, but this would not secure their continued presence in Latvia or Estonia.

overdetermines the contemporary sources and operation of statelessness and forced migration, at least when situated against more complex and dispersed forms of power within and beyond territorial political units.

Today's refugees are more likely to flee states of the South characterized by chronic political, social and economic instability. These dysfunctions in turn erupt or manifest in civil disorder, armed conflict, insurgency, and high levels of violence emanating from the state or from non-state actors in circumstances where the state is complicit, indifferent, or simply unable to exercise effective control. The causes of these various crises are complex and contested, and pose several challenges to the scope of the refugee definition. These include the role of non-state actors as persecutors, the ability of the state (as opposed to its willingness) to protect, and the availability of refugee protection in civil war situations where an individual may be one of a very sizable group who faces a risk of persecution for a Convention reason.³⁹

These issues emerged most starkly in cases of asylum seekers fleeing so-called "failed states." The term has been applied variously to Somalia, Sierra Leone, Cambodia, Sudan, Liberia and Afghanistan, among others. A salient common feature is the state's "fundamental loss of institutional capability."⁴⁰

The option of naturalization presented by Latvia and Estonia to these Russian speakers has been continually criticized for imposing language requirements so onerous that they are virtually unattainable for many ethnic Russians, given that Russian was the public language in the Baltic states throughout the Soviet era. Perhaps the most important difference between this phenomenon and that described by Arendt concerns the role of supranational political and economic institutions in leveraging human rights. Since the Baltic states aspire to membership in the European Union (and the anticipated economic benefits accruing therefrom), the Council of Europe and the Organization for Security and Co-Operation in Europe (OSCE) were able to apply pressure to Latvia and Estonia to ease the requirements for naturalization. Nevertheless, over a half-million ethnic Russians in Latvia and Estonia remain stateless today. In May 2006, the Council of Europe opened for the signature the Convention on the Avoidance of Statelessness in Relation to State Succession, May 19, 2006, Council Europ. T.S. No. 200, available at <http://conventions.coe.int/Treaty/EN/Treaties/Word/200.doc>. The treaty supplements the European Convention on Nationality by imposing an obligation on successor states to grant citizenship to habitual residents of the territory at the time of succession if such persons would otherwise be rendered stateless. *Id.* art. 5. Palestinians, the largest stateless population in the world, never possessed a Palestinian citizenship to lose.

39 The first two issues also emerged as particularly salient in extending refugee protection to women fleeing gender-based persecution, which is often committed in the private sphere by non-state actors.

40 WORLD BANK, 1997 WORLD DEVELOPMENT REPORT 158 (1997), quoted in Tara Magner, Note, *Does a Failed State Country of Origin Result in a Failure of International Protection? A Review of Policies Toward Asylum-Seekers in Leading*

The central government may have collapsed, or may simply lack legitimacy in the eyes of most of the populace. Whatever the causes of the fragmentation and dissolution of institutions and practices of governance, there is effectively no state capable of protecting citizens in the most fundamental sense of providing security or basic services. The abuses of fundamental rights associated with persecution may emanate from private actors, from rebel or insurgency groups battling for control, from actors who claim but are not recognized as exercising governmental authority, or from actors connected to an invading or occupying state. Citizenship truly is purely formal for nationals of these "failed states," for it delivers virtually none of the protection associated with membership in a functioning polity.⁴¹

Up until recently, receiving states varied considerably in their willingness to interpret the refugee definition in a manner that would encompass asylum seekers fleeing the chaos, conflict and violence of failed states, especially Afghanistan and Somalia. Several jurisprudential obstacles stood between these forced migrants and refugee status. Bringing these forced migrants under the aegis of refugee protection required receiving states to recognize non-state actors as agents of persecution; to accept that the absence of a state capable of providing protection denotes a failure of protection; and to not disqualify victims of civil war on the basis that their fear of persecution was indistinguishable from that of other civilians. Liberal interpretations adopted these three propositions.⁴² Restrictive approaches rejected at least one.⁴³ The recent European Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons

Asylum Nations, 15 GEO. IMMIGR. L.J. 703 (2001). The Failed State Index, produced annually by Carnegie Endowment for Peace and Foreign Policy magazine, defines a failing state as "one in which the government does not have effective control of its territory, is not perceived as legitimate by a significant portion of its population, does not provide domestic security or basic public services to its citizens, and lacks a monopoly on the use of force." Foreign Policy, *The Failed States Index* (May-June 2006), http://www.foreignpolicy.com/story/cms.php?story_id=3420.

41 In 1998, outgoing Colombian President Ernesto Samper made a startling admission of state failure when he called on Canada and European states to offer refuge to tens of thousands of Colombian civilians threatened with political assassination because the Colombian state was unable to protect them. Paul Knox, *Colombian Will Ask Canada to Help Activists; Refuge Sought for Rights Workers*, GLOBE & MAIL, May 27, 1998, at A1.

42 See, e.g., Immigration and Refugee Board (Canada), *Guidelines on Civilian Non-Combatants Fearing Persecution in Civil War Situations* (Mar. 7, 1996), available at www.irb-cisr.gc.ca/en/references/policy/guidelines/civil_e.htm.

43 For a description and discussion of the relatively narrow French and German interpretations, see Catherine Phuong, *Persecution by Non-State Agents:*

as Refugees adopts the more generous approach on the first two issues, but remains silent on the third.⁴⁴ The European Council for Refugees and Exiles (ECRE) unsuccessfully advocated that explicit account be taken of situations of failed states where "central government institutions have ceased or virtually ceased to exist,"⁴⁵ though it is at least arguable that the final version of the Directive does not preclude such an approach.

Without painting a more flattering portrait of refugee jurisprudence than it merits, I would suggest that the interpretation of the refugee definition has moved toward acknowledging and accommodating a phenomenon that did not figure in Arendt's depiction of *apatrides*, refugees and rightlessness, namely the collapse of organized political community as such. Although Arendt clearly devoted considerable attention to imperialism elsewhere, it was the experience of totalitarianism within the European geographical space and not the phenomena of (de)-colonization that informed her approach to statelessness. The following passage reveals her presupposition of a globally organized, uninterrupted, system of sovereign, autonomous, functional states:

The trouble is that this calamity [of rightlessness] arose not from any lack of civilization, backwardness, or mere tyranny, but, on the contrary, that it could not be repaired, because there was no longer any

Comparative Judicial Interpretations of the 1951 Refugee Convention, 4 EUR. J. MIGRATION & L. 521 (2002).

44 Council Directive 2004/83, Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or Persons Who Otherwise Need International Protection and the Content of the Protection is Granted, 2004 O.J. (L 304) 12 (EC), *available at* http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_304/l_30420040930en00120023.pdf.

Article 6 of the Asylum Qualification Directives states that:

Actors of persecution or serious harm include:

- (a) the State
- (b) parties or organisations controlling the State or a substantial part of the territory of the State
- (c) non-State actors, if it can be demonstrated that the actors mentioned in (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm

The European Commission's original draft of the Directive also provided that "it is immaterial if the applicant comes from a country in which many or all persons face the risk of generalized oppression," but this proviso was dropped from the final version. *See* ECRE, ECRE Information Note on the Council Directive 2004/83/EC, at 9 (Apr. 29, 2004), *available at* <http://www.ecre.org/statements/qualpro/pdf>.

45 *Id.* at 7.

"uncivilized" spot on earth, because whether we like it or not we have really started to live in One World. Only with a completely organized humanity could the loss of home and political status become identical with expulsion from humanity altogether.⁴⁶

Where refugee law validates an asylum claim based on a state's inability to protect a person from persecution at the hands of non-state actors, it recognizes the failure of the state to fulfill its duty of protection toward a particular individual. To the extent that nationals of failed states qualify for asylum, refugee law acknowledges that a state no longer capable of providing protection per se has ceased to function as a state. At the limit, its nationals are indeed de facto stateless: they are citizens without a state.

But here again, even this form of statelessness may not entitle one to protection. In *Jama v. Immigration and Customs Enforcement*,⁴⁷ the refugee status of a Somali in the United States was terminated because of a criminal conviction involving moral turpitude. It was accepted by the U.S. Supreme Court that the government could not obtain advance consent of the Somali government to Jama's return because Somalia lacked a government capable of furnishing consent. Both the majority judgment of Justice Scalia and the dissenting opinion of Justice Souter consist of exquisitely intricate maneuvers of statutory interpretation devoted to the issue of whether the legislative provision setting out the procedure for selecting a destination for removal of an alien required the consent of the receiving country. The majority concluded that the statute did not preclude deportation of Jama to Somalia, and that the absence of a functioning government did not render removal impracticable. According to Justice Scalia, "Removing an alien to Somalia apparently involves no more than putting the alien on one of the regularly scheduled flights from Dubai or Nairobi, and has been accomplished a number of times since petitioner's removal proceedings began." The argument that Somalia did not qualify as a "country" under the statute owing to the "lack of any functioning central government" is dismissed in a footnote on the basis that it was not properly raised before the lower appellate court.⁴⁸ This exercise of juridical formalism performed at the very apex of the United States' densely saturated legal order assumes an almost baroque quality when juxtaposed against the target of its projection — a territorially-demarcated legal vacuum.

Within four months of the decision in *Jama*, the appellant was transported to Nairobi by U.S. officials and then removed to an autonomous region in

⁴⁶ ARENDT, *supra* note 5, at 297.

⁴⁷ 543 U.S. 335 (2005).

⁴⁸ *Id.* at 352 n.13.

Somalia (Puntland) by a private security firm hired by the U.S. government precisely because the United States did not have diplomatic ties with the non-existent government of Somalia. The Puntland "officials" summarily punted Jama. The private security firm then escorted Jama back to Nairobi and returned him to immigration detention in the United States. Eventually, the U.S. Court of Appeal (Eighth Circuit) upheld a District Court order releasing Jama from detention pending removal.⁴⁹

Although refugee law proceeds from the instance of displacement, as does Arendt's model of statelessness (which is partly why she can conflate stateless persons and refugees), statelessness is not necessarily accompanied by transnational displacement. In a critique that interrogates "the popular staging of the refugee" as the "ultimate Other," Patricia Tuitt argues compellingly that at present, internally displaced people (IDPs) are more symptomatic of contemporary rightlessness than refugees: They remain trapped within a nominal state that renounces them and virtually abandoned by a global regime that respects the sovereignty of states too much to intervene effectively. Unlike refugees, they are not cognizable as legal subjects bearing rights specific to their condition. Thus, IDPs are in some sense even more abject than those who manage to traverse international borders and assert the identity and rights of a refugee. Whatever assistance they receive consists of humanitarian relief and comes from inter-governmental nor non-governmental organizations, whose presence is rendered precarious by hostile local authorities.⁵⁰ As the United Nations High Commissioner for Refugees (UNHCR) recently reported,

Often persecuted or under attack by their own governments, [internally displaced persons] are frequently in a more desperate situation than refugees. . . . Sometimes, mountains and rivers impede flight across

49 *Jama v. Immigration & Customs Enforcement*, Civil No. 01-1172 (Dist. Ct. Minn. motion for release granted May 20, 2005); *U.S. Immigration Spent 200K on Keyse Jama Deportation* (Minn. Pub. Radio radio broadcast June 23, 2006), available at <http://minnesota.publicradio.org/display/web/2006/06/23/jamaflight/>. For a fascinating ethnographic study of Somalis deported from Canada and the U.S. to Somaliland, see Nathalie Peutz, *Embarking on an Anthropology of Removal*, 47 *CURRENT ANTHROPOLOGY* 217 (2006).

50 Patricia Tuitt, *The Territorialization of Violence*, in *CRITICAL BEINGS: LAW, NATION AND THE GLOBAL SUBJECT* 37 (Peter Fitzpatrick & Patricia Tuitt eds., 2004). Tuitt makes the important and, in my view, accurate observation that even for those scholars, such as Giorgio Agamben, who claim adherence to a conception of the refugee that "exceeds its legal construction, the legal refugee haunts much work of this kind." *Id.* at 39.

borders, or people may flee to other parts of their own country to remain in relatively familiar surroundings. Even when they do manage to cross national frontiers, however, the displaced rarely find a welcome. Hostility to refugees and asylum seekers has grown since the end of the Cold War, with many countries seeing it as too costly or destabilizing to admit them. In several recent emergencies, states have closed their borders to refugees or adopted restrictive admission policies. *As a result, there is an inverse relationship between the rising number of internally displaced persons and the declining figure for refugees.*⁵¹

The descriptive category of "internally displaced persons" emerged partly out of a desire to make visible (through naming) those who were similar to refugees but who had not managed to cross an international frontier. In a particularly cruel and ironic twist, the House of Lords recently interpreted the refugee definition in a manner that would permit denial of refugee status to asylum seekers on the basis that they could survive in their countries of origin as IDPs.⁵² British asylum authorities subsequently determined on re-hearing that Darfuriian Sudanese appellants who fled persecution by militia sponsored by the Khartoum government, had an "internal protection alternative": they could return to live in IDP camps in and around Khartoum.⁵³ It was as if the very exercise of naming "internal displacement" as a phenomenon and locating it in a geographical space (IDP camps) transmuted the internally displaced persons from a subject position so abject that it has no legal existence, into a fixed status of visibility and viability. The House of Lords thus validated through its jurisprudence a fear expressed by the United Nations High Commission for Refugees that "countries of asylum may renounce their protection obligations toward refugees and asylum seekers, on the basis that the UN response in the country of origin provides them with an 'internal flight alternative.'⁵⁴

A correlation between internal displacement and failed states is suggested by the fact that in addition to producing the world's largest number of IDPs

51 UNHCR, STATE OF THE WORLD'S REFUGEES 153 (2006) (emphasis added).

52 Januzi v. Sec'y of State for the Home Dep't [2006] UKHL 5, [2006] 2 A.C. 426 (appeal taken from Eng.).

53 HGMO (Relocation to Khartoum), Sudan CG [2006] UKAIT 00062 (Asylum & Immigr. Trib.).

54 Erika Feller, *UNHCR's Role in IDP Protection: Opportunities and Challenges*, FORCED MIGRATION REV. (SPECIAL ISSUE) 12 (2006).

(six million),⁵⁵ Sudan also topped the 2006 Carnegie Fund for Peace/Foreign Policy Magazine Failed State Index.⁵⁶ If the *apatride* embodies the person without citizenship, then the IDP embodies the citizen without a state. Both lack a state capable of fulfilling a duty of protection, not even the surrogate protection owed a refugee under the U.N. Refugee Convention.

Exploring the interplay between the categories of refugee and "internally displaced person," and the duty of state protection supports a conception of statelessness that includes nominal citizenship in a failed state. One benefit of broadening the conception of statelessness in this way is that it addresses the denial of state protection in forms associated with both legal citizenship (access to territory, diplomatic protection), and social citizenship (fundamental rights, entitlements, equality, human security, etc.). The obverse is that the corresponding conception of citizenship against which statelessness is positioned encompasses the functional elements of legal and social citizenship.

This foray into dimensions of refugee law has been in the service of reclaiming and reconceiving statelessness as a category that retains resonance as the Other of the citizen. While I commend a concept of statelessness that encompasses loss of state as well as loss of status, I caution against casually labeling as "stateless" the array of subject positions occupied by nationals or migrants who are marginalized, oppressed, or otherwise denied full enjoyment of membership rights in a given political community. Thus, I

55 UNHCR, *supra* note 48, at 154.

56 The Fund for Peace, Failed State Index 2006, <http://www.fundforpeace.org/programs/fsi/fsindex2006.php> (last visited Sept. 1, 2006). The British Home Office also announced its determination to return failed asylum seekers to Iraq, even though the Foreign Office advises against travel to Iraq owing to dangerous conditions, and the Ministry of Defence must charter a special flight to effect the removal. Britain has rejected more than 90% of Iraqi asylum seekers since 2000, and Home Secretary, John Reid, warned that "To ensure the viability of this operation and in line with enforcement operational instructions, the Home Office may decide not to defer removal in the face of a last-minute threat or application to seek judicial review." *Home Office Adamant on Iraq Removals*, GUARDIAN WKLY., Sept. 8-14, 2006, at 13. Iraq ranked fourth on the 2006 Failed State Index. Each of the five countries with the highest number of IDPs also ranked among those designated as failed states. According to Internal Displacement, Global Overview of Trends and Developments in 2005, at 6 (Mar. 2006), [http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/895B48136F55F562C12571380046BDB1/\\$file/Global%20Overview05%20low.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/895B48136F55F562C12571380046BDB1/$file/Global%20Overview05%20low.pdf), the top IDP populations were located in Sudan (5.4 million IDPs), Colombia (up to 3.7 million), Uganda (2 million), DRC (1.7 million) and Iraq (1.3 million). These countries ranked 1, 27, 21, 2 and 4 in the Failed State Index.

concur with much of Linda Kerber's fine historicized account of citizenship and statelessness in the U.S. context, and I arrive at the same conclusion that "the stateless are the citizen's Other."⁵⁷ My project is not, however, to build a better binary for purposes of allocating everyone to one or the other side of a dimensionless border dividing citizenship and statelessness. Hence, I depart from Kerber's inclination to gather refugees, slaves, trafficked persons, detainees at Guantánamo Bay and non-status migrants under the rubric of statelessness. I sympathize with the ethical impulse animating this rhetorical move, but worry that it poses two risks: first, it homogenizes an array of subject positions (illuminating by virtue of their diversity), through the brute force of dichotomizing them into citizen or stateless. Secondly, an overly expansive invocation of statelessness for descriptive purposes almost inevitably dulls the critical and analytical edge that a more precise reconfiguration of statelessness can offer in relation to thinking about citizenship.

II. BETWEEN THE CITIZEN AND THE STATELESS: MEASURING THE HEFT OF CITIZENSHIP

It remains to demonstrate that redeeming statelessness as the antipodal reference point for citizenship has any analytic utility. Rather than conceive of citizenship and statelessness as an "either/or" proposition, I posit them as idealized representations of presence and absence, between which lay a range of subject positions that most people actually occupy. I further propose that the substance of the citizenship experienced by individuals is produced by the synthesis of elements comprising legal and social citizenship in all countries where the individual has formed significant attachments. This means that while citizenship retains its connection to a state, it represents a composite of the elements of membership within and between all states to which the individual is connected. I measure this compound citizenship in terms of the "heft" of citizenship.

The preceding analysis implicitly critiqued the legal category of refugee as too limited and limiting to perform the role of the citizen's Other. I also contend that other popular "Others" of the citizen, such as the alien, the foreigner, the second-class citizen and the stranger, are nested within the broader idea of statelessness. Consider the alien. The condition of alienage remains defined by reference to the state of territorial presence. That is to say, one is an alien with respect to, and from the perspective of, a

⁵⁷ Kerber, *supra* note 3.

particular political community. One may pass through legal gradations of alienage en route to citizenship (and one may remain socially, culturally or economically alienated despite acquiring legal citizenship), but these statuses are constituted and transpire within the self-contained unit of the territorial nation-state. My concern with the citizen vs. alien binary is not that it is incorrect, but only that it is incomplete. It tends to totalize the relationship of the individual to a single and particularized territorial state, thereby misapprehending a fragment for the whole.

The vast literature on transnational citizenship demonstrates the multiple linkages across an array of dimensions (legal, social, kinship, economic, political) that exist among migrants and diasporic communities. What it also does is remind us of how the significance of the status (legal and otherwise) of an individual to a given state is conditioned by her relationships to other individuals, communities and to states.

The importance of situating an individual within a matrix of all states to which she is connected lies in bringing to the surface the taken-for-granted but crucial point that one may be an alien in relation to most states, but almost everyone is simultaneously a citizen of at least one state. The fact of being a citizen somewhere else matters for the alien, as does the content of that citizenship. Alienage certainly does not feel the same to all aliens, and for reasons that are not wholly determined by the formal conditions of residence imposed by the receiving state. The experience of alienage is profoundly shaped by the alternatives open to the alien.

The limiting case that frames the experience and impact of alienage is not the one who does not wish to return to her country of citizenship, however, but the one who cannot because she has no country of citizenship to which she can return, namely the stateless person (within the double signification described above). The impact of alienage would be unmitigated by her citizenship elsewhere. No matter how bad life becomes for the stateless person, there is no better (or less bad) place to go. I acknowledge that statelessness among migrants is in decline compared to other precarious non-citizen positions, but my point here is not empirical. My argument about statelessness is not primarily directed at exploring statelessness for its own sake. Rather, I offer an account of how statelessness operates as the conceptual reference point for citizenship's Other precisely in order to set parameters capable of bringing the status, relationships, and practices of these intermediate subjects of citizenship within a wider-angle lens than the citizen-alien nexus can capture.⁵⁸

I remarked earlier that a plausible heuristic for locating subjects in this

⁵⁸ A reasonable objection to this approach is that the focus on non-citizens excludes

matrix is to imagine citizenship as a substance with heft. What are the ingredients that combine to constitute the heft? I propose that elements associated with legal citizenship as well as social citizenship contribute to the mix. I resist attributing a priori weight to individual factors solely on the basis of whether they are associated with legal or social citizenship. The unconditional right to enter and reside, the franchise, diplomatic protection factor, civil, social, economic and cultural rights, entitlements, duties, identity claims and practices each warrant consideration, but should not and often cannot be weighted independently of one another. The practical availability of diplomatic protection to a citizen abroad may be colored by tacit evaluations of the citizen's normative claim to membership in the polity, or by the state's calculus regarding the force of the duties it owes to citizens as against maintenance of good relations with other states.

The value of the right to enter and remain in one's country of citizenship is conditioned by the quality of social citizenship available generally and in particular to an individual. Returning to one's country of citizenship may represent the restoration of state protection, or consignment to an abyss. That citizens of one state might choose to forego the security of legal citizenship to live under conditions of alienage that render them precarious and unequal in another state speaks to the fact that even marginal membership in the economy of a stable and wealthy state can seem preferable to whatever citizenship in a destitute, conflict-ridden state offers. Equating the heft of citizenship with the economic dimensions or consequences of citizenship would be unduly reductive, but in a world of radical disparities of wealth (and of the preconditions to human functioning, in Amartya Sen's account),⁵⁹ the role of economic opportunity and the impact of legal citizenship's mobility constraints is self-evident. Moreover, gross inequalities between citizens of a given polity on the basis of class, race, sex, ability, ethnicity and other variables mean that the heft of citizenship varies internally as well as externally. In short, the heft of citizenship is produced through the specific and contingent interaction of the variables constituting both legal and social citizenship for a given individual.

In sum, measuring the heft of citizenship provides a means of relativizing citizenships within and between states, recognizing that citizenship for most people is not a container that is either full or empty. My proposal also offers a bridge traversing the discursive divide between legal citizenship

internally displaced citizens from the field of inquiry, thereby lending undue primacy to territorial location as a discontinuous form of displacement.

⁵⁹ AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (2000).

and at least some of the alternative articulations of citizenship currently in circulation.⁶⁰

The remainder of this Article illustrates how thinking about citizenship in terms of heft can assist in clarifying the positioning of various migrant subjects.

A. Patterns of Migration

In general, the heft of citizenship negatively correlates to the incentives to migrate, and positively correlates to the legal capacity to migrate. Consider refugees: their citizenship delivers them little protection from violations of fundamental rights, and so they flee. Even states that interpret the refugee definition more generously than others expend considerable resources in preventing asylum seekers from reaching the borders of the state. Despite the ostensible legal obligations binding the 146 States Party to the U.N. Convention Relating to the Status of Refugees, there is virtually no lawful means for an asylum seeker to reach Europe, North America or Australia/New Zealand. Visas are required from refugee producing countries, and almost never knowingly issued to anyone admitting or suspected of an intention to seek asylum. Safe third country agreements such as the EU Dublin Regulation⁶¹ or the Canada-U.S. Safe Third Country Agreement⁶² restrict asylum seekers to lodging their refugee claims in the first country of arrival and preclude consideration by another state that is party to the agreement. Carrier sanctions penalize ships or airlines that transport improperly documented people (including asylum seekers who resort to false documents). Governments post officials at airports abroad to screen passengers' documents prior to boarding, or delegate the function to private airline officials. States notionally excise morsels of territory — airport transit lounges or, in Australia, the coastline perimeter — for the express and limited

60 This reframing of citizenship also offers the possibility of dissolving the paradox of the "citizenship of aliens" (discussed *supra* note 8), once one accepts that the citizenship in question aggregates not only the attributes of membership in the state of alienage, but also those in the state(s) of legal citizenship.

61 Council Regulation (EC) No. 343/2003 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National, 2003 OJ (L 50) 1 (EC), available at <http://www.uvi.fi/download.asp?id=Dublin+II+asetus+eng:979;%7B8C0EC6FC-E189-4ED9-88C1-FC4132E6E978%7D>.

62 Safe Third Country Agreement, U.S.-Can., Dec. 5, 2002, available at <http://www.cic.gc.ca/english/policy/safe-third.html>.

purpose of repelling asylum seekers. And these are only the non-entrée mechanisms; one could compile an equally long list of the deterrent and punitive strategies for immiserating asylum seekers who manage to reach many of these states.

From the perspective of receiving states, these strategies are designed to deflect and criminalize self-selected, spontaneous migration by those whose citizenship falls below a certain substantive threshold in the countries of origin. Although western governments typically allege that the migrants they intend to deter are seeking economic opportunities and not fleeing persecution, neither the techniques deployed to fortify borders, nor those used to surmount them (smuggling and trafficking) differentiate between migrants on the basis of motive.

At the other end of the spectrum, the heft of citizenship for the educated and elite in any given society frequently insulates them from the pressures that impel others to migrate. But if and when they determine that citizenship elsewhere offers a more attractive or secure package of benefits, they can take advantage of the opportunity by accessing the various skilled-worker and entrepreneur immigration programs run by settler societies (Canada, U.S., Australia, New Zealand) and increasingly emulated by Britain, Germany and other EU states.⁶³ Aihwa Ong's account of "flexible citizenship" superbly documents this phenomenon.⁶⁴ Citizenship can function as a commodity for those with the resources to play the market.

63 Canada and Australia operate points systems whereby entrants acquire permanent resident status more or less automatically. While the United States delegates greater control to private employers by tying permanent residence ("green cards") to a specific offer of employment, in practice, most skilled workers enter the U.S. on temporary employment visas and convert their status to permanent residence through employer-sponsored petitions. Britain and France are at various stages of initiating their own points systems, while Germany has introduced a system that operates similar to the U.S. insofar as skilled workers enter on temporary visas and become eligible for permanent residence after five years.

64 AIHWA ONG, *FLEXIBLE CITIZENSHIP: THE CULTURAL LOGICS OF TRANSNATIONALITY* (1999). A notorious Canadian example is Conrad Black, the disgraced media baron who renounced his Canadian citizenship in favor of British citizenship so he could become a peer in the House of Lords, and explained his decision by declaring that Canadian citizenship "is not now for me competitive with that of the United Kingdom and the European Union." Linda McQuaig, *I am NOT Canadian*, *GLOBE & MAIL*, May 26, 2001, at F4. With the possibility of criminal conviction in the United States presently looming before Mr. Black, he is attempting to re-acquire Canadian citizenship. Canada and the United States have a prisoner transfer agreement that enables Canadians convicted in U.S. courts to serve their sentences in Canadian prisons. The United Kingdom does not have a prisoner transfer agreement with the United States.

Somewhere between the irregular migrant and the global entrepreneur/high-skill worker resides the vast majority of today's lawful immigrants to countries of the North, namely those who enter on the basis of kinship with existing residents and citizens. Casting an entitlement to transnational family formation and reunification in terms of citizenship's heft surfaces the ability to sponsor family members as a particularly valuable asset of citizenship. Again, the value of sponsoring relatives can only be assessed against the other elements constituting membership in the destination state.⁶⁵

Taking into account the variable heft of citizenships also helps to explain the paradox of the EU's open borders. For all the ease of mobility and relocation, Western Europeans hardly relocate at all. Barriers of language and skill recognition may impede some. But for others, the simple question must be "why move?" — what can life in Belgium offer that life in Denmark cannot? Like solutions separated by a semi-permeable membrane, when substantive citizenship is at equilibrium on either side of the membrane, one would expect little diffusion. Two decades ago, the anticipated emigration from new member states, Greece (1981), Spain and Portugal (1986) did not materialize despite somewhat lower standards of living in the latter states. The pattern thus far seems to be that borders will be most open to those whose hefty citizenship makes them least likely to move, except as consumers or as couriers of global trade and investment. European Union citizenship does indeed mark a remarkable and profound transformation of that quintessential modern expression of state sovereignty, namely border control. However, it cannot escape notice that states are most comfortable compromising the mobility-constraining aspect of legal citizenship under conditions of a rough parity in the heft of citizenship between nation-states.⁶⁶ Apart from a peripatetic class of global elites and intrepid twenty- and thirty-somethings seeking education and/or adventure, the truism remains true in the EU: people tend not to leave unless they are pushed.

The recent accession of ten new states to the EU (EU10) will test this hypothesis. All are poorer in economic and political terms than the other EU states (EU15). Contrary to past practice, however, all EU15 states except Ireland, Sweden and the United Kingdom initially imposed restraints on labor market access for citizens of the newly admitted members. For these twelve states, the regulatory practice of border control will temporarily

65 Some states (Canada, Germany) do not distinguish between citizens and permanent residents in terms of their ability to sponsor family members, while others (U.S.) give preference to citizens.

66 The same holds true for visa exemption.

remain within the authority of individual member states, precisely because of the anticipated migration consequences of EU enlargement.⁶⁷ Some in Ireland, Sweden and Britain are gambling that EU migration from east to west will not increase to unmanageable levels, and quietly welcome the migration as a corrective to the demographic and labor market shortfall that domestic politics preclude addressing directly via a considered immigration policy. A recent European Commission interim report on labor migration trends from EU10 to EU15 states suggests that the gamble is paying off economically.⁶⁸

Politically, the story is different: When Bulgaria and Romania acceded to the European Union in January 2007, Britain reversed its earlier position and restricted access to its labor market. A newspaper report quoted an unnamed British Cabinet minister who admitted that the decision was driven by public anxiety over migration, security and multiculturalism: "[W]e have a strong record on accepting migrants from Europe, but sometimes politics has to override the economics."⁶⁹

From the perspective of the EU10 states (including Bulgaria and Romania), accession augments the heft of national citizenship (compared to neighboring non-accession states) in direct proportion to the ability of EU10 nationals to move and work freely in EU15 states. Of course, the long-term objective of EU membership is to make citizenship within states heftier, thereby minimizing the incentives to migrate to the point

67 Finland, Greece, Portugal and Spain recently announced their intention to remove remaining barriers to free movement for citizens of EU10 states; Belgium, France, Italy and Luxembourg intend to ease certain restrictions. Germany, Denmark and Austria intend to retain their visa requirements for workers from EU10. In practice, Germany has issued 500,000 work permits to Eastern European workers since 2004. *EU Labour Chief Calls for End to Labour Barriers*, EXPATICA, May 2, 2006, http://www.expatica.com/source/site_article.asp?subchannel_id=26&story_id=29696.

68 European Commission, *Communication from the Commission to the Council, the European Parliament, The European Economic and Social Committee and the Committee of the Regions: Report on the Functioning of the Transitional Arrangements Set Out in the 2003 Accession Treaty (period 1 May 2004-30 April 2006)*, COM (2006) 48 final (Feb. 8, 2006), available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0048en01.doc; see also Eur. Comm'n Directorate-Gen. for Econ. & Fin. Affairs & Eur. Comm'n Bureau of European Policy Advisers, *Enlargement, Two Years After: An Economic Evaluation* 79-85 (May 2006), http://ec.europa.eu/economy_finance/publications/occasional_papers/2006/ocp24en.pdf.

69 Patrick Wintour, *Permit Scheme to Cut Flow of East Europeans*, GUARDIAN UNLIMITED, Aug. 31, 2006, <http://www.guardian.co.uk/immigration/story/0,,1861634,00.html>.

that intra-EU migration will approach or reach equilibrium again. In the short-run, however, large-scale migration of relatively inexpensive labor from east to west actually suits the interests of the EU15 states as much as the sending states of EU10.

B. Temporary Migration

Consider the French nanny and the Filipino nanny working in Canada. Both possess the same temporary employment visa, thereby occupying the same legal status. Yet the condition of alienage affects them in dramatically different ways: the French au pair is likely a student who has come to Canada temporarily, with a view to traveling, experiencing life in another country, perhaps improving her English. Her presence in Canada is a matter of indifference to France. The Filipino nanny is almost certainly sending remittances home to family members (possibly including her own children), and likely intends to acquire Canadian permanent residence and then citizenship at the earliest opportunity. The government of the Philippines is intensely invested in facilitating this outmigration of its nationals, whose remittances are crucial to the Philippine economy, and effectively comprise the main source of its hard currency. The Filipino nanny's identity *qua* foreigner is racialized and gendered differently and disadvantageously compared to the French nanny's identity. If the French nanny finds herself dissatisfied with her work situation, return to France is viable and relatively costless. The same is not true for the Filipino nanny, for whom the fear of deportation operates as a powerful disciplining force.

The gender dynamics that shape citizenship in the country of origin may also inflect the material experience of alienage: A recent United Nations Population Fund report indicates that female migrant workers remit a higher percentage of their lower incomes than do male migrant workers, and they tend to direct more money toward health care and education because "women tend to invest more in their children than men."⁷⁰

The comparison between the French and the Filipino nanny illustrates how the relative heft of citizenship between sending and receiving state structures the experience of temporary labor migrants. It also tells us something about the heft of affluent Canadian women's citizenship. The availability of migrant care-givers for those with the means to hire them means that child care retains its character as both private and as "women's work," and

⁷⁰ UNFPA, *State of World Population 2006: A Passage to Hope* 29 (2006), http://www.unfpa.org/swp/2006/pdf/en_sowp06.pdf.

women's participation in the professional workplace becomes dependent upon the labor of other women with more precarious citizenships.⁷¹

It seems empirically indisputable that mass temporary worker regimes are sustained by the variance between substantive citizenship in sending and receiving states. It is important to recognize that the normative argument for access to secure legal status derives much (though not all) of its force from this disparity. It is unlikely that many North Americans and Europeans working in the Gulf States feel unjustly treated because they can never obtain citizenship in Saudi Arabia or Qatar, whatever the size of their contribution to the economy or duration of residence in those states.

The availability of diplomatic protection to citizens abroad evinces the heft of citizenship between states and at the level of the state-citizen nexus. Diplomatic protection is commonly assumed to be a classic entitlement of legal citizenship. A diffident response to appeals for that protection may expose the flimsiness of certain individual's citizenship, or the weakness of some citizenships compared to others. An example of the former might be the alleged failure of the Canadian government to furnish consular assistance to Omar Khadr, a Canadian citizen detained at Guantánamo Bay since age fifteen.⁷² An example of the latter might be the reluctance of major labor exporting states to come to the aid of their migrant workers when the latter encounter abuse or exploitation in host states. In principle, governments of sending states have a duty to defend their nationals abroad from rights violations in receiving states.⁷³ If states' formal sovereign equality were matched substantively, the reciprocal interests of each state in the welfare of their nationals abroad might actually ensure a decently equivalent standard of protection. But of course, this situation does not obtain. It is thus unsurprising that the U.N. Convention on Migrant Workers and their Families⁷⁴ attempts to compensate for the weakness of sending states by recasting protection of

71 I am not claiming that the existing sexual division of labor or the organization of the workplace are normatively justified. For an analysis of migrant domestic workers, see Audrey Macklin, *Foreign Domestic Worker: Surrogate Housewife or Mail Order Servant?*, 37 MCGILL L.J. 681 (2006).

72 Omar Khadr has challenged the denial of consular assistance as a breach of his constitutional rights and a breach of the Canadian government's statutory duties. The litigation is ongoing. *See* Khadr v. Canada, [2004] 266 F.T.R. 20 (Fed. Ct.).

73 Under international law, states have the right to assert diplomatic protection of their nationals against foreign states; whether citizens have a right to demand diplomatic protection from their state of nationality is less clear.

74 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Dec. 18, 1990, G.A. Res. 45/158, Annex, U.N. Doc. A/45/49.

migrant workers in terms of human rights owed directly to workers by host states. It is equally unremarkable that the only signatories to the Migrant Workers Convention thus far have been sending states.⁷⁵

C. Dual Citizenship

The relative heft of citizenship obviously influences instrumental decisions by migrants about acquisition of a second or subsequent citizenship. The benefits of transnational citizenship to sending states can also translate into the revision of entrenched attitudes toward dual and multiple citizenship. In particular, less-developed states that formerly prohibited dual citizenship are now beginning to value their expatriates in accordance with the passport they surrendered their original citizenship to acquire. These states now have an incentive to permit multiple citizenships in anticipation that this will encourage diasporic communities to sustain and expand certain affiliations to the "home" country. India offers a particularly striking case study.⁷⁶

India imposes limits on foreign investment by non-citizens. Up until recently, it also prohibited dual or multiple nationality. In early 2003, India amended its citizenship law to permit "persons of Indian origin" (PIO) who hold citizenship in other countries to retain or reclaim a qualified form of Indian citizenship, called Overseas Citizenship of India (OCI). Bearers of an OCI passport acquire the permanent right to enter India without a visa and parity with non-resident Indians in economic, educational and financial domains. They do not acquire the franchise or the right to stand for public office.⁷⁷ The original proposal limited access to citizens of sixteen countries: Canada, the United States, eleven EU members, Israel, Australia and New Zealand.⁷⁸ A website sponsored by the Indian Ministry of External Affairs and the Federation of Indian Chambers of Commerce and Industry made no secret

75 In the context of the "war on terror," the interventions of Britain, Australia and France on behalf of their detained nationals in Guantánamo Bay have been conspicuously more successful than similar attempts by the government of Pakistan. It must be said here that Canada's efforts in this regard appear less assiduous than those of other similarly situated states.

76 For other illuminating discussions of this phenomenon, see Catherine Dauvergne, *Citizenship with a Vengeance*, 8 THEORETICAL INQUIRIES L. 489 (2007); Ratna Kapur, *The Citizen and the Migrant: Postcolonial Anxieties, Law and the Politics of Exclusion/Inclusion*, 8 THEORETICAL INQUIRIES L. 537 (2007).

77 Embassy of India, Persons of Indian Origin — Card Scheme, http://www.indianembassy.org/policy/PIO/Introduction_PIO.html (last visited Sept. 4, 2006).

78 IndiaDay.org, Dual Citizenship Now a Reality, <http://indiaday.org/dual-citizen.htm>

of the motive behind the preferential treatment of diasporic Indians living in states where the heft of citizenship along non-cultural dimensions arguably exceeds Indian citizenship. Even the reference to the psychological dimension of citizenship — the feeling of "belonging" — is linked to enhancing the material benefits to India of dual citizenship:

Persons of Indian origin settled in economically more advanced countries of the world have skills and expertise in vital sectors. There is no doubt that investments are induced principally by the logic of business considerations and the investment climate. The facility of Dual Citizenship would foster better co-operation in these sectors by way of investments and transfer of skills and resources.

The principal rationale of the demand of the Diaspora for dual citizenship, however, is sentimental and psychological. Desire of PIOs to forge emotional and cultural bonds with their country of origin is quite evident in the amount of philanthropic activities done by them in India. Dual Citizenship shall strengthen this bond and facilitate Diaspora's contribution in India's social Development.⁷⁹

Indeed, the investments, philanthropic activities and skills transfer anticipated through the conferral of Overseas Citizenship can be viewed as an appeal to national belonging in the service of supplementing the package of citizenship entitlements delivered through the existing system of governance in India. This selective reclamation of Persons of Indian Origin illustrates what Aihwa Ong describes as the emergence of a neo-liberal "ethics of citizen-formation [that] are not confined to the West but have migrated to emerging sites of hypergrowth."⁸⁰ The idealized Indian citizen was thus revealed as *homo economicus*, the enterprising market citizen.⁸¹ Eventually, in 2005, the government of India relented and extended eligibility for Overseas Indian Citizenship to Persons of Indian Origin from any state that permits dual citizenship.⁸²

(last visited May 16, 2004). The list of qualifying European states excludes those that prohibit dual citizenship.

79 *Id.*

80 Aihwa Ong, *Experiments with Freedom: Milieus of the Human*, 18 AM. LITERARY HIST. 226, 237 (2006).

81 *Id.*

82 High Commission of India, London, Promulgation of Citizenship (Amendment) Ordinance, 2005, <http://www.hcilondon.net/Overseas-Indian-Citizenship/index.html> (last visited Sept. 4, 2006).

CONCLUSION

The technologies of identity documentation provide a handy distillation of citizenship's heft within and across borders in an era of uneven global mobility: Arendt wrote incisively about how "loss of citizenship deprived people not only of protection, but also of all clearly established, officially recognized identity, a fact for which their eternal feverish efforts to obtain at least birth certificates from the country that denationalized them was a very exact symbol."⁸³ The contemporary traffickers and unscrupulous employers who seize the passports of trafficked persons or non-status migrants aim to exacerbate the vulnerability of their victims by withholding the legal identity document that would facilitate access consular protection (including repatriation) by their state of nationality. This is one means of creating "de facto" statelessness. Yet it is at least equally common for asylum-seekers and non-status migrants to destroy their passports precisely in order to prevent or at least delay repatriation to their state of citizenship. Even trafficked persons may dread return to their home country. Moreover, the person most likely to lack access to an "officially recognized identity" today is not the denationalized citizen, but rather the citizen of a failed state that lacks the governmental infrastructure required to generate official identity documents. For example, the inability of Afghans and Somalis to prove their identity to the satisfaction of Canadian immigration officials for purposes of obtaining permanent resident status can delay the permanent residence of recognized refugees for several years, leaving them in a legal limbo without the ability to sponsor family members or acquire legal citizenship.

Finally, post-9/11 border practices reveal the signaling function of passports as a quick calibration of citizenship's combined legal and substantive heft: After decades of requiring only birth certificates or driver's licenses as identification at the border, the United States government has initiated a policy of accepting only passports from Canadian citizens. This signifies a certain demotion of Canadian citizens from their privileged status as exempt from the formality of passport requirements.

Of course, Canadian citizenship retains its elevated position in the hierarchy insofar as a Canadian passport is infinitely more valuable at the U.S. border than, say, a Pakistani passport. Presentation of the latter will not enable entry without an accompanying visa. However, Canadian passports also contain data unavailable on drivers' licenses, such as place of birth. One cannot but speculate that a Canadian passport listing "place

83 ARENDT, *supra* note 5, at 287.

of birth" as Winnipeg (or even Vienna) routinely attracts less attention than one indicating a Karachi birthplace. Indeed, the fact that Canadian passports still identify place of birth reveals something about lingering differences in the heft of citizenship for the birthright versus the naturalized citizen.⁸⁴ In addition, a recent pilot study of border stops by British immigration officials reveals that non-white Canadian citizens seeking entry to the UK were nine times more likely to be stopped for questioning than white Canadians. In order to control for the possibility that non-white Canadians are scrutinized more closely because they are poor (and thus allegedly more likely to work illegally in the UK), the researchers adjusted the figures to control for socio-economic status. The adjusted stopping rates increased the gap: A non-white Canadian was 13.5 times more likely to be stopped than a white Canadian of equal socio-economic status.⁸⁵ Race and class (and race as proxy for class) apparently diminish the heft of what is otherwise one of the most substantial citizenships in the world.

The foregoing journey has arrived at citizenship by way of statelessness as its alterity. In a similarly oblique fashion, I have not answered the *why* question about citizenship. Instead, I proposed *how* we might integrate our thinking about citizenship. My aspiration is that calibrating the heft of citizenship's diverse elements will advance the dialogue across the disciplinary frontiers of citizenship scholarship.

84 In fairness, the passport of a birthright citizen born abroad to a Canadian citizen would also list a non-Canadian birthplace.

85 Kandy Woodfield et al., *Exploring the Decision-Making of Immigration Officers: A Research Study Examining Non-EEA Passenger Stops and Refusals at UK Ports* 43 (Jan. 2007), <http://www.homeoffice.gov.uk/rds/pdfs07/rdsolr0107.pdf>. The authors of the report caution that the size of the sample group was too small to permit definitive conclusions about racism as a causal factor. Interestingly, there was no statistically significant difference in the stop rate of white and non-white Americans. *Id.*