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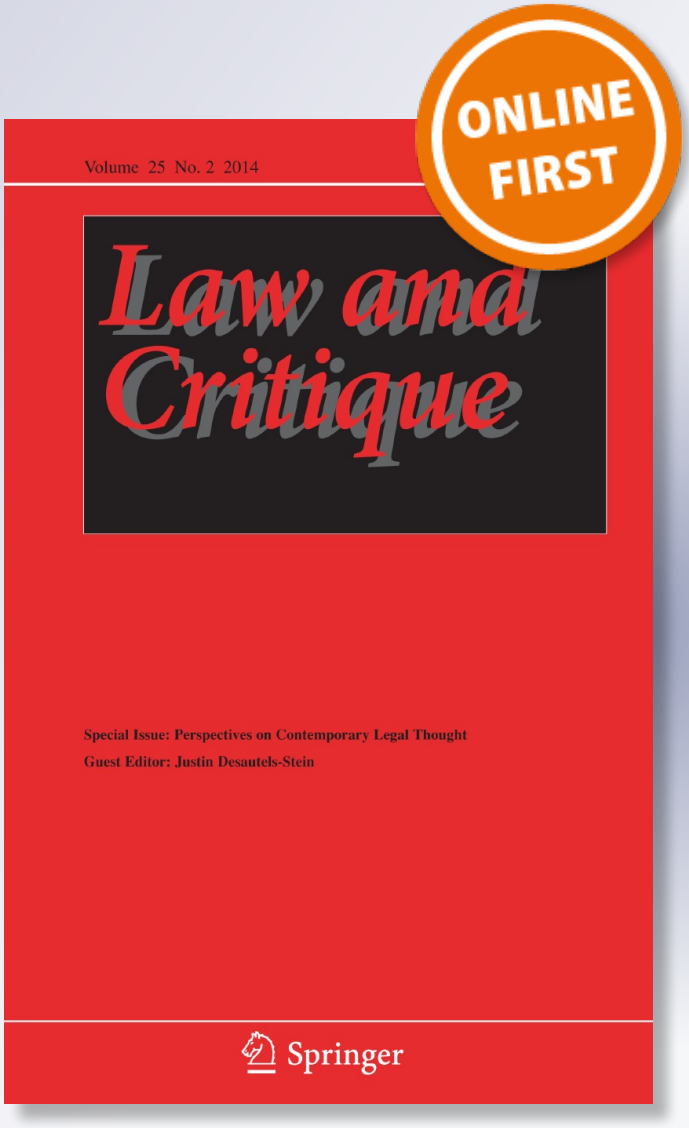

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Accidents, Agency and Asylum: Constructing the Refugee Subject

Simon Behrman

Abstract Refugee law demands that the asylum seeker demonstrate an extremely limited and distorted form of agency that is encapsulated within the legal definition of the refugee. Such a framework also denies the role of the accidental in the refugee experience. I argue that the problem lies at the heart of the legal form, as constructed under capitalism. The *sans-papiers* show us the potential for refugees themselves to reconstruct a subjectivity that transcends the distorted form of agency and the false dichotomy between the accidental and agency found in law, through their rejection of legal definitions and the re-emergence of themselves as political subjects.

Keywords Agency · Marxism · Refugees · *Sans-papiers*

Introduction

All forced migrants operate in a complex of circumstances involving both the accidental and agency. No-one chooses to find themselves on the wrong side of a newly drawn border when nation-states are created, in a repressive state or in a war-zone. We do not choose to be born a certain gender or into a particular racial or ethnic group. Yet the refugee, by definition, does not face these circumstances with passivity; they move, they fight for their survival and a better life. This point is too often lost in the prevailing discourse that sees refugees as an undifferentiated mass, lacking the skills and the sophistication of the settled citizenry. Instead they are presented as having no agency, described in elemental terms: flood, influx, swamping etc. We need, therefore, to be protected from the mindless and

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unstoppable flood of human misery. So if we accept only the accidental when explaining the refugee crisis we reduce forced migrants to one dimensional figures; problems not persons.

Equally there is a strong tradition, mainly literary in nature, that presents the exile as a heroic figure, one whose agency as ambassador for the ideals of freedom has led to their seeking asylum. A nostalgic ideal-type of the 'real' refugee struggling against injustice remains within our collective consciousness: the Huguenots, the fighters for freedom such as Garibaldi and Kossuth, anti-Apartheid activists, dissident intellectuals from the USSR etc. There are two problems with this construct. The first is that this romantic exile possesses a very particular type of agency: the bourgeois individual, thinking great thoughts, alone in their struggle against irrational barbarism (Kaplan 1996). All of the examples I have just mentioned have one thing in common: their struggles had as their aim the attainment of liberal democracy, broadly conceived. Those who are guided by hostility to liberal democracy, from 19th century anarchists to contemporary radical Islamists, find themselves denied asylum as irrational terrorists. The second problem with this nostalgic trope is that, in fact, the overwhelming majority of those who fled France in the 17th century or Nazi Germany and the USSR in the 20th century were not ambassadors in the service of a political ideology, but people who found themselves due to an accident of history at a time and place where their religion, race or political opinion was the subject of persecution.

In short, resorting to simple notions of the accidental or agency obscures the full complexity of the refugee experience and the reasons for their flight. My aim in this article is to show how law frames the refugee subject in such a way as to reinforce these 'false images' of the refugee (Tuitt 1996). The argument proceeds in four stages. First, I will describe the various ways in which the law frames agency in relation to the refugee. Second, I will outline, from a Marxist perspective, how the legal subject is tied to the subject of capitalist relations, a subject defined by a very peculiar notion of agency. Third, sticking with the Marxist framework, I will identify a more sophisticated understanding of how agency works. Finally, I will attempt to show how this more complex understanding of the subject has informed the struggle of a key group of forced migrants, the *sans-papiers* in France, enabling them to challenge and move beyond the narrow confines of the accidental and agency.

The Juridical Agency of the Refugee

Article 1A of the 1951 Refugee Convention, the founding document of contemporary refugee law, gives the following definition of the refugee:

> [A refugee is one who] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country (UNHCR 1951).

There are several key terms in this definition that require, or at least suggest agency: being outside their country of nationality, i.e. having moved across a border, persecution, adherence to religious or political beliefs, and membership of a social group. What follows is a brief look at how refugee law configures agency on each of these counts.

On the question of movement, it is obvious that in order to qualify as a refugee only one type of movement—across a border—is recognised.[1] The office of the United Nations High Commissioner for Refugees (UNHCR) has made clear that 'there are no exceptions to [this] rule' (UNHCR 2011, para 88). And yet, as James Hathaway points out: 'There is nothing intuitively obvious about this requirement: many if not most of the persons forced to flee their homes in search of safety remain within the boundaries of their state' (Hathaway 1991, p. 29). As such, this leads to 'a mismatch between the [refugee] definition and the human suffering consequent to involuntary migration' (Hathaway 1991, p. 29). In a civil war many will either want to remain within a certain area of the country, or else be unable to move beyond its borders. The practical result of this demarcation of the refugee subject is that today there are, at a conservative estimate, 26.4 million Internally Displaced Persons (IDPs) worldwide,[2] denied the rights commensurate with refugee status, most of whom are living in camps in conditions of what Giorgio Agamben has termed 'bare life', or mere survival (Agamben 1998).

But it is on the issue of persecution that refugee law is most problematic in relation to the question of agency and the accidental. Persecution is key to the definition of the refugee in the 1951 Convention, it is the 'exclusive benchmark' set by law for attaining refugee status (UNHCR 2001, p. 80; Hathaway 1991, p. 99). The obvious point is that without a persecutor, one who actively targets the asylum-seeker, there cannot be a claim for refugee status. So victims of economic collapse, civil war and natural disasters are deemed not to be refugees in law.[3] The House of Lords in *Adan v. Secretary of State for the Home Department* [1998] denied an asylum request on the grounds that the fall of the Barré regime in Somalia had removed any direct threat of persecution of Mr Adan.[4] While Adan lacked protection as a result of the complete collapse of the state in Somalia, he failed on the 'fear test' as there was no longer an identifiable persecutor. Moreover, mere membership of a social, racial or religious group facing persecution is not enough to meet the bar set by the 1951 Convention (UNHCR 2011, paras. 70, 73, 79). The claimant has to establish that they *individually* have a reasonable fear of being persecuted. This view has also been repeatedly upheld in the European Court of

[1] For an extended discussion of the insistence of movement as a criterion of the refugee subject, see Tuitt (1999).

[2] Internal Displacement Monitoring Centre (IDMC) www.internal-displacement.org.

[3] For an explication of the inadequacies of international refugee law in relation to forced displacement due to climate change, see McAdam and Saul (2010), pp. 7–9. In another piece Jane McAdam makes the excellent point that whereas in the past inhabitants of places threatened by climate change could at least move elsewhere, the huge growth in legal restrictions on migration today make such an option increasingly unobtainable. (McAdam 2010, p. 5) In this case law forecloses the potential for forced migrants to exercise agency in fleeing from the danger.

[4] *Adan and Others v Secretary of State for the Home Department* [1999] 1 A.C. 293.

Human Rights (ECtHR). In *H.L.R. v. France* [1997][5] the court held that, in general, Article 3 rights[6] can only be engaged where the claimant fears direct persecution, not just generalised violence. The bar for claiming Article 3 protection in a situation of generalised violence without specific persecution is very high indeed. And in successive judgements of the ECtHR since *H.L.R. v France* the court has refused to engage human rights protection against return without a finding that the claimant will in some way be singled out for harm.[7]

Yet even the scope for this privileged type of individualised persecution is further limited in relation to states' rights. In *Ravichandran v. Secretary of State for the Home Department* [1996][8] it was held that the targeting of particular groups in the interests of 'public order' was, within certain limits, not grounds for persecution for the purposes of the Convention. The claimants were Tamils who had fled Sri Lanka at a time when young Tamil men were being repeatedly arrested and detained on suspicion of membership or support of the Tamil Tigers. The Court of Appeal took the view that 'loss of liberty…is not persecution for a Convention reason [where] young male Tamils are not arrested and detained because they are Tamils but rather because they *may* have been involved in some outrage'.[9] Yet the sole reason offered for why they were deemed to be potentially involved in an outrage was that they were young Tamil men. This circular argument gave a licence to the Sri Lankan state to arrest and detain them, and denied them refugee status in the UK. *Ravichandran* subtly reveals the privileging of the state's monopoly of violence, and its right to preserve order against non-state groups who are seeking an alternative 'public order'. It is for this reason that there is no right in international law to asylum, only the right to make such a claim.[10] Instead, insofar as international refugee law bestows rights, it is the rights of states to grant or withhold asylum (Harvey 1998, p. 221).

The dictionary definition of 'persecution', as quoted in *Ravichandran*, is: 'To pursue with malignancy or injurious action; especially to oppress for holding a heretical opinion or belief.'[11] Note here that what is required is agency on both

[5] *H.L.R. v. France* [1997] 11/1996/630/813.

[6] 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

[7] *Jeltsujeva v. Netherlands* [2004] 39858/04; *N.A. v. United Kingdom* [2008] 25904/07; *F.H. v. Sweden* [2009] 32621/06.

[8] *Ravichandran v Secretary of State for the Home Department* [1996] Imm. A.R. 97; *The Times*, October 30, 1995.

[9] *Ravichandran v Secretary of State for the Home Department*, [1996] Imm. A.R. 97; *The Times*, October 30, 1995 per Simon Brown LJ (Emphasis added).

[10] *T v Immigration Officer* [1996] 2 A.C. 742, at 754; Goodwin-Gill (1996), p. 174. During discussions at the United Nations on the Draft Declaration of Human Rights, reference to the 'right to seek and be granted' asylum was changed to the 'right to seek and enjoy' asylum in the final draft of what would become Article 14 of the Universal Declaration of Human Rights. This was at the insistence of a number of states who argued that the original wording would have subverted the sovereign right to control entry into their territory. One leading commentator on these discussions stated baldly that 'there was no intention to assume even a moral obligation to grant asylum. There was an explicit disclaimer of any such intention'. (Grahl-Madsen 1972, pp. 100–102).

[11] *Ravichandran v Secretary of State for the Home Department*, [1996] Imm. A.R. 97; *The Times*, 30 October 1995 per Simon Brown LJ.

sides: the persecutor must pursue, and with malignancy; the persecuted is usually required to possess, and presumably assert a set of beliefs. But to find oneself, by an accident of history, to be a member of a group who are being legitimately targeted by the state according to law, places oneself outside the category of refugee. The more obvious point is that the insistence on persecution as a necessary criterion for being a refugee excludes vast numbers of people forced to flee their homes, people whom most of us would regard as genuine refugees in need of assistance. This list would include those fleeing natural disasters or zones of conflict, as well as those escaping structural forms of violence such as climate change and poverty. Indeed in many cases at least one or two of these 'accidental' types of danger would be directly linked to recognised forms of persecution. For example, members of a rural community persecuted for their ethnicity may also find themselves destitute due to the ravaging of their lands by the persecutors, or experiencing suffering due to lack of access to resources to cope with a drought. Even UNHCR has admitted that the 'distinction between an economic migrant and a refugee is…sometimes blurred' (UNHCR 2011, para 63).

UNHCR has stated that where claimants for refugee status have been prosecuted for 'politically-motivated *acts*' and where the 'anticipated punishment is in conformity with the general law of the country concerned, fear of such prosecution will not in itself make the applicant a refugee' (UNHCR 2011, para 84, emphasis in original). This was the logic followed in *Ravichandran.* Had such a rule applied in the 19th century it is at least arguable that many of the great heroic refugees of the period such as Giuseppe Mazzini and Lajos Kossuth might well have failed to gain asylum. In fact, such a distinction does exclude many today who are prosecuted for violent acts against a repressive state. A particularly contentious area lies in the application of Article 1F of the 1951 Convention, the so-called exclusion clause. This denies refugee status to persons guilty of war crimes, crimes against humanity or serious non-political crimes. In recent times Article 1F has frequently been deployed to deny asylum to alleged terrorists including Tamils, Islamic militants, Hamas activists and Mexican guerrilla fighters (Kaushal and Dauvergne 2011). This 'criminalization of politics' has effectively stripped political actors from outside the sphere of liberal politics of any claim to political agency (Kaushal and Dauvergne 2011, p. 71). As Asha Kaushal and Catherine Dauvergne note:

> Violence is increasingly cast as irrational and disproportionate, rendering it non-political regardless of motive. The result is that it is nearly impossible to commit a political crime of violent resistance within the terms of Article 1F. (Kaushal & Dauvergne 2011, p. 74)

Kaushal and Dauvergne argue that recourse to human rights law could offset this restrictive interpretation of refugee law. However, according to the jurisprudence of the ECtHR the principle of non-refoulement, which prohibits return to a state where the applicant's life or liberty is at stake, is not absolute.[12] The principle can be circumvented in cases where the refugee is considered to be a danger to national security (Council of Europe 2013, p. 63). This was one of the considerations that

[12] UNHCR (1951), Article 33.

allowed the deportation of Abu Qatada from the UK to Jordan.[13] On the other hand, in another recent case the ECtHR did take a step forward in broadening the scope of non-refoulement in reference to the Article 3 prohibition on inhumane treatment.[14] The court held that an extreme level of generalised violence in Somalia rendered deportation back to that country illegal. However this ruling does not guarantee asylum or a ban on deportation. The asylum seeker can be expelled, just not to the state where there is a risk of death or torture. Moreover, according to the ECtHR, in circumstances where there was no persecution or direct violence, for example where the applicant is threatened with return to a country where lack of health care will lead to suffering and an early death, there is no bar on deportation.[15]

Alternatively, asylum seekers, if they fail to secure refugee status under the 1951 Convention, could perhaps seek protection against extradition back to their home country on the basis of the 'political offence exception'. This is a rule, dating back to the 1830s and common to many extradition treaties, that prohibits the return of people to countries where their extradition is sought so that they can answer criminal charges; the exception being that if the acts were of a political nature or closely related to political aims, then extradition will be denied. But here too a highly restricted view of agency is imposed on the refugee; one that, again, reinforces the primacy of the state form and the hegemony of liberal views of the political subject. As early at 1856, when the Belgian government inserted the *clause d'attentat,* which excluded all attacks on political leaders and their families as valid political acts, into all its extradition treaties, clear boundaries have been set for what constitutes a valid political offence. In *Re Castioni* [1891] the so-called 'incidence' test was developed, a test still used today.[16] This restricts the political exception to those offences committed in the context of a wider uprising or civil conflict. In *Quinn v. Robinson* [1986] Judge Reinhardt stated that the incidence test only covers those offences committed concurrently with an uprising or political disturbance already in progress.[17] Thus the test excludes offences committed by individuals wishing to initiate a political struggle. There is a logical fallacy in this distinction between the deserving and the undeserving refugee: someone, some act must initiate a struggle or uprising, yet that person and that act falls outside the political exception, while those that follow fall within it. The 'incidence' rule thus privileges those who choose to act only when they (accidentally?) find themselves already in a conflict situation.

In *Re Meunier* [1894] it was held that anarchism as a motive for carrying out a criminal offence was illegitimate for the purposes of the political exception.[18] This was because an ideology that rejects state power as such was deemed *ipso facto* to be non-political. In the US case of *Eain v. Wilkes* [1981] the 'dispersed' nature of

[13] *Othman (Abu Qatada) v. UK* [2012] 8139/09.

[14] *Sufi and Elmi v. UK* [2011] 8319/07.

[15] *N v. UK* [2008] 26565/05; *S.H.H. v. UK* [2013] 60367.

[16] *Re Castioni* [1891] 1 Q.B. 149. For examples of how the test has been applied more recently, see *Canada (Attorney General) v Ward* [1993] 2 S.C.R. 689; *T v Immigration Officer* [1996] 2 A.C. 742.

[17] *Quinn v Robinson* 783 F 2d 776 (1986).

[18] *Re Meunier* [1894] 2 Q.B. 415.

the Palestinian resistance provided grounds for denying the political element to the alleged offence.[19] In order to be properly 'political' the act had to be carried out by a well-organised and directed organisation. Only conflicts involving 'organised battles between contending armies' would be covered.[20] Shifting back from extradition law to refugee law, in *T v. Immigration Officer* [1996] Lord Mustill laid out a very direct form of agency necessary to ground a claim to a political offence:

> It seems to me in a real sense that a political crime, the killing of A by B to achieve an end, involves a direct relationship between the ideas of the criminal and the victim, which is absent in the depersonalised and abstract violence which kills 20, or three, or none.[21]

The question of the political is circumscribed by the courts in these leading cases in terms of a narrow view of agency; one that excludes acts which initiate struggle or engages in a generalised campaign of violence, excludes any political ideology that does not have state power as part of its goals, and which, in terms of organisation, fails to mirror the state/military-type structure. One of the reasons for this is that the political exception was conceived of in the 19th century as a means for justifying acts by those fighting to establish liberal democracies—the Polish, Italian and Hungarian revolutionaries—against autocratic regimes. Geoff Gilbert, writing at the close of the Cold War, therefore argues that the political exception cannot equally be applied to those 'intent on destroying liberal democracy' (Gilbert 1991, p. 115). It was for this reason that the first restrictions on the political exception were directed at those most antagonistic to liberalism: anarchists. The European Arrest Warrant, initiated in 2002, and now applicable throughout the EU, which eliminates the 'political offence exception' in regards to all extraditions within the EU, is testament to the further narrowing of the political in the age of liberal capitalist hegemony.[22] Arguably, Article 1F of the 1951 Convention, a product of the Cold War, sets the same parameters of 'politics'. The effect has been to ossify in law an 'objective' standard of political agency that excludes all who refuse to accept liberal democracy as the paradise of freedom it claims to be.

Turning now to the various grounds for persecution as specified in the 1951 Convention, we can see how these also frame agency in a peculiar and restricted way. In the US Supreme Court case of *INS v. Elias-Zacarias* [1992] the applicant's asylum claim was based upon his fear of persecution for refusing to join a paramilitary group in El Salvador.[23] Giving the majority opinion of the court, Justice Scalia rejected the applicant's asylum claim because his refusal was not politically motivated, or indeed motivated by any other grounds specified in the Convention.[24] The applicant simply did not want to get involved in the raging civil war then gripping his homeland. In *Canada (Attorney General) v. Ward* [1993] La

[19] *Eain v Wilkes* 641 F.2d 504 [1981].

[20] *Eain v Wilkes* 641 F.2d 504 [1981] at 519.

[21] *T v Immigration Officer* [1996] 2 A.C. 742 at 772.

[22] Council Framework Decision 13 June 2002 (2002/584/JHA).

[23] *INS v Elias-Zacarias* 112 S.Ct. 812 [1992].

[24] *INS v Elias-Zacarias* 112 S.Ct. 812 [1992] at 815–816.

Forest J is equally clear in regards to persecution on political grounds: 'Not just any dissent to any organisation will unlock the gates to Canadian asylum; the disagreement has to be rooted in a political conviction.'[25] In the UK Court of Appeal case of *Omoruyi v. Secretary of State for the Home Department* [2000], the court refused asylum to a man violently threatened by a religious cult for refusing to bury his father according to their rites.[26] Simon Brown LJ, giving judgement for the court, argued that the case failed 'not for want of enmity or malignity on the part of the [cult]…but rather because [their] motivation was in no realistic sense discriminatory against the appellant on account of his Christianity but rather stemmed from his refusal to comply with their demands'.[27] In each of these cases, spread over three different jurisdictions, the failure to actively assert a set of religious or political opinions is held to disqualify one from refugee status. The fact that they have found themselves being persecuted in circumstances not of their own choosing sinks the claim. Here it is the failure to assert agency in the required way that precludes a grant of asylum.

The category of 'social group' excludes those 'groups defined by a characteristic which is changeable or from which dissociation is possible, so long as neither option requires renunciation of basic human rights' (Hathaway 1991, p. 161). We are then faced with the question of what is reasonable when it comes to changing one's affiliations. Thus working in a particular sector, for example, even if finding alternative employment would be hard or highly disruptive, is excluded as grounds for persecution, in spite of the fact that it is frequently the case that people associated with a certain profession—for example, workers in a highly unionised sector, or small businesses associated with a particular ethnic or political identity—may be persecuted, particularly in circumstances of civil war or state repression.[28] In *Ward* the Supreme Court of Canada made the distinction between 'what one *is* against what one *does*, at a particular time'; the former is privileged over the latter when it comes to grounds of persecution on the basis of membership of a social group.[29] In this case, concerning a former member of the Irish National Liberation Army (INLA), the Canadian Supreme Court held:

> The fight for independence from the United Kingdom and unification with the Irish Republic may be very serious political ends for INLA members, but requiring them to abandon their violent means of expressing and achieving these goals does not amount to an abdication of their human dignity.[30]

This is a blatant value judgement. To be forced to dissociate oneself from a struggle against perceived national or religious repression, as in the case of Northern Ireland, would in the minds of many constitute a violation of the basic rights to

[25] *Canada (Attorney General) v Ward* [1993] 2 S.C.R. 689 per La Forest J.

[26] *Omoruyi v Secretary of State for the Home Department* [2000] WL 1480010.

[27] *Omoruyi v Secretary of State for the Home Department* [2000] WL 1480010 per Simon Brown LJ.

[28] See for example, *Matter of Acosta,* Interim Decision (2986, 1985) WL 56042, United States Board of Immigration Appeals.

[29] *Canada (Attorney General) v Ward* [1993] 2 S.C.R. 689, p. 27 (emphasis added).

[30] *Canada (Attorney General) v Ward* [1993] 2 S.C.R. 689, p. 30.

freedom of speech and of association. The qualification of violence does not hold either as, in the words of one UK Law Lord, 'yesterday's terrorist is today's freedom fighter and perhaps tomorrow's head of state'.[31] The recent history of Northern Ireland, in particular, bears this out. It is hard to dispute Michael G. Heyman's criticism of the restricted grounds on which a claim for persecution can be based according to the 1951 Convention, when he writes: 'there would seem to be little difference between suffering arising from one of those five sources and any other form of suffering. The results are the same; the human cost is incalculable' (Heyman 1987, p. 453). Once again we find that refugee law is highly capricious when it comes to determining the 'correct' type of agency performed by the applicant for refugee status.

Finally, refugees must demonstrate agency in yet another, more fundamental way; one which exists irrespective of any specific definition of refugee, but which is essential to any system of refugee law: they must engage in the process of refugee status determination as a precondition to receiving the benefits of asylum. The UNHCR makes clear that 'in accordance with general principles of the law of evidence, the burden of proof lies on the person who makes the assertion—in the case of refugee claims, on the asylum-seeker' (UNHCR 2001, p. 79).[32] The ECtCR concurs by insisting that an asylum-seeker provide sufficient evidence to prove a threat of death or inhumane treatment in their country of origin (Council of Europe 2013, p. 72). Although UNHCR claims that one 'does not become a refugee because of recognition, but is recognised because he is a refugee', the inescapable fact is that once there is a definition in law a decision must be made as to whether this or that claimant is or is not a refugee, and thus deserving of asylum (UNHCR 2011, para 28). And it is almost impossible to conceive of a refugee definition that is neutral and accepted by all. Is persecution a necessary element? Should all grounds of persecution be covered? What about those escaping environmental destruction or economic deprivation etc.? Elsewhere UNHCR states: 'The key to the characterisation of a person as a refugee is risk of persecution for a Convention reason' (UNHCR 2001, p. 78). So, in fact, one only becomes a refugee once one has reached the threshold of the legal definition. Moreover, as the UNHCR Handbook further points out, the claimant must 'establish to a reasonable degree' that they can no longer remain in their country of origin, and that they must 'show good reason why [they] individually [fear] persecution' (UNHCR 2011, paras 42 and 45).[33] The necessity for the refugee to prove through testimony and evidence that they are genuinely refugees is thus absolutely central to the whole refugee status determination process.[34] Thus to be a refugee one must don the cloak of the legal subject; failure to do so adequately leads to the denial of asylum.

[31] *T v Immigration Officer* [1996] 2 A.C. 742 at 755.

[32] See also *R. v Special Immigration Adjudicator* [2000] WL 699382 per Goldring J, quoting the Adjudicator: 'The onus is on the [claimant] to show that he is entitled to asylum'.

[33] See also *Adan and Others v Secretary of State for the Home Department* [1999] 1 A.C. 293.

[34] See Barsky (1994), for an in-depth analysis of how the refugee determination process forces the refugee to adopt certain tropes in order to fit the refugee definition and gain asylum.

In bringing this explication of agency in relation to refugee law to a close, the key point I want to make is that the problem lies in the very fact of having any legal definition of the refugee. Operating on such a basis legitimates the denial of sanctuary for millions who need it, and leads to a demonising discourse of 'bogus' asylum seekers and 'economic migrants'. It is precisely due to the fact that the vast majority of refugees are excluded from the legal category of the refugee, whose *sine qua non* is agency, that the dominant construct of the refugee mass (those lacking the legal moniker) is reduced to one of mindlessness and agentlessness—the 'flood'—or, at best, mere victimhood. Thus refugee law imposes not only a severely circumscribed form of agency upon the refugee as legal subject, but in its exclusionary role condemns the rest to a pathetic caricature, stripped of agency. Guy Goodwin-Gill contrasts the legal definition of refugee—'a term of art'—with its more common usage involving a 'broader, looser meaning'. Furthermore, he admits that defining refugees 'may appear an unworthy exercise in legalism and semantics, obstructing a prompt response to the needs of people in distress' (Goodwin-Gill 1996, p. 3). Yet reference to a legal definition of a refugee is a very recent phenomenon. The category of refugee had been 'mutable' for much of the past 300 years (Marfleet 2006, p. 13). Indeed, for most of that period, up until the 20th century, there was no such thing as refugee law *per se*, and therefore no precise definition was in circulation. But the advent of the 1951 Convention, and the ensuing rapid spread of refugee law at both the international and domestic levels moved the refugee definition, such as it was, 'from a basis in flexible or open groups and categories, to an apparently more closed and legalistic one', whose 'main purpose was to prevent refugees becoming a liability to the international community' (Goodwin-Gill 1996, p. 6).

If we are to avoid this emaciated construction of the refugee, one which not only excludes the accidental, but which also severely circumscribes the complex notion of agency, then refugee law and the determination procedures that necessarily accompany it must be avoided. I recognise that this might appear to be an extreme and dangerous position. But, as I argue elsewhere, refugees were in general better off before the advent of refugee law; it is the very existence of refugee law that has led to the contemporary downfall of the refugee (Behrman 2014). How then should we identify a refugee? The OAU Refugee Convention and the Cartagena Declaration of Latin American States offer a somewhat broader definition of a refugee than the 1951 Convention, including those who have fled as a result of civil wars or other forms of civil disturbance. But they also exclude victims of events that do not involve a clearly identifiable agent of violence such as natural disasters or economic deprivation (Hathaway 1991, pp. 17, 20). Moreover, by giving a legal definition they too require refugees, in the midst of one of the most severe personal crises any human can experience, to engage in a complex and stressful legal procedure. We could adopt Emmanuel Marx's suggestion to adopt the rather broad concept of a refugee as one 'whose social world has been disturbed' (Marx 1990, p. 190). Broader still, the Japanese word for refugee, *nanmin,* means literally a person or group in difficulty. These vague definitions have the positive consequence that we do not seek to impose any particular notions of agency or the accidental on those seeking asylum. I would, however, be wary of any definitive definition, broad

or otherwise, precisely because it is such a contested concept. Perhaps we could approach asylum in the same way as any other emergency service such as firefighting or healthcare, by providing it based on need without recourse to a legal category of the deserving subject. However, at the very least, it should be clear from what I have argued thus far that the legal definition of the refugee does not do justice to the complexities of the refugee experience. The logical inference of my argument is therefore that the problem lies deeper than simply the current instruments of refugee law.

Agency, the Accidental and the Legal Form

Are the problems that I have identified so far merely a problem of refugee law? Is the problem simply that of a bad law, which could be replaced by a better alternative? My view is that the problem lies within the legal paradigm itself. It seems that wherever one looks the law is framed around active legal subjects asserting their rights and responsibilities, with deliberation on the basis of rational self-interest. As I have already discussed, in refugee law this is evident in such criteria as movement and persecution. But one finds the same thing across many other fields of law; in criminal law where we must always seek the meeting of the *mens rea* and the *actus reus*—the confluence of consciousness and action—or contract law where the courts will often make up for a lack by constructing implied terms, reasoned agency is always required. Even in that sphere of law that deals explicitly with accidents, the tort of negligence, the courts are always looking to ascertain what the 'reasonable person' *would* have done, or *should* have known, had they been in the position of the tortfeasor. That ubiquitous figure of common law, the reasonable man, is, in the words of Patrick Atiyah, 'an odious and insufferable creature who never makes a mistake' (Conaghan and Mansell 1999, p. 52). The accidental, on the other hand, deals with the indeterminate, the unforeseeable, of subjects acted upon rather than acting, and of acts that are mistakes rather than planned. Yet it appears that the law is unable to abide an accident as such, without reading into it some type of reasoned agency. In short, the legal subject appears to be based on a type of voluntarism, ignoring both the accidental and the contingent, and the complex ways in which agency can both be present and compromised through restraints and impulses. However, if we are to accept the idea that law is inimical to the accidental and to the multi-faceted nature of human agency, then we need to look deeper than these randomly selected examples. And to do that we must briefly identify what is at stake in the legal form itself.

Under capitalism a very peculiar and highly ideological notion of agency comes to predominate. The development of generalised commodity production, in which every subject interacts with each other as owners of commodities, necessitates that all property is capable of being freely appropriated and alienated in a constant process of exchange. In *Capital: Volume One* Marx highlights the obvious but often overlooked point that commodities have no agency of their own; they must be brought to market by their owners (Marx 2011, p. 96). The premise of the relationship of commodity exchange, one that is central to the ideology of

capitalism, is that all actors engage in the market on the basis of enlightened self-interest, i.e. they are knowing agents acting with forethought and deliberation. Accidents, whether of nature or circumstances, have no part in this type of subject. For such a process to operate effectively all actors in the market must be free and equal subjects. This is at the root of the voluntarism that informs ideas such as the American Dream and the notion that anyone can become rich if only they work hard enough. Of course this is a fiction. We are, all of us, impelled and restrained by the specific social and historical circumstances in which we find ourselves. Nonetheless, the premise of capitalist relations, that we are all free and equal agents acting according to enlightened self-interest, necessitates the development of the legal subject as itself a free and equal subject, possessing the same inherent rights as all others. Evgeny Pashukanis convincingly argues in *The General Theory of Law and Marxism* that the growth of generalised commodity exchange, from its origins in the market towns of the Middle Ages onwards, required a regulated system of mutual recognition encapsulated in the relations between legal subjects (Pashukanis 2002). This means that concepts of agency that are central to commodity exchange *ipso facto* become those that define agency in law. The subjects of commodity exchange barter on the basis of their respective ownership of commodities; legal subjects are essentially those who make claims on the basis of mutual recognition as possessors of varying sets of legal rights.

The essentially bourgeois framework of the legal subject explains why in refugee law the onus is on the refugee to prove that they are genuinely a refugee, rather than, say, being able to call upon asylum in much the same way in which one might call upon an emergency service. The refugee is perceived to be a subject simply asserting their rights as any other legal subject would. Instead, by recognising that they are experiencing a severe 'social disturbance', or that they are a person in difficulty, we should perhaps respond much as we would to someone whose house is on fire, or who has collapsed from a heart attack, i.e. by simply responding to their needs, not demanding that they make a case for why they should fit a legal categorisation deemed worthy of assistance. Another way in which the refugee subject, as constructed in law, replicates bourgeois norms is in the insistence upon persecution as intentional and the result of a direct relationship; an identified agent of violence, causing harm to a particular victim. According to the *travaux préparatoires* of the 1951 Convention, the Israeli delegate made the curious argument that people fleeing natural disasters could not be included within the refugee definition because 'fires, floods, earthquakes or volcanic eruptions' do not differentiate 'between their victims on the grounds of race, religion or political opinion' (Einarsen 2011, pp. 61–62). Either this was a completely disingenuous argument—a possibility—or else this reflected an inability to conceptualise how structural violence in the form of oppression and exploitation renders some people more vulnerable to natural disasters than others. The imposition of tropes of bourgeois subjectivity can be seen in refugee law in other ways too. For example in the fact that claims must be based on the individual experience of persecution; collective claims for refugee status based solely on fear and persecution as members of a collective are excluded from refugee law. The refugee is forced to perform a type of agency judged on the basis of choice—choosing to adhere to or proselytise a

political or religious belief, choosing to cross a border, choosing to make a claim etc.[35] Political violence that does not fit the 'rational' or 'enlightened' norms of liberal democracy—anarchism, Islamism, or any struggle which does not seek state power or whose organisational form is disparate—is not considered political. In all these ways the prism of law filters out so many of the complexities of the refugee experience.

Restraints and Impulses

Sticking with the Marxist perspective, let us now examine how a more sophisticated understanding of agency can be framed. We begin with Marx's classic statement:

> Men make their own history, but not of their own free will; not under circumstances they themselves have chosen but under the given and inherited circumstances with which they are directly confronted. (Marx 1973, p. 146)

Marx wrote this in order to describe how the French revolutionaries had managed to smash 'the feudal basis to pieces', while at the same time looking backwards to the 'costumes' and 'slogans' of Rome with which to legitimise their actions (Marx, 1973, p. 147). Just a few years later Marx, in another famous statement of his philosophical method, wrote:

> At a certain stage of development, the material productive forces of society come into conflict with the existing relations of production…From forms of development of the productive forces these turn into their fetters. Then begins an era of social revolution. (Marx 1975, pp. 425–426)

What Marx is outlining in these two cornerstones of his philosophy is the idea that human beings do not simply react to accidental circumstances (they make history, in greater or lesser ways), but their agency is conditioned by certain restraints (the conditions in which they find themselves) and impulses (the need to break the fetters on their own further development as individuals and as a society).

Perhaps the key method for identifying how agency is situated between constraints and impulses is through an understanding of structures. As I have already noted, refugee law is predicated upon the legal fiction that the genuine refugee is a product of violence inflicted by an agent; structural violence as a result of social oppression and economic exploitation is completely ignored. The idea that such things are the result of a completely agentless process has been aptly critiqued by Susan Marks. She too identifies the structural borders that govern agency, describing them as 'systemic constraints and pressures' (Marks 2009, p. 2). She accepts the premise of Roberto Unger's notion of 'false necessity' that 'things do not have to be as they are' (Marks 2009, p. 3); there is potential for agents to act to alter or eliminate existing structures. Yet while transformative change is possible,

[35] In addition to the discussion of refugee law statutes and cases above, see, for example, *Mendis v Secretary of State for the Home Department* [1988] WL 1608759; *Secretary of State for the Home Department v Ahmed* [1999] WL 1071271.

Marks asks us to challenge what she defines as 'false contingency', whereby 'the injustices of the present order are made to appear as though they were random, accidental and arbitrary' (Marks 2009, p. 20). The very real factors which determine, if not conclusively so, our actions 'shape both realities and possibilities'. Marks outlines a typical way in which false contingency operates:

> [T]he angle of vision may be too narrow, or the time-frame too short, so that patterns and logics cannot appear. Systemic factors may also be removed from view insofar as the focus is on issues conceived as monadic and autonomous, rather than relational and interactive. (Marks 2009, p. 15)

This description fits absolutely the restricted narrative of law, the narrow vision that frames a clear beginning and end to every narrative of claim. In refugee law each claim for asylum starts with an identifiable persecutor and ends with the crossing of a border. Less than this and the claim fails; more than this and the facts become superfluous. If the narrative does not begin with persecution then the claimant is a mere 'economic migrant'; if it ends without the crossing of a border then they are Internally Displaced Persons (IDPs) for whom meaningful asylum is closed off. If their claim involves structural inequalities associated with, for example, class exploitation or oppression, this has little or no bearing on a claim for protection.

In critiquing 'false contingency' Marks asks us to accept that agency is indeed severely circumscribed, determined, by existing social structures, of which law is a major example. How then can refugees act as subjects, in a form given to them in law and that permeates through wider society, yet at the same time transcend these narrow boundaries, these constricted notions of agency and victimhood? Here it is worth recalling Marx's point about how the French Revolutionaries were forced to adopt the costumes and slogans of Rome, as the horizons of republicanism in 1789 offered little else to give their struggle legitimacy; they made history, but not using the signs or the identities of their choosing. In trying to unpick the way in which we can transcend our given subjectivities while remaining constrained by them Alex Callinicos offers us a possible way out. By seeing agency as something performed within a process in which 'structures *enable* as well as constrain' Callinicos attempts to steer a course that avoids the rigid determinism of orthodox historical determinism and the radical indeterminism that flows from certain precepts of post-modernism (Callinicos 2009, p. 214, emphasis in original). He argues that a more sophisticated understanding of historical materialism 'specifies the structural capacities possessed by agents' while acknowledging the limitations imposed by the given (objective) nature of those structures (Callinicos 2009, p. 106). But crucially for Callinicos, the severe constraints imposed by given structural forms mean that individuals are rarely if ever able to transform the forms of subjectivity imposed upon them by these structures:

> Structural capacities, the powers agents possess by virtue of their position in the relations of production, typically cannot be exercised by individual persons. Their exercise requires the construction of collectivities through

> which agents co-ordinate their actions on the basis of a recognised common identity. (Callinicos 2009, p. 214)

In other words, it is only through collective struggle that subjectivities can be (re)formed in ways that transcend those already pre-formed through existing structures. Yet, paradoxically, the way in which these common identities are developed is bounded by the pre-existing structures. Callinicos makes his point by focusing upon the example of *Solidarność,* a movement whose ideology was shaped by Catholicism and nationalism, yet whose practice pointed towards a more radical form of class-consciousness (Callinicos 2009, pp. 248–250). The given or accidental nature of the circumstances in which the shipyard workers of Gdansk found themselves—facing a 'communist' regime, in a country with a strong Catholic-nationalist tradition of resistance—both enabled their struggle and constrained it; the huge power of Catholicism as a legitimating ideology gave them a weapon with which to fight, but its limitations along with the 'communist' nature of the state served to foreclose a fully self-conscious class struggle. The particular nexus of place, time, history and ideology set the terms of agency.

Callinicos takes the argument a step further than structures simply constraining and impelling certain actions, for this could simply lead us back to a deterministic view of agency. Borrowing a phrase from Erik Olin Wright—'structural capacities'—he identifies a space within which agents possess a degree of 'free play', in which a variety of choices are open to them, but with constraints imposed as to the range of choices and the extent to which they can be pursued (Callinicos 2009, pp. 274–275). If we are to avoid framing agency in terms of an abstract paradigm imposed upon subjects, involving all the prejudices and borders imposed by the prevailing ideology, then we must indeed recognise that subjects are formed through engaging in their own subjectivisation, in the 'free play' of collective contestation and resistance. This means that we must shift our focus away from law and towards politics, the realm of what Rancière terms 'dissensus', where the 'part [of society] that has no part' asserts its right to be (Rancière 1999, p. 9). The remainder of this article will therefore explore a concrete example of how refugees have successfully shifted their struggle from the purely legal into the political realm also, and in doing so have moved beyond the false binary of the accidental and agency.

Emerging from the Shadows

The *sans-papiers* erupted onto the scene in 1996 with their occupation of the church of St. Ambroise in Paris, and have remained a force in French political life ever since. As such, the previously marginalised and invisible groups that make up the movement have achieved a re-insertion of themselves within the polis as active subjects. Up until this moment they had been constructed in the public mind in two ways. First, they were generally known not as *sans-papiers* but as *clandestins;* illegal, hidden, a threat. So pervasive was this epithet that one of the first statements issued by the occupiers of St. Ambroise was entitled *Le SOS des clandestins de Saint-Ambroise* (Diop 1997, p. 76). In the initial discussions in the occupation many

people expressed the problem of lacking a collective identity, but also in the sense of not being recognised as having a legal status, of being hidden (Diop 1997, p. 28). Their self-renaming appears to have come about partly as a response to a question put to them about how they wanted their demands addressed to the government: 'Tell the French government that we are not terrorists. We are not illegals (*clandestins*). We are only seeking papers' (Diop 1997, p. 77). One of the leading figures in the occupation writes of how effecting this change of nomenclature was also part of escaping the legal framework that forced them into the shadows:

> We had chosen a new form of struggle and decided to come out into the open to point the finger at the dramatic situations caused by the laws themselves. We wanted to force the French to see, to open their eyes. We wanted to demonstrate that we had no fear of repression. We no longer wanted to live in the shadow cast by the laws. (Diop 1997, p. 76)

Their new name was also partly a self-conscious throwback to another group of *sans* who possess a mythical role in the founding of the French Republic: the *sans-culottes* (Diop 1997, p. 95); whereas the French revolutionaries adopted the 'costumes' of Rome, so the occupiers of St. Ambroise in turn adopted those of the stormers of the Bastille.

In contrast to the identification of them as a hidden threat, the *sans-papiers* were viewed by those more sympathetic to their situation almost solely in terms of victimhood. Indeed one of the initial stages in their struggle was to free themselves from the paternalistic attitude held by many of their own supporters. For example, one statement from the trade unions at the beginning of the movement attempted to garner sympathy for the plight of the *sans-papiers* by depriving them of their agency and reasserting their role as passive subjects: 'They are not guilty (*coupables)*, but victims' (Blin 2005, p. 70). There was then an attempt to impose a leadership of 'mediators', a group of the great and the good of the liberal-left, that was later rejected by the *sans-papiers*. The *sans-papiers* were, in fact, able to maintain autonomy throughout the struggle by holding regular meetings in the various sites of their occupation, by electing their own spokespeople and deciding for themselves the terms of their claims, and what would be an acceptable outcome (Diop 1997, p. 78). For instance, they resolutely opposed settlements that would grant papers to some but not others, based on the notion of deserving/undeserving migrants or good/bad cases. It is also worth pointing out that the *sans-papiers* include a broad range of immigrants, and not just refugees. What they have in common is that for one reason or another they have been denied official documents regularising their residence in France. Many are straightforward asylum-seekers who have failed the legal test for refugee status, or who straddle the artificial, and legally constructed, dividing line between refugees and economic migrants. Reading through testimonies of some of the participants it is clear that the denial of refugee status often foundered on one of the issues I discussed earlier in relation to the assumptions about agency that exist in refugee law (Sané 1996; Cissé 1997; Diop 1997; Goussault 1999; Cissé 1999; Collectif des Sans-Papiers du Loiret 2000; Sambou et al. 2008). In fact one of the defining features of the movement has been precisely to resist the categorisations imposed upon them by law, and indeed the premise that each of them must prove

their individual case in law. This aspect is evident in the key slogan raised by the movement: '*Papiers pour tous*'.

One controversial aspect of the *sans-papiers*' struggle has been their use of the tactic of the hunger strike. In an exhaustive study of the question Johanna Siméant has shown how this has, in fact, been a tactic used by various groups of undocumented migrants in France since the early 1970s (Siméant 1998). She underlines how one of the main purposes of the hunger strike has been that it exposes to public view the hidden violence, in the form of super-exploitation, poverty and precarity, suffered by those at the margins of society (Siméant 1998, p. 330). It is also a tactic deployed in order to reclaim an identity based on dignity and control in deciding when and on what terms to cease the hunger strike (Siméant 1998, p. 344). As one of the hunger strikers during the occupation of St. Bernard in the summer of 1996 put it: 'The government will regularise us or it will not. But they cannot play with our lives like this…We will see this through to the end, until regularisation, and if we don't have our papers then, too bad, we will die' (Blin 2005, p. 103). The assertion of agency works here on a number of levels, one of which is the fact that if they are to die it will not be due to the accidental circumstances of being trapped in a war zone, or suffocating in the back of a lorry attempting to flee. Instead their death will have been achieved for a purpose and in public view. They have relegated the accidental nature of their circumstances to the background without completely abandoning it. They might be starving but they are no longer victims. The *sans-papiers* were thus able to 'transform their weakness into a threat' (Blin 2005, p. 104). Although some at the time criticised the hunger strike as a self-defeating tactic, due to the practicing of violence upon themselves, Thierry Blin is correct to point out that it is perhaps one of the few tactics open to those operating from a position of socio-political weakness (Blin 2005, pp. 100–104). It is thus, in one sense, a desperate tactic, yet it did in these circumstances succeed in forcing concessions from a strong and powerful government.[36] In manipulating the pre-existing construct of themselves as victims the hunger strikers are an example of how structures enable as well as constrain. The *sans-papiers* were able to work within the constraints imposed upon them to achieve a measure of liberation. The hunger strike was an example of the way in which the ideological trope of victimhood was turned into its opposite, an aggressive act that forced the government that was denying them regularisation into an exposed position. In other words, the *sans-papiers* were able to both appropriate and subvert their own interpellation through complicating tropes of agency and the accidental.

A similar appropriation of the dominant discourse leading to its subversion can be found in other aspects of the *sans-papiers*' struggle. Blin's critical reading of the movement argues that too much of their strategy was focused around constructs borrowed from a depoliticised, moralistic humanitarianism (Blin 2010). While some of these criticisms have merit, he nevertheless acknowledges that the *sans-papiers* were operating at a time when the 'political landscape has been repainted in the colours of morality, where we no longer speak of class struggle but of exclusion, of

[36] The right-wing government then in power controlled over 80 % of the seats in the National Assembly and the right's candidate, Jacques Chirac, had won the Presidency just the year before.

humanity' (Blin 2010, p. 142). However, 'in the case of forced migrants the weight of constraint is overwhelming and the range of choices is often minimal' (Marfleet 2006, p. 193). Yet the efficacy of the *sans-papiers*' strategy is evidenced in two ways, one immediate, and the other longer term and structural. The very fact of emerging from a condition of, if you like, *clandestinité* to the field of engagement within the polis is itself a self-evidently political act. Second, the fact that, whether by moralistic means or otherwise, the *sans-papiers* engaged the support of the trade unions made their discourse precisely one of class struggle, i.e. by overcoming the usual playing off of the super-exploited undocumented migrant against the established workforce in danger of having their pay and conditions undercut by the former. Yet the fact that the *sans-papiers* were able to forge strong links with the trade unions so effectively is a testament to precisely their engagement at the level of class solidarity. The emphasis on a 'shared social fate' between documented and undocumented workers drove a wedge through an argument that is frequently used to divide 'indigenous' workers from immigrants. Anne McNevin writes:

> In a neoliberal environment in which market value increasingly determines the validity of one's social contribution, the Sans-Papiers' claims *as workers* provide a powerful form of leverage and a legitimising image that directly contradicts the right-wing assault on migrants in general as antisocial lawbreakers. (McNevin 2011, p. 110)

McNevin is alive to the problems inherent in adaptation to the construct of the neo-liberal subject that privileges the economically 'productive' over those who are constructed as parasitical. Yet the terms of the discourse put forward by the *sans-papiers*, while appropriating neo-liberal assumptions, goes beyond them and challenges them. It is once again a demonstration of how 'structures enable as well as constrain'. Recent statements from the movement which highlight the reasons for their flight from their home countries assert their agency in ways which encompass all irregular migrants, whether economically productive or not, and ignores the boundaries of the usual discourses on forced migration which tend to place its subjects at the level of mere victims:

> [We] have *chosen* to leave Africa…we always *decided* to move…we *want* a possibility, we *wanted* to keep our future in our hands…we *wanted* to free ourselves from a system of exploitation which has no borders. (McNevin 2011, p. 112, emphasis added)

McNevin emphasises the overcoming of victimhood and the accidental evidenced by this statement when she writes: 'their starting point is recognition as active agents in their own political futures, both at the point of choosing to migrate and within the context of their migration destination' (McNevin 2011, pp. 112–113). At the same time the *sans-papiers* are keen to reject notions of 'false contingency' in regards to their presence in France, that it is pure chance that has led these forced migrants to that country. At the outset of the movement one of its leading spokespeople, Madjiguène Cissé, alluded to the fact that most of them had come from countries previously colonised by France when she wrote: 'it's not an accident that we find ourselves in France' (Cissé 1997, p. 38).

It is here, in these types of contestation, that it becomes evident how the *sans-papiers* have posited forms of subjectivity that can rupture the tropes of citizens and outsiders. In doing so, they have re-established a discourse of the political as 'dissensus', the conflict of opposing subjects immune from any kind of universalist consensus (Rancière 2010). Moreover, by establishing such a discourse the *sans-papiers* have forced French society to acknowledge the complex circumstances that have led to their flight, whether it be poverty, persecution, ties to the former colonial master-country or accidental circumstances which have led to their irregular status. They have enacted the slogan coined by Alain Badiou: 'everyone here is from here' (Hallward 2002). Agency and the accidental are, in the discourse of the *sans-papiers,* inseparable and irreducible. They have, in short, successfully subverted a legally fictitious notion of agency, one that also obscures the role of the accidental, which had resulted in the denial of papers in the first place. Through their collective political struggles that have problematised the paradigm of legal and illegal immigration, and reconfigured their identities as forced migrants employing a much more sophisticated, and true, narrative of themselves as active in shaping their conditions, yet constrained and impelled by circumstances not of their choosing.

Conclusion

Liberal political theory posits subjects of capitalism and law as rational beings acting freely. Yet it also champions the freedom of the market, an unstable and anarchic system, in which accidents, in the sense of unplanned outcomes, will inevitably happen. Refugees find themselves at the heart of this paradox. The political, economic and, increasingly, environmental chaos of global capitalism is forcing more and more people from their homes. Sometimes individual or collective persecutors are involved. Sometimes active resistance is also a factor. But for many forced migrants today it is the systemic, and thus impersonal, forces of the market and human-made climate change that are responsible for their plight. Such effects may be unplanned but they are not unforeseen, nor do they fall outside of the responsibilities of the avatars of capitalist globalisation. This is at the heart of Marks' concept of 'false contingency'. Yet when refugees encounter the law as arbiter of their status as refugees, they find tropes of agency imposed upon them and their narratives in order to be recognised as refugees and thus worthy of protection. The scope of what constitutes the accidental as well as the potential of human agency are so wide that the legal form of the refugee, certainly as presently constructed, is incapable of embracing such a complex subjectivity, but the problem goes deeper than that; for the legal form is itself incapable of embracing notions of agency that do not conform to bourgeois norms. Thus only by rejecting the legal framework of agency and turning to the political can a discourse be created that recognises the complexities in how the accidental and agency are intertwined. Such a shift is necessary if the refugee is to escape from the 'crushed and flattened' construction of the refugee that prevails today (Agier 2011, p. 23). The example of the *sans-papiers* show that such a transformation is possible.

Taking my cue from the concept of 'false contingency', I want to end by posing the question of the agency and history of the states of the Global North, for whom the arrival of refugees appears to be such a burden. In 1989 Michel Rocard, then Prime Minister of France, explaining his government's shift to the right on immigration and asylum, stated: 'We cannot accommodate all the misery of the world' (*Nous ne pouvons pas accueillir toute la misère du monde*). We have here the familiar model that we identified at the beginning of this article: human beings in danger and seeking help are reduced to an amorphous, if tragic, mass pressing at our doors—the flood. But at the same time the sentiment is expressed of the bewildered Westerner struggling to cope with this unexpected and unreasonable demand for assistance. What is so offensive about Rocard's statement is the light it sheds on the complete lack of self-awareness of the Global North's culpability in creating the misery that has come knocking at its doors: the legacy of imperialism, wars of aggression, neo-liberal neo-colonialism, environmental destruction—the list is long. As Vincent Decroly acidly comments: 'as if "all the misery of the world" was something inevitable, a reality parachuted in from some unknown and particularly malicious heaven' (Decroly 2001, p. 235). Thus to move beyond the false dichotomy between the accidental and agency in relation to the refugee is not only to recognise the justice of receiving them on their own terms rather than those imposed upon them, but it is also to expose the hypocrisy of states, and their law, that now presume to judge on the refugeeness of the refugee.

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