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Revelation out of Rupture: Building Human Rights from the Bottom Up

DANIEL I. MORALES[†]

INTRODUCTION

Children and parents are dying in the Mediterranean;¹ Europe, at Italy's behest, refuses to rescue drowning migrants in its waters.² The American economy booms,³ unemployment hovers at its lowest level in history;⁴ and yet, our National government has effectively suspended asylum for refugees from the global south;⁵ refugees tired of waiting patiently to claim their human rights attempt to cross the border between Mexico and the U.S. and are teargassed⁶ or left to drown in rivers⁷ en route to an America that will not welcome them. If refugees manage to arrive on United States soil, they are caged-

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1. *Missing Migrants Project*, INT'L ORG. FOR MIGRATION (Mar. 26, 2020), <https://missingmigrants.iom.int/region/mediterranean>.

2. Paul Hockenos, *Europe Has Criminalized Humanitarianism*, FOREIGN POLICY (Aug. 1, 2018), <https://foreignpolicy.com/2018/08/01/europe-has-criminalized-humanitarianism/>.

3. Yun Li, *This is Now the Longest Economic Expansion in History*, CNBC (last updated July 2, 2019), <https://www.cnbc.com/2019/07/02/this-is-now-the-longest-us-economic-expansion-in-history.html>.

4. Anneken Tappe, *The US Economy Added 225,00 Jobs in January, Beating Expectations*, CNN (Feb. 7, 2020), <https://www.cnn.com/2020/02/07/economy/january-jobs-report/index.html>.

5. Jens Manuel Krogstad, *Key Facts About Refugees to the U.S.*, PEW RESEARCH CENTER (Oct. 7, 2019), <http://pewresearch.org/fact-tank/2019/10/07/key-facts-about-refugees-to-the-u-s/>.

6. Alan Yuhas, *U.S. Agents Fire Tear Gas Across Mexican Border*, N.Y. TIMES (Jan. 1, 2019), <https://www.nytimes.com/2019/01/01/world/americas/migrants-border-tear-gas.html>.

7. Azam Ahmed & Kirk Semple, *Photo of Drowned Migrants Captures Pathos of Those Who Risk it All*, N.Y. TIMES (June 25, 2019), <https://www.nytimes.com/2019/06/25/us/father-daughter-border-drowning-picture-mexico.html>.

even if they are kids.⁸ As fresh horrors emerge daily from Washington,⁹ London,¹⁰ Hong Kong,¹¹ India,¹² China,¹³ well, nearly every nation on Earth,¹⁴ we, who have dedicated our lives to the pursuit of knowledge that ensures human flourishing across borders, must resist becoming numb or despondent. Even more important, perhaps, is that we embrace this terrible moment of rupture as a moment of revelation.¹⁵

Moments of revelation are difficult for people like us, professors, “experts.” We think we know things. We think we know how the world works, in particular. And in moments of revelation—if we really encounter them—we learn that we didn’t know much at all, or that we missed what was most important. Yet there are opportunities in the face of this encounter with our own ignorance. We can enrich our understanding by integrating this new information into what we know, and using it to prune branches of knowledge which have proven false. We could also do what’s easier: put our heads in the sand and cover our ears, pretending that nothing

8. Clara Long, *Written Testimony: “Kids in Cages: Inhumane Treatment at the Border”*, HUMAN RIGHTS WATCH (July 11, 2019), <https://www.hrw.org/news/2019/07/11/written-testimony-kids-cages-inhumane-treatment-border>.

9. See *Barr v. East Bay Sanctuary Covenant*, 140 S. Ct. 3 (Sotomayor, J., dissenting).

10. Luke McGee, *No-deal Brexit is Back—and It Looks More Likely Than Ever*, CNN (Feb. 29, 2020), <https://www.cnn.com/2020/02/28/uk/no-deal-brexit-is-back-analysis-intl-gbr/index.html>.

11. Daniel Victor, *Why are People Protesting in Hong Kong*, N.Y. TIMES (Nov. 18, 2019), <https://www.nytimes.com/2019/11/13/world/asia/hong-kong-protests.html>.

12. Mira Kamdar, *What Happened in Delhi Was a Pogrom*, THE ATLANTIC (Feb. 28, 2020), <https://www.theatlantic.com/ideas/archive/2020/02/what-happened-delhi-was-pogrom/607198/>.

13. Anna Fifield, *China Compels Uighurs to Work in Shoe Factory that Supplies Nike*, WASHINGTON POST (Feb. 29, 2020), https://www.washingtonpost.com/world/asia_pacific/china-compels-uighurs-to-work-in-shoe-factory-that-supplies-nike/2020/02/28/ebddf5f4-57b2-11ea-8efd-0f904bdd8057_story.html.

14. Norimitsu Onishi, *France Announces Tough New Measures on Immigration*, N.Y. TIMES (Nov. 7, 2019), <https://www.nytimes.com/2019/11/06/world/europe/france-macron-immigration.html>; Helen Davidson & David Fanner, *Life on Manus: How Australia Transformed a Tropical Island Into a Prison*, THE GUARDIAN (July 30, 2019), <https://www.theguardian.com/australia-news/video/2019/jul/30/life-on-manus-how-australia-transformed-a-tropical-island-into-a-prison-video>; Ivan Duque, *Colombia is Committed to Helping Venezuelan Refugees. But We Can’t Do It Alone.*, WASHINGTON POST (Feb. 27, 2020), <https://www.washingtonpost.com/opinions/2020/02/27/ivan-duque-colombia-venezuela-refugees/>.

15. I intend the religious/divine valence of revelation here, alongside its more prosaic meaning, to reveal unknown knowledge. Something about this moment feels both calamitous and like an opening for new possibilities.

happened. We can simply ignore the content of the revelation and carry on as before. Rather than viewing the moment of revelation as a moment that brought forward new data, new evidence that we have a duty to incorporate into our vision of “how the world works,” we see the revelation as aberrant, an outlier that we can discard. (This worked for economists for a while!)¹⁶ It is not the approach I suggest.

Instead we can embrace the less comfortable choice. In the moment of revelation and rupture we can truly look the data in the eye. We can look the new destabilizing, messy information in the eye and hold it in our gaze. And use that data to anchor us as we experience the terrifying feeling that history did not end;¹⁷ here we are again, beset in the midst of it; and worse—in the midst of history cast as experts, but now knowing we haven’t a clue. This is the frightening path I suggest to this group. And what follows is an example of what that path looks like for me, for my effort to assimilate to my vision of “how the world works” to at least one instance, one “moment of revelation,” from the current global Human Rights crisis.

MOMENT OF REVELATION: HUMAN RIGHTS ARE DANGEROUS; DIG DEEPER FOR HUMAN RIGHTS

The moral underpinning of asylum law was the holocaust and the broader post-WWII moment,¹⁸ where the terrifying combination of nationalism, bureaucracy and the modern technology of death blew up for all to see.¹⁹ Asylum law, of course, is not alone in its parentage. Every major global institution and legal regime was born in this old moment of revelation, or can trace its *raison d’être* back to it.²⁰ But what we’re learning now, in our new moment of revelation, is that those institutions and legal regimes are not enough to secure human rights and that those regimes and institutions lack legitimacy.²¹ Just as bad, these institutions also lack the ability to

16. John Cassidy, *After the Blowup*, NEW YORKER (Jan. 4, 2010), <https://www.newyorker.com/magazine/2010/01/11/after-the-blowup>.

17. See, e.g., FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992) (proclaiming the end of the Cold War marked the “end of history”).

18. See generally DAVID MARTIN, T. ALEXANDER ALEINIKOFF, HIROSHI MOTOMURA & MARYELLEN FULLERTON, *FORCED MIGRATION LAW AND POLICY* 43-58 (2d ed. 2013).

19. See generally HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* (1951).

20. Peter Goodman, *The Post-World War II Order is Under Assault From the Powers that Built it*, N.Y. TIMES (Mar. 26, 2018), <https://www.nytimes.com/2018/03/26/business/nato-european-union.html>.

21. *Id.*

command the assent of the wealthy citizens who must be convinced to engage, and to apply, and to extend the human rights project that these institutions and laws were supposed to perpetuate.²²

The German case is particularly instructive. Germany was supposed to have learned the lessons of WWII better than any other country. And Angel Merkel acted as if that belief was true. But as it became clear to her that her citizens would not readily act on their legal and moral duty to admit Syrian refugees en masse, she made a valiant effort to resuscitate the moral force of the postwar order.²³ She implored Germans to act on the lessons of their history, to take in the huddled masses fleeing the latest, devastating war. “Wir schaffen das!”²⁴—“We can do it!” she famously said; what she meant was, we can take on this moral project and live up to—perhaps, even redeem—our history.

We know what happened. Today this “we can do it!”—more precisely, we can do human rights!—moment is viewed as a terrible and—worse—naïve error.²⁵ We can do human rights was a mistake, by the standard account, because Merkel should have known that German citizens’ commitment to global human rights was not robust enough to engage in the project of admitting and hosting a large population of refugees. The right call would have been to reject the refugees and hold fast onto power in Germany, and in Europe, in order to accomplish the more important thing—to shore up center right-power and keep right-wing nationalism at bay.

Here the analysis ends for most experts, but that can’t be enough for us human rights partisans in this moment of revelation. It can’t be enough because notice the lesson of the standard account: cashing out

22. The number of refugees has never been larger and the international system that is supposed to protect refugees has been impeded by sovereign nations in the rich west developing strategies to keep refugees off their soil. See, e.g., Arelis Hernandez & Kevin Sieff, *Trump’s ‘Remain in Mexico’ program dwindles as more immigrants are flown to Guatemala or are quickly deported*, WASHINGTON POST (Feb. 27, 2020), https://www.washingtonpost.com/immigration/remain-in-mexico-deportation-asylum-guatemala/2020/02/20/9c29f53e-4eb7-11ea-9b5c-eac5b16dafa_story.html; See also Matina Stevis-Gridneff, *Europe Keeps Asylum Seekers at a Distance, This Time in Rwanda*, N.Y. TIMES (Sept. 8, 2019), <https://www.nytimes.com/2019/09/08/world/europe/migrants-africa-rwanda.html>.

23. See generally SAMUEL MOYN, CHRISTIAN HUMAN RIGHTS (2015).

24. Emily Janicik, *Wir Schaffen Das: Is it a Reality?*, THE WIRE (May 22, 2018), <https://thewire.wisc.edu/2018/05/22/wir-schaffen-das-is-it-a-reality/>.

25. Gökce Yurdakul & Hartmut Koenitz, *We Can Do It! (Or Can We?) Angela Merkel’s Immigration Politics*, WEATHERHEAD CENTER FOR INT’L. AFFAIRS (May 24, 2019), <https://epicenter.wcfia.harvard.edu/blog/we-can-do-it-angela-merkel-immigration-politics>.

Human Rights is *dangerous!* The notion that “we can do this” in Merkel’s words, that we—Germans—can live up to our obligations under international human rights law is the CAUSE of a renewed interest in *Nazism in Germany*. Sit with that. The Ur-Human right²⁶—the right to asylum—is dangerous, too dangerous to be anything more than words, and so dangerous that states “must” let people die en route to shelter for fear of the internal political ramifications of living up to international human rights obligations.

If human rights are too dangerous to do—that is, actually to implement in the times of crisis where they are most needed—then what are human rights doing? What are we—the human rights experts—doing? Is the Rich democracies’ current implementation of Human Rights, with its dead bodies in oceans and rivers; its criminalization of humanitarian Aid and Rescue—the criminalization, that is, of doing human right; is this the best we can hope for in our always already imperfect, even Fallen, World? If this really is the best we can hope for, we should stop calling the Asylum project human rights and label it what it is—State charity provided not based on the scope of the need, but rather on the needs and limits of those who give. After all, if in practice the most institutionally established and entrenched human right does not in fact operate as a right, then we expressly deceive others and ourselves with the label—it renders the human rights project hypocritical in the extreme—a false promise to mask the fallenness (or the never-risenness) of the “First World.”

One cynical response to this revelation is to give up. Maybe the whole project of human rights was doomed by human nature? Another response is to double-down on current strategies. This response would accept the essentialist take on human nature in the wealthy global north and in response, urge better, more forceful international or domestic countermajoritarian laws or institutions to enforce human rights’ obligations: stronger international treaties with more sanctions attached for non-compliance; a larger role for Brussels, the European court and the EU. In America: binding treaties; less discretion for the executive to roll-back asylum protections; restore robust judicial review over asylum claims in Article III courts.

Many of these changes might pan out in the short or long run, but I think they fail to respond to some critical data points revealed by our current moment. These changes fail to embrace this moment

26. The right to asylum is the most-widely accepted and institutionalized human right.

of revelation.

First, what the prior response gets right: we do have to take in the fact that the individual moral foundation for human rights is weak for the median German voter and that weakness translates to insufficient political support for the refugee project at the necessary scale in this moment. That is very clear. But we need not treat this fact—of low support for refugees—as natural, and certainly not ineluctable. While Merkel’s “we can do this!” was clearly not enough to sufficiently arouse German’s moral passions, the passions and moral convictions of human beings are not fixed and they can be aroused to humanitarian purposes. In other words, We can do this *in principle*, there is no iron law of physics that prevents it.

A second data point. The median German voter’s view of Syrian refugee admissions may have sealed the fate of “Wir schaffen das,” but it is not the only viewpoint. We have to appreciate that national populations are in themselves diverse and do not speak in one voice on this question. For a large percentage of Germans, Merkel’s project is and was their project. And that diversity of opinion has a geography.²⁷ We have seen the same diversity on display in the United States, indeed Trump’s roll-back of asylum and immigration policies are deeply unpopular.²⁸ It’s only by virtue of his hutzpah, the electoral college, and the wide berth given to executive power over asylum and immigration law, that his radical immigration and asylum plans are being implemented. In other words, there exist powerful, wealthy geographies across the world with super-majorities of residents who want to do human rights. But these geographies, of course, are disempowered because they do not map on to national borders—the only boundaries that matter in the international system.

These are things I notice in this moment of revelation. And here’s how they mark my thinking about a path forward for human rights. First: at this juncture in the human rights project building support for human rights norms has to be a bottom up, not a top-down project. Only the granular accretion of human rights norms can build a human rights politics that can withstand the moments of crisis where human rights are actually needed. So, German-by-German,

27. Erik Kirschbaum, *Germany Still Has an East-West Divide—But Now It’s About Attitudes Toward Refugees*, L.A. TIMES (Sept. 17, 2018), <https://www.latimes.com/world/la-fg-east-west-germany-refugees-20180917-story.html>.

28. Rick Noack, *The Urban-Rural Divide that Bolstered Trump Isn’t Just an American Thing; It’s Prevalent in Europe, Too*, WASHINGTON POST (Nov. 27, 2016), <https://www.washingtonpost.com/news/worldviews/wp/2016/11/27/the-urban-rural-divide-isnt-just-evident-in-american-politics-its-prevalent-in-europe-too/>.

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American-by-American, Aussie-by-Aussie, the moral foundation for human rights commitments must be laid. If this is right, then what institutional response should follow? How does the project of human rights become a personal project that is scaled-up—rather than a national project imposed from on high? Here are a few insufficient thoughts:

For one, we might look to decentralize refugee admissions in two ways. Receiving countries might follow Canada's lead and allow expansive private sponsorship of refugees. With private sponsorship of refugees, the project of refugee admission can literally become a voluntary personal project, to help to settle and integrate refugees into the host nation, all the while unearthing for individual sponsors and for the refugees themselves knowledge of what the project of human rights really is in a granular, intimate way; allowing these citizens to feed back that knowledge into the national political systems empowered by the international order.

A second form of decentralization that will perhaps be more controversial is jurisdictional. Here the American example is most useful—just because I know more about it. If localities had the power to admit refugees, America might actually be able to do human rights. California, Illinois, New York, Austin, Bloomington, Houston, Chicago, Los Angeles, Minneapolis. If these Sanctuary Cities and states had the power to actually express their policy preferences and admit refugees, not only could we do human rights, but we could build evidence that we can do human rights, and nurture the moral foundation of human rights in certain redoubts, even when the median voter is unpersuaded of their importance. Doing human rights, voluntarily, helps us do more human rights. Pushing human rights down from the national level means doing more human rights, deepening our global commitment to human rights. Or, that's my theory of revelation, anyway.