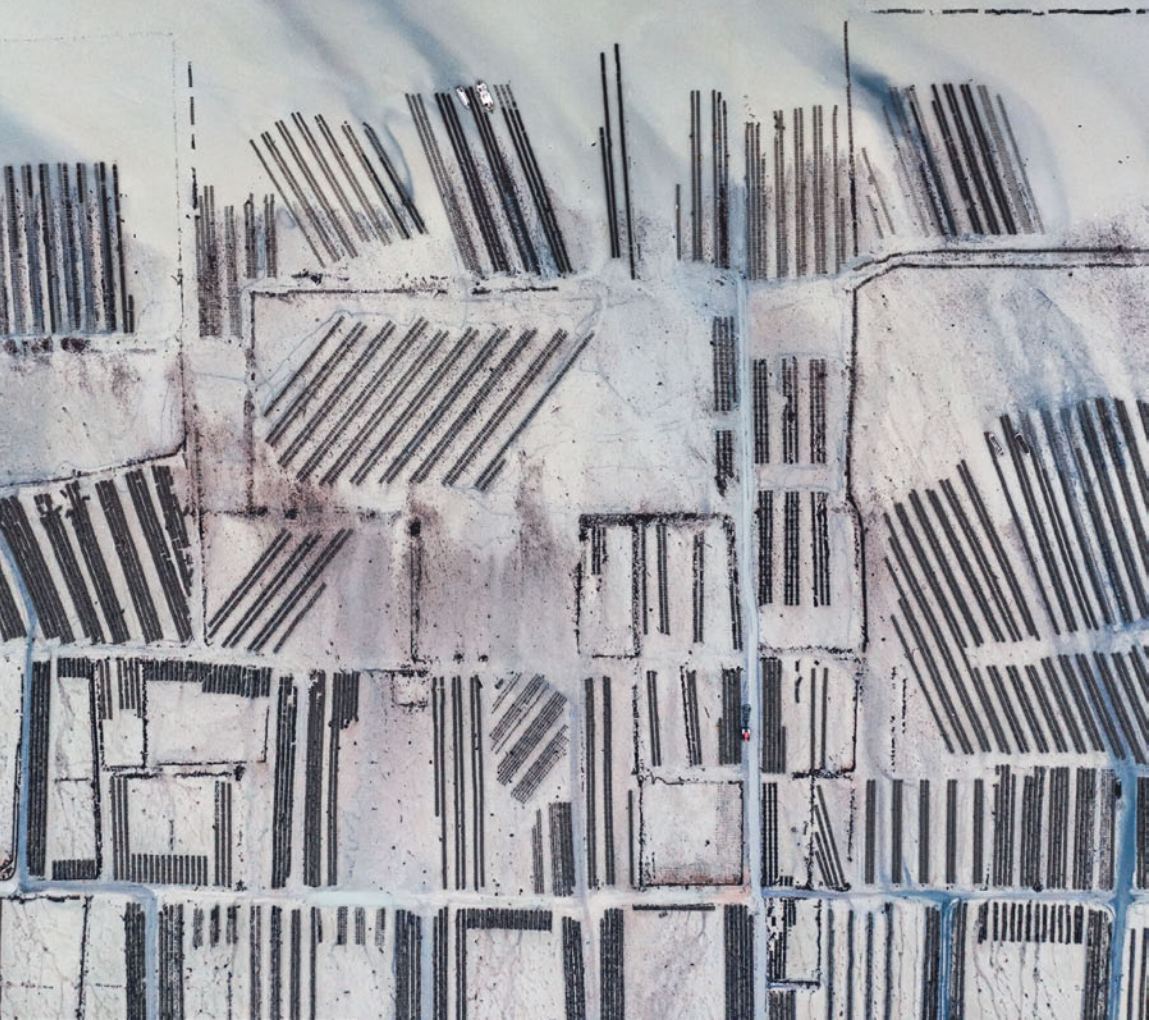


Theorizing Local Migration Law and Governance

Edited by Moritz Baumgärtel
and Sara Miellet



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THEORIZING LOCAL MIGRATION LAW AND GOVERNANCE

In many regions around the world, the governance of migration increasingly involves local authorities and actors. This edited volume introduces theoretical contributions that, departing from the ‘local turn’ in migration studies, highlight the distinct role that legal processes, debates and instruments play in driving this development. Drawing on historical and contemporary case studies, it demonstrates how paying closer analytical attention to legal questions reveals the inherent tensions and contradictions of migration governance. By investigating socio-legal phenomena such as sanctuary jurisdictions, it further explores how the law structures ongoing processes of (re)scaling in this domain. Beyond offering conceptual and empirical discussions of local migration governance, this volume also directly confronts the pressing normative questions that follow from the growing involvement of local authorities and actors. This title is also available as Open Access on Cambridge Core.

MORITZ BAUMGÄRTEL is an assistant professor in law and sociology at University College Roosevelt and was the senior researcher of the ‘Cities of Refuge’ research project based at Utrecht University. He is the author of *Demanding Rights: Europe’s Supranational Courts and the Dilemma of Migrant Vulnerability* (2019).

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Edited by

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To Chris Lasch,
and his enduring contribution to the fight
for migrants' rights

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The genesis of this work falls in a prolonged period of assaults on the rights of vulnerable migrants. As we are writing these words, refugees are currently being locked out, teargassed and beaten at the Poland–Belarus

border. There are also struggles for rights that fade into oblivion during pandemic times, of those who are forced to endure protracted uncertainty in remote corners of the world, such as the island of Bhasan Char in the Bay of Bengal, where Rohingya refugees are being detained. In the face of such immediate and persistent violence and suffering, any efforts at theorizing local migration law and governance might appear futile. We still do not believe that this is the case. First, for all their shortcomings, the actions of local authorities and actors remind us that restriction and repression are not the only – or even the primary – policies that people and their governments will support. Second, if local migration governance truly represents a more humane alternative to the untenable status quo, then we will have to better understand both its potential and limitations. This volume hopes to make a modest but real contribution in this regard.

Moritz Baumgärtel and Sara Miellet, November 2021

ABBREVIATIONS

AAGSP	All Assam Gana Sangram Parishad
AASU	All Assam Students' Union
BJP	Bharatiya Janata Party
CAA	Citizenship Amendment Act (India)
CABC	Collective Approach to Border Control (South Africa)
CBSA	Canada Border Services Agency
CERB	Canada Emergency Response Benefit
CPIC	Canadian Police Information Centre
CSIS	Canadian Security Intelligence Service
DHA	Department of Home Affairs (South Africa)
DRC	Democratic Republic of the Congo
EU	European Union
ICE	Immigration and Customs Enforcement (United States)
INS	Immigration and Naturalization Service (United States)
IOM	International Organization for Migration
LHR	Lawyers for Human Rights
MoU	Memorandum of Understanding
NeST	Neustart im Team (Germany)
NGO	Non-governmental organization
NIDS	National Inter-departmental Structure (South Africa)
NRC	National Register of Citizens (India)
OCASI	Ontario Council of Agencies Serving Immigrants
PSA	Police Services Act (Ontario, Canada)
PSC	Public Safety Canada
RCMP	Royal Canadian Mounted Police
SANDEF	South Africa National Defence Forces
SAPS	South African Police Service
SARS	South African Revenue Services
SPD	Social Democratic Party (Germany)
TPS	Toronto Police Service
TPSB	Toronto Police Services Board
UN	United Nations
UNHCR	UN High Commissioner for Refugees
VTP	Vancouver Transit Police

Introduction

Theorizing Local Migration Law and Governance

MORITZ BAUMGÄRTEL AND SARA MIELLET

A paradox lies at the heart of contemporary scholarship on local authorities and migration. On the one hand, as cities are becoming increasingly involved in the reception and inclusion of migrants, their engagement has also taken on a transnational dimension. When world leaders came together in Marrakesh in 2018 to pass the Global Compact for Safe, Orderly and Regular Migration, mayors from all over the world gathered at a separate event on the same site, launching the Mayors' Migration Council to further develop already existing links between cities and towns.¹ This being only one example of a growing 'transmunicipal solidarity'² in this domain, such initiatives have consolidated the status of local authorities as actors with legitimate interests that national policymakers need to take seriously. Many scholars, on the other hand, remain somewhat hesitant to 'zoom out' and employ a global rather than purely local or national lens to theorizing how cities and towns deal with the question of migration. Even the seminal contributions that avoid the lure of 'methodological localism'³ operate at a relatively high level of abstraction, for instance, by introducing 'horizontal' and 'vertical dimensions' of 'multi-level migration governance'⁴ or advocating for a 'multiscalar perspective' that situates the relation of localities to migration in the power structures created by the global economy.⁵

While these conceptual insights have all been valuable, they seem to overlook the fact that expressions of transmunicipal solidarity are fuelled not

¹ Oomen, "Cities, Refugees and Migration", p. 240.

² Heimann et al., "Challenging the Nation-State from Within".

³ Filomeno, *Theories of Local Immigration Policy*, p. 7, and Caponio, Scholten and Zapata-Barrero, *The Routledge Handbook of the Governance of Migration and Diversity in Cities*.

⁴ Scholten and Penninx, "The Multilevel Governance of Migration and Integration".

⁵ Çağlar and Glick Schiller, *Migrants and City-Making*.

only (or even largely) by organizational rationales or economic calculations but also by a perception that local authorities increasingly face similar challenges in their national contexts. For instance, a rise of populist parties riding the wave of anti-immigrant sentiment can be observed in various places, as can civic⁶ and legal mobilization⁷ countering these trends. Despite their somewhat different expressions, there are intuitive links between these developments. The ‘deportation turn’⁸ that was first identified in many Western states in the mid-2000s received further rhetorical tailwind with the success of the Brexit campaign in the United Kingdom and through the actions of Donald Trump as the US president.⁹ Controversial measures such as the automatic, public health-reasoned ‘Title 42’ deportations of asylum seekers have hereby survived the election of President Joseph Biden in 2020.¹⁰ Likewise, the threat of deportation now looms large for populations in the global South, for instance, for Muslims with a precarious legal status in India.¹¹ The net effect of such trends is not always more expulsions (in fact, comparing the Trump presidency to the Obama presidency, a decrease in such trends could be observed).¹² However, there are often disproportionate effects on specific localities, as seen with the targeted ‘immigration raids’ in the United States during the Trump era,¹³ as well as an activation of local resistance and ‘solidarity’ movements opposing deportations and immigration detention in Austria, Germany, Switzerland and the United States.¹⁴ In such contexts, municipal and other subnational authorities in different countries find themselves in analogous situations.

The deportation example serves to illustrate another point: confronted with similar challenges, local actors often react in the same manner to

⁶ See, for instance, Rao, “Nationalisms by, against and beyond the Indian State”.

⁷ Kavar, “Contesting Migration Governance through Legal Mobilization”.

⁸ Gibney, “Asylum and the Expansion of Deportation in the United Kingdom”.

⁹ De Orellana and Nicholas Michelsen, “Reactionary Internationalism”.

¹⁰ Blitzer, “How Biden Came to Own Trump’s Policy at the Border”.

¹¹ Changoiwala, “India’s Muslims Are Terrified of Being Deported” and Kumar, “Turning Their Back on the Rohingyas: A Border Control Regime Blind to the Collapse of Burmese ‘Democracy’”.

¹² Caldwell and Radnofsky, “Why Trump Has Deported Fewer Immigrants than Obama”.

¹³ For a recent reference on the gendered and raced effects of the local immigration enforcement in the United States, see Simmons, Menjivar and Valdez, “The Gendered Effects of Local Immigration Enforcement: Latinas’ Social Isolation in Chicago, Houston, Los Angeles, and Phoenix”.

¹⁴ See Rosenberger, Stern and Merhaut, *Protest Movements in Asylum and Deportation* and Kagan, “Toward Universal Deportation Defense”, p. 306.

contest national policies, thereby deepening schisms in policy approaches. In Barcelona, for instance, the city council ordered the close-down of the local state-run detention centre, partly due to human rights concerns about detention conditions, invoking local jurisdiction over the use of public buildings.¹⁵ While this initiative eventually failed, it demonstrated Barcelona's willingness to pressure the national government on what is usually perceived as an uncontested national competency. Similar developments can be seen in the United States where 'sanctuary cities' have been resisting the enforcement of federal immigration law dating back at least to the 1980s.¹⁶ Debates about 'immigration federalism'¹⁷ have recently sprung up in India,¹⁸ where several states have pushed back against the central government's intention to implement a National Register of Citizens. Some Indian states have gone as far as challenging the new Citizenship Amendment Act in the Supreme Court.¹⁹ More examples exist of subnational authorities, including local governments, asserting themselves on matters of deportation, the *ultima ratio* of immigration law and the traditional prerogative of national authorities. Commentators have noted that this trend ends up generating 'geographically varied terms that constitute immigrants' daily lives' even within one country, which notably includes 'differing local risks of detention and/or deportation'.²⁰ And while these reflect a range of shifts in the power dynamics in the political, economic and social realm, they are intimately linked to questions of the law. Conditioning and conditioned by the law, the actions of local authorities in the domain of migration cannot be divorced from the complex domestic and international legal structures in which they are embedded.

1 The Dynamics of Migration Governance and Research

Deportation is, of course, only one of many legal techniques through which immigration is regulated. Departing from the observation of

¹⁵ Fernández-Bessa, "A Theoretical Typology of Border Activism".

¹⁶ Collingwood and Gonzalez O'Brien, *Sanctuary Cities*.

¹⁷ Ramakrishnan and Gulasekaram, *The New Immigration Federalism*.

¹⁸ Kennedy, "Federalism as a Moderating Force? State-Level Responses to India's New Citizenship Law".

¹⁹ See Mongia's chapter in this volume (Chapter 7).

²⁰ Goodwin-White, "Today We March, Tomorrow We Vote!". See also Schneider, Segadlo and Leue, "Forty-Eight Shades of Germany".

parallel developments in its local governance in different countries, this volume discusses the role that legal instruments, doctrines and principles – ‘the law’ broadly understood in its various forms and in different legal fields – play in constituting these processes. For this purpose, this book provides contrasting views from different national and local jurisdictions that, like pieces of a mosaic, display contours of a larger picture.

The moment could hardly be more apt for such a discussion. While debates about the direction of migration governance have loomed large for many years, the adoption of particular policy measures by subnational administration now raises broader questions on whether and how their totality fits within existing legal frameworks, for instance, when it comes to the separation of powers and individual rights. Divergent reactions by local authorities are an important part of this story, reinforcing political divisions and adding to them legal conflicts regarding national and local competencies. Despite its notorious ambiguity and indeterminacy, the legal dimension of migration governance seems to be pulling towards points of consolidation, which is reflected in many complex technical debates on how to reconcile contradictory legal norms and objectives. This section provides a short overview of the most prominent of these dynamics to situate the contribution of this volume and its individual chapters, all of which offer different perspectives on the role that law plays in local migration governance.

The first dynamic related to the rise of local authorities in the domain of migration concerns processes of decentralization and devolution of state authority. Devolution can hereby be defined as ‘political decentralization’ constituting ‘the lawful transfer of revenues and responsibilities to sub-national levels: to states or provinces, and counties or municipalities’.²¹ This development, which took place in a great number of jurisdictions, is frequently cited as one contributing factor (and at times even as the main reason) behind the emergence of local migration governance as a ‘world-wide phenomenon’.²²

In the United States, for example, reforms of federal legislation in the 1980s and 1990s provided ‘significant opportunities for state and local law-making’²³ that came to be used especially in the period following the 9/11 attacks. Strikingly, this has benefitted both cities that sought to adopt more

²¹ Bresser-Pereira, *Democracy and Public Management Reform*, p. 241.

²² Filomeno, *Theories of Local Immigration Policy*, p. 4.

²³ Ramakrishnan and Gulasekaram, *The New Immigration Federalism*, p. 49.

welcoming policies and those that wanted to curb the number of arrivals.²⁴ A more varied kind of devolution has taken place in the European context where, to use the popular formulation by Guiraudon and Lahav, migration competencies were ‘shifted up’ to the European Union (EU), ‘out’ to non-state actors and ‘down’ to substate entities including local government.²⁵ Another way of devolution, observable in ‘new’ immigration countries like Indonesia, consists of the formalization of responsibilities in refugee reception, which local governments previously held informally.²⁶ While idiosyncratic, all these variants of devolution share a commonality: in formally breaking down responsibilities, they create more heterogeneous, ‘messy’²⁷ spaces of migration governance that bring in a greater number of public (and indirectly also private) actors in the process.²⁸

Trends of devolution have been widely observed across states and jurisdictions; empirically speaking, such processes are still ongoing in many places.²⁹ However, as Daniel Morales shows in his contribution ([Chapter 9](#)), there are also compelling normative reasons to support devolution as a way of creating a more pluralistic environment in which liberal and restrictive migration policies could coexist.³⁰ Analytically, devolutionary trends can also be understood as a function of the proliferation of neoliberal governance.³¹ In many instances, however, local authorities (particularly in larger cities) have also adopted proactive approaches to migration governance even when there is no legal basis for their involvement and no allocation of competencies and resources.³² In countries like Indonesia, cities’ rather recent involvement in refugee protection and

²⁴ See [Chapter 6](#) by Lasch, as well as Visser and Simpson, “Understanding Local Government’s Engagement in Immigration Policy Making in the US”.

²⁵ Guiraudon and Lahav, “A Reappraisal of the State Sovereignty Debate”, pp. 181–184.

²⁶ Missbach et al., “Is Makassar a ‘Sanctuary City’?”, pp. 206–208.

²⁷ In fact, migration scholar Anna Triandafyllidou argues in favour of a “messy governance approach” that “embraces complexity and uncertainty and acknowledges conflict and disensus” and suggests that tension and dissonance are “inherent in the governance of international migration”. See Triandafyllidou, “The Global Governance of Migration: Towards a ‘Messy’ Approach”.

²⁸ For a more detailed discussion of this point, see also the concluding chapter by Mariana Valverde ([Chapter 11](#)).

²⁹ See Oomen and Leenders, “Symbolic Laws, Street-Level Actors”.

³⁰ See [Chapter 9](#) by Morales.

³¹ See Dobrowolsky, “Nuancing Neoliberalism” and Filomeno, *Theories of Local Immigration Policy*, p. 4.

³² Kühn and Münch, “Zuwanderungspolitik: ein neues kommunales Aufgabenfeld?”.

migration management was subsequently formalized.³³ While some cities have been at the forefront of legal reforms, both pushing for decentralization from below³⁴ and participating in the making of new immigration laws,³⁵ others have rebuked central government policies and laws.

That said, there are also instances of ‘re-centralization’ in federal states like Germany, where the states (*Länder*) held responsibilities for a longer time.³⁶ Similar observations with regard to integration policies have recently been made in Denmark and Sweden.³⁷ In the US context, President Trump’s ‘war’ on sanctuary cities and states was politically motivated, trying to reign in defiant localities by threatening either to defund them or to remove federal immigration officials from them.³⁸ With such formal struggles over authority potentially serving either political side,³⁹ changes in administration do not necessarily curb these centripetal forces. De- and re-centralization can actually go hand in hand,⁴⁰ with decentralized solutions allowing superordinate authorities to enlarge their regulatory reach.⁴¹

Finally, tensions resulting from crises, which also regularly make their way into the media,⁴² have recently spurred an almost exponential growth of scholarship that analyses and interprets trends in migration governance, including at local or urban scales, and frequently also with an implicit normative outlook on how to improve policies in terms of their efficacy and equity. This ‘local turn’⁴³ in migration studies is generally also understood as a response to the critiques of ‘methodological nationalism’,⁴⁴ with the concept of the ‘local’ principally relating to processes that revolve around local authorities (though we will see that it brings

³³ Missbach et al., “Is Makassar a ‘Sanctuary City’?”, pp. 206–208.

³⁴ Nijman, “The Urban Pushback: International Law as an Instrument of Cities”.

³⁵ See, for instance, the example of São Paulo municipality as discussed by Filomeno, “Global Cities and Local Immigration Policy in Latin America”.

³⁶ Soennecken, “Germany and the Janus Face of Immigration Federalism”.

³⁷ Emilsson, “A National Turn of Local Integration Policy”.

³⁸ Grad and Tchekmedyian, “Trump’s Immigration War with California Has Reached a Fever Pitch”.

³⁹ See Chapter 6 by Christopher N. Lasch.

⁴⁰ Oomen and Leenders, “Symbolic Laws, Street-Level Actors”.

⁴¹ See Chapter 5 by Graham Hudson.

⁴² See, for instance, Edgecliffe-Johnson, “Why Cities and National Governments Clash over Migration” and Horowitz, “Italy’s Crackdown on Migrants Meets a Grass-Roots Resistance”.

⁴³ Zapata-Barrero et al., “Theorizing the ‘Local Turn’ in a Multi-Level Governance Framework of Analysis”.

⁴⁴ Wimmer and Glick-Schiller, “Methodological Nationalism and Beyond: Nation-State Building, Migration and the Social Sciences”.

in a host of other actors, such as civil society organizations and social movements).⁴⁵ It is important to note that the involvement of cities and local authorities in migration governance, which includes the development and implementation of own policies, does not actually constitute a new phenomenon.⁴⁶ Scholarship on the local turn is yet to unpack the various historical precedents and (dis)continuities that characterize such processes.⁴⁷ Furthermore, some of the responses to the critiques of methodological nationalism (such as transnational perspectives) still contain a ‘residue of methodological stateism’ as they are premised on ‘relatively stable understandings of the state that do not account for its historical transformations, such as its ‘nationalization’’.⁴⁸

2 The Local Turn in Migration Scholarship and the Curious Demotion of the Law

To be sure, efforts in theorizing the relationship between migration and local settings, policies, practices and actors bring together insights from a broad spectrum of disciplines.⁴⁹ Scholarship at the nexus between migration and localities (or cities specifically) often touches upon legal questions such as access to rights, citizenship and (precarious) legal status. For instance, legal theories such as ‘immigration federalism’⁵⁰ or specific concepts such as ‘sanctuary firewalls’⁵¹ were engaged to study local approaches to forced migration. However, these studies are exceptions rather than the rule and do not address the ‘local turn’ in migration governance from a distinctively legal perspective. *Theorizing Local Migration Law and Governance* seeks to fill this significant gap in scholarship by demonstrating how legal debates, processes and principles informs the theorization of the role of local governments in migration

⁴⁵ In the present volume, [Chapter 3](#) by Handmaker and Nalule and [Chapter 7](#) by Mongia conceptualize the “local” more broadly and not necessarily related to local governments.

⁴⁶ Darling and Bauder, *Sanctuary Cities and Urban struggles* and Prak, *Citizens without Nations: Urban Citizenship in Europe and the World*.

⁴⁷ See, however, Lucassen and Lucassen, *Globalising Migration History*, Hirota, “Limits of Intolerance: Nativism and Immigration Control in Nineteenth-Century New York”, and Räuchle, “Discursive and Administrative Dimensions of Hamburg’s Arrival Infrastructures around 1900”.

⁴⁸ Mongia, *Indian Migration and Empire: A Colonial Genealogy of the Modern State*, p. 153.

⁴⁹ Caponio, Scholten and Zapata-Barrero, *The Routledge Handbook of the Governance of Migration and Diversity in Cities*.

⁵⁰ Soennecken, “Germany and the Janus Face of Immigration Federalism”.

⁵¹ Crépeau and Hastie, “The Case for ‘Firewall’ Protections for Irregular Migrants”.

governance. Our notion of ‘theorizing’ is hereby markedly *not* one of ‘grand theory’ but implicates a range of analytical claims usually centred around middle-range concepts.⁵² The following sections will expound how these kinds of theoretical contributions take the shape of empirical perspectives, conceptual accounts and critiques, and normative angles. The chapters in this volume place different emphases in their contributions and will therefore be divided into three distinct parts, even if all of them speak to multiple of these interrelated themes. Before introducing these, we will first elaborate on the reasons and implications of the ‘demotion’ of law in research on local migration governance. Perhaps surprising and certainly problematic, this state of affairs can be attributed to several factors.

The first explanation for the marginalization of legal debates is that these continue to be steeped in a methodological nationalism wedded to the Westphalian model,⁵³ which is ‘the idea that the state presents itself as an ultimate point of reference for both domestic and international law’.⁵⁴ There is more than a grain of truth to this claim, with much legal scholarship and practice remaining strongly embedded especially in national law, entrenching in society an attitude that Resnik refers to as ‘sovereignism’.⁵⁵ It is also correct, however, that the cutting edge of legal theory has long moved past accepting methodological nationalism uncritically. Legal scholars have turned their critical gaze towards, amongst others, non-singular conceptions of citizenship,⁵⁶ immigration federalism and its links to trans-state and trans-local collaborations⁵⁷ and the role of non-state actors as well as cities in international law.⁵⁸ They have challenged statist perspectives by demoting the state to one of several sources of law at transnational and subnational levels⁵⁹ and have examined how the mobility of law and transnational transplantation of legal norms is tied to the

⁵² This resonates with other recent interventions that have tried to broaden our perspectives on the legal regimes in play in processes dealing with migration at the local level; see notably Moffette and Pratt, “Beyond Criminal Law and Methodological Nationalism”.

⁵³ Abraham, “Law and Migration: Many Constants, Few Changes”, pp. 289 and 292.

⁵⁴ Michaels, *Globalization and Law*, p. 5.

⁵⁵ Resnik, “Law as Affiliation”, p. 33.

⁵⁶ Resnik, “Bordering by Law”, p. 141.

⁵⁷ Villazor and Gulasekaram, “Sanctuary Networks”, p. 1270.

⁵⁸ See, for instance, Clapham, *Human Rights Obligations of Non-State Actors* and Nijman, “The Urban Pushback: International Law as an Instrument of Cities”.

⁵⁹ See Griffiths, “What Is Legal Pluralism?” or more recently, Von Benda-Beckmann and Turner, “Legal Pluralism, Social Theory, and the State”.

mobility of people.⁶⁰ Chapter 3 by Jeff Handmaker and Caroline Nalule illustrates this trend as it traces the transnational transplantation of border control policies from the United States to South Africa, which entrenched the already existing ‘racial underpinnings’ of the country’s deportation and detention regimes. In short, there is enough critical legal scholarship to make a meaningful contribution to any theory on the emergence and consequences of local migration governance.

If relevant legal works are not always given due consideration by other fields, a second explanation for the demotion of law is linked to dynamics internal to the legal discipline. The fact that most, though not all, analyses of the law concentrate on national or international legal frameworks promote a certain kind of legal scholarship – narrow in scope, exceedingly detailed and technical – over another – comparative, contextual and open-ended. For instance, US legal scholars have abundantly discussed the ‘new immigration federalism’ that has elevated the authority of states and local authorities in recent times.⁶¹ Based on detailed exegeses of case law including from the US Supreme Court, they have engaged in complex legal debates concerning ‘pre-emption’ and ‘anti-commandeering’ doctrines to understand the authority of Congress, as well as its limits, in questions of immigration and alienage law.⁶² Recounting such exchanges is beyond the scope of this introduction. We want to note, however, that while these debates have been immensely relevant for the US context (including for the situation of migrants), they have had little resonance elsewhere – and probably never intended to have any in the first place. In Europe, likewise, accounts of the legal regimes governing migration, asylum and integration are usually ‘siloed’ into EU and national frameworks.⁶³ The result is that, although there is generally no shortage of scholarship on immigration law, the latter remains fragmented along jurisdictional lines.⁶⁴ Moreover, attitudes remain generally inward-looking from a disciplinary standpoint and hyper-focused on the (legal) questions at hand.

⁶⁰ Von Benda-Beckmann and Von Benda-Beckmann, “Mobile People, Mobile Law”.

⁶¹ See, for instance, Motomura, *Immigration Outside the Law* and Ramakrishnan and Gulasekaram, *The New Immigration Federalism*.

⁶² See, amongst many others, Olivas, “Immigration-Related State and Local Ordinances”, Rodriguez, “The Significance of the Local in Immigration Regulation” and Armacost, “‘Sanctuary’ Laws: The New Immigration Federalism”.

⁶³ Guild and Groenendijk, *Illiberal Liberal States*. It should be noted that concerns with local authorities and actors more generally have been less prominent with these authors.

⁶⁴ However, see Baglay and Nakache, *Immigration Regulation in Federal States*, which offers a more comparative angle featuring chapters on several federal countries.

The consequence is a disciplinary divide that wastes talents and insights that could help us improve our general understanding of local migration governance in at least three respects. First, a look at the practical functioning of the law and questions concerning its application and interpretation can be empirically revealing. The fact that local migration governance remains highly politicized and torn between competing policy rationales is frequently reflected in legal regulation. Indeed, such tensions tend to jump out from the point of view of the law where principles of consistency, foreseeability and certainty – dare we say the rule of law in general – demand their resolution. Sidelining legal perspectives in the study of local migration governance means bypassing those who are trained to expose incongruities, which may mediate or deepen political schisms. At the same time, legal analysts need to make greater effort to consider the wider political and societal implications of their work. This suggestion and the possibilities that arise from removing disciplinary barriers will be elaborated upon in [Part I](#) of the book as well as [Section 3](#).

The second shortcoming related to the demotion of legal perspectives is the loss of a critical angle on processes of ‘scaling’ such as devolution, which includes their effects. It is odd, in our view, that theories on the ‘local turn’ in migration governance are presently agnostic as to *what* is actually being pivoted, which, in many cases, is the law. This remains true for the inherently legal process of devolution (or re-centralization) where competencies are shifted downwards (or indeed upwards). Likewise, there have been many instances in which local authorities have empowered themselves by using the law and legal arguments. Sanctuary cities in the United States are once again a case in point, illustrating the exogenous effect of the legal realities that will determine whether Congress can preempt such initiatives or whether these can be defunded by the federal government.⁶⁵ [Chapter 4](#) by Moritz Baumgärtel and Franziska Pett shows how, in the German context, the strategies adopted by the City of Berlin vis-à-vis the national government are significantly shaped by its special legal position as a city-state, which allows it to make a legal push for more liberal admission policies. To be sure, these debates should not be reduced to their doctrinal dimension, although it is relevant. The point is that legal frameworks, *at least partially, influence* the content of debates on migration as well as the terms of their potential escalation and resolution. The

⁶⁵ See [Chapter 6](#) by Lasch.

second objective of this volume is to set out and critique the implications that arise from legal processes of scaling.

Finally, not taking into consideration legal processes means to marginalize normative voices, which have always been strongly present in literature dealing with law. True, legal positivists have traditionally been adamant to maintain a strict conceptual and analytical distinction between law and morality.⁶⁶ Deontological questions nonetheless ‘creep in’ even for the strictest of analytical jurists, if only in the form of a choice between two equally valid legal interpretations. For most lawyers, normative queries are both more common and meaningful. In international law scholarship, for instance, it has long been recognized that the proliferation and constantly evolving nature of rules bring forth an intimate connection between the law that is (*lex lata*) and the law as ought to be (*lex ferenda*).⁶⁷ As argued earlier, legal scholarship also has a tendency to question the status quo in order to resolve conflicts in the law and to fill legal gaps, both of which are legion in migration governance. It thus provides a pool of (largely untapped) resources for anyone interested in developing solutions in a policy domain where these are wanting. Such possibilities will be explored in [Part III](#).

To conclude, the law should not be reduced to mere context or to an epiphenomenon but considered an integral piece of the puzzle when it comes to theorizing local migration governance. This volume seeks to prove this point, address the disciplinary divide and form a launchpad for future theorization based on analyses of legal debates, processes and principles. The remainder of this introduction outlines the three themes addressed in *Theorizing Local Migration Law and Governance*, situating them within recent scholarship on local immigration law and governance while also introducing the chapters of this volume.

3 Legal Contradictions and Tensions in Local Migration Governance

The demotion of legal perspectives has made scholarship on the local turn in migration governance overlook the valuable theoretical insights that can be gained from having a closer look at the genesis and workings of the law in concrete contexts. To illustrate and address this oversight, Part

⁶⁶ Cotterrell, *The Politics of Jurisprudence*, pp. 114–115.

⁶⁷ Virally, “A propos de la *lex ferenda*”.

I of this volume offers empirical perspectives based on three case studies from Canada, South Africa and Germany, all of which foreground specific tensions and contradictions in local immigration law and governance. They do so by discussing how these are reflected in the legal instruments, doctrines and principles that have a bearing at the local level. It should be noted that several other chapters also speak to this theme even if, due to their somewhat different emphases, they have been assigned to a different part. This section outlines some of the pertinent tensions and contradictions in reference to existing literature, which provides the backdrop for the respective contributions.

The first and from a legal perspective most obvious tension involves jurisdictional conflicts, most notably between federal, state and local authorities. As mentioned, this theme has been at the core of scholarship on ‘sanctuary’ policies in the US and Canadian cities. Likewise, political scientists in Europe have observed the interplay between governance levels and actors, developing theories of multi-level governance and coining concepts such as ‘disjointed governance’ and ‘governance decoupling’.⁶⁸ In this line of scholarship, ‘decoupling’ refers to local-level policies that follow ‘a very different logic of policymaking than on the national level’, which can result in direct conflicts.⁶⁹ Authors such as Scholten and Penninx have claimed that that these could (and should) be resolved, with different constellations of multi-level migration governance illustrating alternative pathways.⁷⁰ Others have pointed to the virtues of ‘concurrency’ rather than exclusivity of jurisdiction, for instance for women who may benefit from a multiplicity of sources and legal forums for the enforcement of their rights.⁷¹

Such questions also play a prominent role in this volume, for instance in Benjamin Perryman’s chapter on the ‘emplacement’ of non-citizens in specific localities which, as he argues, complicates notions of citizenship that are formally linked to the national level. He also shows that such emplacement influences legal and practical outcomes in the context of deportations. Jeff Handmaker and Caroline Nalule, in their contribution, describe how in South Africa, repeatedly failed efforts to reform the

⁶⁸ Scholten, “Agenda Dynamics and the Multi-Level Governance of Intractable Policy Controversies”.

⁶⁹ Scholten, “Two Worlds Apart? Multi-Level Governance and the Gap between National and Local Integration Policies”, p. 159.

⁷⁰ Scholten and Penninx, “The Multilevel Governance of Migration and Integration”.

⁷¹ Jackson, “Citizenships, Federalisms, and Gender”, p. 463.

system of migration control at the national level have brought about an ‘everyday legal governance’, sustained at both national and local levels and marked by a violence, corruption and above all racism, that stands in marked contradiction to the constitutional system of post-apartheid South Africa. Graham Hudson’s chapter in [Part II](#) of the book challenges conventional understandings of sanctuary policies as protection from the reach of federal authorities. He highlights how the latter can, in effect, extend their jurisdiction: drawing on the example of Canada and specifically Ontario, Hudson demonstrates how data sharing between local police and federal immigration authorities spurs a process of ‘urban securitization’ that undermines the legal strength of sanctuary cities. All these contributions make clear that a closer look at the law, although not resolving these jurisdictional tensions (as some may hope), still tells us a lot about their functioning and concrete, ‘everyday’ implications. This conclusion resonates with what legal pluralists have long been arguing, namely that essentialist approaches to what constitutes ‘law’ are fruitless in an interconnected world and that the real point of inquiry ought to be ‘which social norms are recognized as authoritative sources of obligation and by whom’.⁷²

Conceptualizing the tensions between levels of government also provides a good entry point for deeper inquiries into the (non-)functioning of migration governance. Recent scholarship on the local turn has described migration policy as a ‘battleground’ in which ‘different actors take part according to diverse economic interests, social bonds, moral values and political beliefs’.⁷³ Tensions can therefore also be identified insofar as the objectives and rationales of governance are at stake. For instance, inclusive local approaches towards forced migrants with precarious legal status that give rise to tensions in multi-level governance networks can reflect deep divisions between the objectives and interests of various governmental actors.⁷⁴ Such schisms are often manifest in the discourses and frames that local authorities and other actors adopt to justify their approaches.⁷⁵ Our argument, here as elsewhere,⁷⁶ is that legal tensions are often at the heart of these processes in the sense that they are linked to the interpretation, invocation and thus ultimately the application of norms.

⁷² Berman, *Global Legal Pluralism*, p. 56.

⁷³ Ambrosini, “The Local Governance of Immigration and Asylum”, p. 197.

⁷⁴ Hepburn and Zapata-Barrero, “Introduction: Immigration Policies in Multilevel States”.

⁷⁵ Spencer and Delvino, “Municipal Activism on Irregular Migrants”.

⁷⁶ See Baumgärtel and Oomen, “Pulling Human Rights Back In?”.

The chapters provide ample evidence for this suggestion. Moritz Baumgärtel and Franziska Pett show how Berlin's local government adopts a 'complex' set of strategies of divergence from different national laws relating to refugee admission and integration. Strikingly, the particular combination of seemingly contradictory strategies (and their interplay) allows Berlin to prove a cosmopolitan commitment to high sea rescue and integration of forced migrants while avoiding closer scrutiny on actions that undermine the same cause. Benjamin Perryman's chapter takes on one of the most contested norms – citizenship – and highlights how its conventional, formalistic notions may stand in direct competition with local understandings of citizenship as constituted by performative acts and social processes at the municipal level, which result from local emplacement in the child welfare system. At the same time, he sheds a light on how these iterations of local citizenship are connected to developments and debates in constitutional law and international human rights law regarding non-citizens' sociological connections to states. Chris Lasch's chapter, by contrast, reveals how debates on communal values are effectively removed from discourse through the application of formal legal principles. He draws our attention to the fact that sanctuary policies are not normally couched in terms of equal protection but in structural and formalistic arguments based on principles such as pre-emption, federal supremacy and the separation of legislative and executive powers. All these contributions show that the outcomes of these contestations, the legal 'realities' (for want of a better word), have a profound practical effect, for instance on the specific outlook of municipal policy (Baumgärtel and Pett), on individual cases of deportation (Perryman) and on the quality of debates concerning sanctuary (Lasch).

The example of citizenship illustrates how conflicts regarding the interpretation of certain principles can play a crucial role in sustaining legal tensions. However, questions of interpretation can also create other kinds of complications, such as discretionary spaces that actors may or may not fill by adopting different kinds of strategies.⁷⁷ This circumstance has not gone unnoticed in migration scholarship, which has started to address the often striking diversity in local policy implementation as well as variations between states in federal contexts,⁷⁸ counties and localities.⁷⁹ While much of this literature offers descriptive analyses of the implementation of specific policies across different scales, some scholars have traced divergency

⁷⁷ See also Oomen et al., "Strategies of Divergence".

⁷⁸ Töller and Reiter, "Federal Diversity of Asylum Policies in Germany".

⁷⁹ Schultz, "Ambiguous Goals, Uneven Implementation".

back to the ambiguity within legal instruments. For instance, Schammann concludes in his analysis of the ambivalent legal basis of the German Asylum Seekers Benefit Act that policy conflicts that remained unresolved at the national level are effectively shifted to the local level, where the purpose of the law is then decided.⁸⁰ In other cases, discretionary spaces result from conflictive legislative changes that enable more permissive practices (e.g. labour market access for asylum seekers) while, at the same time, installing other kinds of restrictive policy (e.g. on involuntary returns of rejected asylum seekers).⁸¹ The consequences of such ambivalent legal bases and indeterminate legal terms are ‘individual-level dilemmas of frontline implementers between law and practice’,⁸² as documented in North America and Europe.⁸³ Some migration scholars who managed to trace these go as far as recommending municipalities to ‘choose the most extensive interpretation of the law’ where national legal frameworks are unclear, for instance in questions of service provision.⁸⁴

The tensions and conflicts that arise from such legal ambiguity and related questions of interpretation are a topic in all three chapters of [Part I](#). Jeff Handmaker and Caroline Nalule, for instance, draw our attention to how South Africa’s failure to effectively revamp its migration policy nationally has left ample space, at lower levels of governance and in local places such as border posts and deportation centres, for racial abuse and violence reminiscent of the apartheid era. The chapter by Benjamin Perryman makes two points regarding expansions and contractions in discretionary spaces in the deportation regulation in Canada. First, the once unquestioned authority of the federal state has been weakened by the interplay of international human rights norms and grassroots mobilization. Second, Perryman suggests the scope of discretion may be broader when the person concerned is a long-term resident. More specifically, he suggests it may be possible to recognize such an expanded scope of discretion not to deport in circumstances where the person concerned was a former crossover youth⁸⁵ who was apprehended by child welfare agencies for whom the state had failed to obtain citizenship.

⁸⁰ Schammann, “Wenn Variationen den Alltag bestimmen”, p. 177.

⁸¹ Schultz, “Ambiguous Goals, Uneven Implementation”.

⁸² Dörrenbächer and Strik, “Implementing Migration Policies”, p. 61.

⁸³ See *ibid.*, Eule, *Inside Immigration Law*, and Schultz, “Ambiguous Goals, Uneven Implementation”.

⁸⁴ Spencer and Delvino, *Migrants with Irregular Status in Europe*.

⁸⁵ As Perryman explains in his chapter, crossover youth are minors who grow up in the child welfare system and “crossover” to the youth criminal justice system.

Moritz Baumgärtel and Franziska Pett discuss how the local government in Berlin has inhabited the discretionary spaces that city-states (do not) enjoy in national legal frameworks in Germany. Above all, their chapter highlights the proliferation of such spaces even on a specific question (namely local-level admissions) and within a narrow time frame, in this case between 2018 and 2020.

To conclude, in examining tensions between governance levels, the invocation, interpretation and application of contested norms and principles – as well as discretionary spaces created by legal ambiguities – this book stresses the centrality of law for the unfolding of often highly contradictory dynamics in migration governance. At the same time, it shows that these processes are not as messy, unstructured and uninhibited as they may appear. Socio-legal approaches offer an effective tool to unearth their modalities by singling out specific legal objects (such as citizenship, detention and admission) and tracing *how*, *when* and *in whose interest* their outlook and effect has changed over time. In investigating the law, one may therefore be able to make sense of the evolution of the highly volatile field of migration governance, at least partially and within specific contexts.

4 Accounts and Critiques of Legal Processes of Scaling

While paying closer analytical attention to questions of law reveals the inherent tensions and contradictions in local migration governance, the law also structures the processes of ‘scaling’ and ‘re-scaling’ of migration governance, including to (and at) the local level. As already mentioned, processes of devolution and (re-)centralization are normally effectuated through changes in the law, such as shifts in formal responsibilities and competencies from one level to another. Logically, the local turn in migration governance must therefore be mirrored by a local turn in legal frameworks. Based on our hypothesis that law is more than a mere epiphenomenon, [Part II](#) of *Theorizing Local Migration Law and Governance* hence tackles the question of the effects of legal processes of scaling. Like [Section 3](#), the subsequent paragraphs seek to contextualize the contributions made by the chapters in this regard.

Any discussion regarding the legal quality of scaling processes in migration governance will benefit from engaging with the seminal work of Mariana Valverde; this introduction takes as its point of departure. Seeking to rehabilitate the ‘technicalities of law’ as a resource for social theory, Valverde suggests that the law can insightfully be understood as

creating and maintaining particular ‘scales of governance’.⁸⁶ She illustrates this point by dissecting the notion of jurisdiction, an ‘ancient legal machinery’, the usage of which enables shifts in ‘the where, the who, the what, and the how of governance through a kind of chain reaction’.⁸⁷ In a Foucauldian paradigm where governance takes place through power/knowledge rather than simple coercion, such path dependency turns jurisdictional moves into particularly potent ways of alternating the rules of the game ‘as if by magic’.⁸⁸ Though not exactly hidden from the view of the public, the technicality of jurisdiction makes it less amenable to critical examination (a point worth remembering in connection with the demotion of law mentioned earlier); it may even lead to ‘blackboxing’ over time.⁸⁹ The combination of these two features as presented by Valverde is characteristic to jurisdiction and directly related to its legal character. Another example of a legal notion with similar ‘structuration’ quality is citizenship which, according to Valverde, represents neither an actual status or identity but rather a mechanism that facilitates the formation and domination of social and political groups.⁹⁰

The chapters in this volume provide ample evidence for the general scale-making qualities of law. Graham Hudson, for instance, shows how sanctuary policies as one form of local resistance to repressive federal migration policies are limited by jurisdiction over matters of security that, shared at the local and federal levels, effectively create ‘parallel legal modalities of urban securitization’.⁹¹ The observation that overemphasizing federalism doctrine has obscured such potent dynamics in Canada strongly resonates with Chris Lasch’s critique of the primacy of structural claims related to formal authority over substantive ones grounded in communal values in the United States. These two contributions illustrate another of Valverde’s main claims regarding legal technicalities, namely that they frequently make the ‘how’ of governance subservient to questions of ‘who’ and ‘where’.⁹² Radhika Mongia, finally, draws our attention to the intimate and mutually constitutive relationship between migration law and the national scale. The concrete and even material quality of

⁸⁶ Valverde, “Jurisdiction and Scale”.

⁸⁷ *Ibid.*, pp. 143–144.

⁸⁸ *Ibid.*, p. 145.

⁸⁹ Valverde, “Practices of Citizenship and Scales of Governance”, p. 238.

⁹⁰ *Ibid.*

⁹¹ Chapter 5 by Hudson, p. 39.

⁹² Valverde, “Jurisdiction and Scale”, p. 144.

legal scale-making are hereby first situated in the British colonial context at the beginning of the twentieth century and find one expression in the legal object of the passport. A second set of explorations focuses on the complex dynamics of the changing migration and citizenship regime in postcolonial India and shows how subnational forces are embedded in the processes that reproduce and transform national space and national scale. Both sets of explorations bring into focus the centrality of migration and citizenship law to the making and recalibration of (national) scale.

This last insight warrants further consideration. As already alluded to, Valverde's discussion of 'games of citizenship' exposes another manner in which law fortifies governance scales, namely by constituting the groups that are placed within them.⁹³ The chapters in this book point likewise to the dynamic identity-forming features of law. This understanding of law, not as an artefact, but as a 'constitutive practice that organizes interpersonal relations and daily routines' and a 'site of activity through which identity is expressed,'⁹⁴ is of course not new. For instance, legal scholars have revealed how citizenship is a powerful yet exclusionary legal tool,⁹⁵ which is notably also engendered.⁹⁶ Yet, the law begets also other, arguably more subtle identities such as 'constitutional identity', which is distinct from citizenship and even national identity.⁹⁷ Another example is 'indigeneity' where native communities, faced with no alternative, are forced to prove their cultural distinctiveness to receive standing to claim land rights before courts.⁹⁸ Common to these examples is that they are the product of interactive legal processes and generative not only of identities but also of particular scales and physical spaces.

Three chapters in this book develop this connection in new directions with critical insights for scholarship on the local turn in migration governance. Radhika Mongia examines how the framing of migration law in terms of nationality in Canada and South Africa produced national identity in legal and affective registers. Her account of the legal regulation of colonial Indian migration historicizes this understanding of the scale-making and the identity-creating aspects of law whilst also challenging the primacy of the nation-state by exploring migration beyond, or rather

⁹³ Valverde, "Practices of Citizenship and Scales of Governance", p. 226.

⁹⁴ Resnik, "Law as Affiliation", p. 63.

⁹⁵ See Shachar, *The Birthright Lottery* and Kochenov, *Citizenship*.

⁹⁶ Benhabib and Resnik, *Migrations and Mobilities*.

⁹⁷ Rosenfeld, *The Identity of the Constitutional Subject*, pp. 10–11.

⁹⁸ Merry, "Crossing Boundaries".

before, the emergence and limits of the nation-state. Mongia specifically highlights historical instances in which there were minimal regulations at locales of immigration and most migration occurred outside the purview of state authorities. This chapter also sheds light on more recent examples of the ‘legal production of illegality’ such as through the recent implementation of the National Register of Citizens in the Indian state of Assam, which was exacerbated further by the Citizenship Amendment Act. Benjamin Perryman’s chapter similarly speaks to the identity-forming features of the law and legal mechanisms. It focuses on how the placement of migrant children and specifically cross-over youth in cities and local child welfare systems creates relational obligations of care that demand a redefining of citizenship. As Perryman notes, ‘wards of the state are *of the state*’. His chapter argues that the state assumes the role of a parent when it apprehends migrant children in child welfare (because they are in the state’s jurisdiction) by ‘providing opportunities (and erecting barriers) to that child’s development, and through this process, accepting that child as a member of the state, even if that child is a non-citizen’.⁹⁹ The chapter by Chris Lasch contributes to this discussion by demonstrating how a focus on structural legal doctrines fostered the formation of a coalition of sanctuary proponents despite the ‘mixed motivations’ within them. Their resulting ‘identity’, principally devoid of ‘communal values’ and generally thin, paradoxically also opens spaces for anti-sanctuary narratives, who can make their case using the same technical language without explicitly evoking anti-immigrant sentiments.

A final aspect relates to the processes of ‘scaling’, a word that we use deliberately both in this introduction and in naming the third section. Whilst the term ‘re-scaling’ features prominently in recent scholarship on cities, migration and citizenship, it has been used to analyse a range of different phenomena and processes. Our introduction cannot examine all these different meanings in depth. However, reflecting on the various theoretical musings on the term, Brenner has noted that ‘re-scaling’ is used as a ‘general descriptor for the transformed global context within which cities are currently situated’.¹⁰⁰ These perspectives thus foreground *processes* of scaling rather than the scales themselves, meaning the continuous reconfiguration of ‘dimensions of particular processes’ such as global, supranational, national, and local along ‘a vertical hierarchy of relatively discrete

⁹⁹ Chapter 2 by Perryman, p. 7.

¹⁰⁰ Brenner, “The Urban Question and the Scale Question”, p. 38.

spatial units'.¹⁰¹ This holds true, for instance, for the seminal work of Nina Glick Schiller and Ayşe Çağlar, who have examined the role of migration in the rescaling of urban places within a neoliberal global economy.¹⁰² The term is also increasingly used by migration scholars to refer to efforts to reconsider migration beyond national perspectives and to interrogate the possibilities for and contestation of urban citizenship, rights and belonging.¹⁰³ While aware of the contestation and critique that 'scalar thought' has elicited,¹⁰⁴ we contend that engaging with it still is useful. For one, because scaling enables us to denominate a specific type of process that, unlike 'reform' or 'legislation', for example, entails a profound transformation in the very logic of governance. Compared to 'devolution', scaling underlines the immanently political character of the change and its embeddedness in hierarchies of power. One question that [Part II](#) addresses is whether and how such processes of scaling are contingent upon operations of the law.

Thus, rather than proposing epistemological scale-shifting, for instance from national to local or urban scales, the chapters by Radhika Mongia and Graham Hudson develop alternative conceptualizations of scale and its relation to law in their analyses of historical and contemporary processes of migration governance. Graham Hudson draws on his empirical study of urban securitization process in Canada to demonstrate how federal immigration authorities 'scale down' by appropriating local powers, especially through the local police, thus amplifying their own regulatory reach. Importantly, this process does not result in a zero-sum shifting of sovereign power from one level to another but amplifies it overall, most notably through the local collection and cross-level sharing of data. Mongia focuses likewise on the role of law as a preeminent scale-making technique and highlights, for instance, how migration law and the legal regulation of colonial Indian migration were produced by and implicated in a deep restructuring of space. Drawing on an analysis of legal artefacts and technologies, she details how an imperial social–legal space was gradually rendered 'unintelligible' as a national social–legal space ascended. The chapter engages with critiques of scalar thought, most notably those that oppose spatial and temporal analysis as distinct approaches. Whilst Mongia draws on the work of Lefebvre to temporalize spatial categories

¹⁰¹ *Ibid.*, p. 32.

¹⁰² Schiller and Çağlar, "Towards a Comparative Theory of Locality in Migration Studies".

¹⁰³ Darling and Bauder, *Sanctuary Cities and Urban Struggles*.

¹⁰⁴ Isin, "City.State: Critique of Scalar Thought".

and historicize scale-making, it is her focus on the role of law that especially enables her to persuasively develop these alternative scalar conceptions and ‘space-time formations’.

Common to all chapters, addressing legal processes of scaling and the scaling qualities of the law, is a concern for the historical context in which they arose. This attention is deliberate. For whether we talk about general scale-making, identity formation or critical interrogations of the concept of scaling, much will be gained by situating them in accounts of actual processes rather than relying on static categories that often turn out to be bound to the nation-state.¹⁰⁵

5 Normative Perspectives on Local Migration Law and Governance

It has already been mentioned that much of the scholarship regarding local migration governance takes an empirical approach. That said, the observation that local authorities are (even if not for the first time) becoming more involved in migration governance has also spurred some debates about how the different levels of government could interact more beneficially.¹⁰⁶ Normative arguments feature hereby prominently in the form of general appraisals of local level pragmatism, which is presented as less politicized and more suited to overcome ‘silo thinking’ in policymaking than at national levels.¹⁰⁷ Beyond that, however, literature on the local turn does not usually have a clear normative orientation on the outlook of migration policy.¹⁰⁸ Likewise, the upsurge in local-level policymaking is conspicuously absent from the works of Joseph Carens, David Miller and other normative migration theorists,¹⁰⁹ which may yet again be attributed to the conceptual centrality of the nation-state and state sovereignty in these debates.¹¹⁰

The gap between these two bodies of literature is striking considering how politically charged the idea of local migration governance is, not least outside academia. The ongoing dispute surrounding sanctuary cities in the United States, addressed in this volume in the chapters by Chris Lasch and Daniel Morales, is probably the clearest illustration of this

¹⁰⁵ Hoye, “Sanctuary Cities and Republican Liberty”.

¹⁰⁶ See Scholten and Penninx, “The Multilevel Governance of Migration and Integration”.

¹⁰⁷ See Wolffhardt, “Operationalising a Comprehensive Approach to Migrant Integration”, p. 5.

¹⁰⁸ Missbach et al., “Is Makassar a ‘Sanctuary City?’”, p. 212.

¹⁰⁹ Hoye, “Sanctuary Cities and Republican Liberty”, p. 71.

¹¹⁰ Song, “Why Does the State Have the Right to Control Immigration?”.

point. Another striking example is provided by Moritz Baumgärtel and Franziska Pett in their discussion of how the local government in Berlin challenges restrictive national legal frameworks. They contend that the legal action taken by the city of Berlin against the national government before the Federal Administrative Court emerges within specific socio-legal constellations that derive also from the support of a broader trans-municipal solidarity movement that calls for increased refugee admission. The chapters by Nikolas Feith Tan and the one by Baumgärtel and Pett forcefully show, moreover, how subnational and local efforts are no longer limited to addressing the reception and integration of those already present but are now also directed at refugee admission, resettlement and community sponsorship.

So why should local authorities (and local actors generally) participate in migration governance in the first place, this apparent and possibly last ‘bastion of sovereignty’¹¹¹ in global times? The third objective of *Theorizing Local Migration Law and Governance* is to explore this question against the backdrop of the debates, sources and problems connected to law. Such legal perspectives have a lot to offer, not least because they are always (at least implicitly) engaged in normative queries because migration laws are always developing and often manifestly deficient. This section provides the background for this discussion by recounting some of the works that are relevant in this context.

A first noteworthy contribution that this volume makes is to the lively debate on citizenship. To be sure, the concept continues to be under heavy pressure, with critics not mincing their words. Shachar has described it as a ‘birthright lottery’,¹¹² while Kochenov calls it a ‘somewhat whimsical and totalitarian’ legal fiction that preaches equality but practices exclusion.¹¹³ While understandable, there is a quixotic quality to these critiques: the pervasiveness of the concept of citizenship at all levels of governance means that those who are disadvantaged will normally fight for it rather than abandon it. According to Arendt, the significance of citizenship is most apparent when looking at refugees and displaced people who ‘defend themselves furiously’ against threats of statelessness.¹¹⁴ It therefore comes as no surprise that the growing involvement of local authorities and actors has fuelled attempts to rethink this category in terms of ‘urban’ and

¹¹¹ Dauvergne, ‘Sovereignty, Migration and the Rule of Law in Global Times’, pp. 588.

¹¹² Shachar, *The Birthright Lottery*.

¹¹³ Kochenov, *Citizenship*, p. 3.

¹¹⁴ Arendt, *The Origins of Totalitarianism*, p. 292.

‘municipal citizenship’.¹¹⁵ While this body of literature continues to proliferate (making it impossible to do full justice to it here), the jury is still out on whether these efforts are feasible and indeed desirable. On the one hand, it has been argued that particularly in the domain of migrant integration, urban citizenship plays a crucial role mediating formal membership and bottom-up claims made by those who are being excluded.¹¹⁶ On the other hand, it has also been shown that urban citizenship claims can be competing and potentially fragmenting.¹¹⁷ As Bauböck puts aptly though somewhat disappointingly from a normative perspective, urban citizenship ‘is not intrinsically good or bad’.¹¹⁸

Several chapters in this book address the question of citizenship and flesh out its various contested forms and, more generally, how we can understand belonging in a world where it often has multiple anchors. Discussing the topical example of the implementation of the National Register of Citizens in Assam and the Citizenship Amendment Act in India, Radhika Mongia highlights how national citizenship, historically one of the primary space-making techniques of migration law, permeates subnational and local regulations. The chapter by Benjamin Perryman demonstrates by contrast that even if municipal citizenship may not exist from a formal point of view, it still ‘enables ... [a] space for migrants to more readily become political actors’. Perryman also explores three different avenues to recognize political, social and moral claims in domestic law in the context of former cross youth facing deportation from Canada. Another perspective on the possibilities for local citizenship is offered by Luisa Sotomayor and Liette Gilbert. Their chapter brings into focus the limits of both sanctuary and solidarity in the post-pandemic, neoliberal city of Toronto, while also offering a normative appraisal of these local challenges and contradictions. More specifically, the authors highlight how reclaiming the project of planning as a collective social practice could offer openings for migrant justice and local citizenship.

Still, the approach taken by the different chapters reveals more than the normative ambiguity of citizenship. Debates on urban citizenship are often premised on the local presence or emplacement of forced migrants and on

¹¹⁵ For a recent discussion, see Bauböck and Orgad, “Cities vs States”.

¹¹⁶ Gebhardt, “Re-Thinking Urban Citizenship for Immigrants from a Policy Perspective”.

¹¹⁷ Blokland et al., “Urban Citizenship and Right to the City”.

¹¹⁸ Bauböck, “In Defence of Multilevel Citizenship”.

local or urban challenges to solidarity and sanctuary.¹¹⁹ These urban citizenship debates are yet to fully address another phenomenon: the increasing subnational mobilization¹²⁰ for community sponsorship (see chapter by Nikolas Feith Tan) and refugee admission (Baumgärtel and Pett). The result is a gap in normative theorizing, a challenge that the chapter by Tan takes up, by investigating how protection principles can inform the development of community sponsorship models and by reflecting on the potential of local authorities developing this model of refugee protection.

The second, more general aspect in this part of the volume relates to the challenging question of how the involvement of local actors and especially local authorities ought to be assessed normatively. As mentioned, those advocating for including local government will often (if only implicitly) invoke the ‘local pragmatism hypothesis’¹²¹ that presents them as relatively unpolitical problem-solvers, a trope that remains popular also among scholars. While this proposition is true in some cases,¹²² it has been found to stand on shaky ground because it is easy to identify localities where local government actors discriminate against migrants for political gains.¹²³ Moreover, what is considered ‘pragmatic’ may well differ from one city to the next depending on local norms and identities.¹²⁴ Some of the chapters in this book further complicate and challenge this local progressive pragmatism thesis by pointing towards the limits of sanctuary and solidarity in neoliberal post-pandemic urban contexts (see the chapter by Sotomayor and Gilbert). Even where local governments in principally welcoming and politically progressive large cities like Berlin make ‘pragmatic’ decisions, this does not necessarily result in favourable outcomes for migrants, as the chapter by Baumgärtel and Pett highlights.

To avoid reductionist viewpoints, authors like Filomeno have introduced ‘relational’ approaches that take into account the interdependencies between local governments and other actors.¹²⁵ Our volume follows this suggestion by placing the latter centre stage in this discussion, by zooming

¹¹⁹ *Ibid.*

¹²⁰ Schwiertz and Schwenken, “Mobilizing for Safe Passages and Escape Aid: Challenging the ‘Asylum Paradox’ between Active and Activist Citizenship, Humanitarianism and Solidarity”.

¹²¹ Schiller, “Paradigmatic Pragmatism and the Politics of Diversity”.

¹²² See also [Chapter 4](#) by Baumgärtel.

¹²³ Ambrosini, “We Are Against a Multi-Ethnic Society”; Mourad, “Brothers, Workers or Syrians? The Politics of Naming in Lebanese Municipalities”.

¹²⁴ Hoekstra, “Governing Difference in the City”.

¹²⁵ Filomeno, *Theories of Local Immigration Policy*, p. 11.

in on the role of urban solidarity movements (Sotomayor and Gilbert), transnational movements (Baumgärtel and Pett) and international and faith-based actors (Tan). How to translate such relational perspectives into normative arguments has been addressed in several other instructive legal works. For example, recent scholarship on sanctuaries has reframed those as ‘constitutional cities’ whose autonomy ‘is critical to a healthy interchange between and among federal, state, and local governments’¹²⁶ and can serve as a corrective element that can inject equity into federal immigration law.¹²⁷ Likewise, cities may be needed to reinvigorate international law by ‘pulling’ human rights ‘back in’ as it pertains to undocumented migrants, who have struggled to obtain recognition in this legal framework.¹²⁸

The interdependence between ‘levels’ of governance is in fact, so strong that a historical examination lays bare only their ever-changing ideological orientation. In making this point, Matthew Hoye has gone as far as claiming that sanctuary cities in the United States reflect the original republican ‘volitional allegiance’ that predates even the Declaration of Independence.¹²⁹ By contrast, Hidetaka Hirota’s work on the origins of immigration policy in the United States points to local and state immigration control existing prior to the introduction of federal immigration law. He traces how local authorities and Atlantic seaboard states built upon colonial poor law to develop laws to restrict the immigration of destitute Europeans.¹³⁰ In this book, Radhika Mongia’s chapter historicizes¹³¹ scale- and space-making projects over the *longue durée* focusing on migration governance as a constituent part of a wider, uneven and fraught historical transformation from an imperial scale to a national scale and from empire-states to nation-states. Her analysis shows how emblematic artefacts of modern migration law, such as passports, are connected to contingent historical events that positioned migration law and governance at the heart of the production of national scale and of national identity. By showing how scales shift, change, appear and disappear, Mongia responds

¹²⁶ Massaro and Milczarek-Desai, “Constitutional Cities”, p. 1.

¹²⁷ Cade, “Sanctuaries as Equitable Delegation in an Era of Mass Immigration Enforcement”.

¹²⁸ Baumgärtel and Oomen, “Pulling Human Rights Back In?”.

¹²⁹ Hoye, “Sanctuary Cities and Republican Liberty”.

¹³⁰ Hirota, “Limits of Intolerance: Nativism and Immigration Control in Nineteenth-Century New York”.

¹³¹ In her work, Mariana Valverde has written extensively on the risks of excluding temporalization from the analysis of the relationship between political/legal power and territory in impoverishing our understanding of legal-political governance. See, notably, Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance*.

to a lack of a robust historical dimension in normative debates on the 'local turn' in migration governance.

Several contributions to this volume base their normative claims on relational and integrative understandings of what local authorities can(not) and should (not) do in tandem with other local actors. They thus highlight the interrelation between the normative claims made locally and transnationally. Daniel Morales refers to the 'cosmopolitan' visions that emerge from the growing involvement of local authorities and argues that they could accomplish unanticipated yet tangible results when it comes to a more plural immigration policy. Benjamin Perryman posits that international human rights law is an appealing normative guidepost for dealing with questions of migrant inclusion at the municipal level. Interestingly, the human rights framework is hereby presented as enabling rather than constraining, which underscores the co-constitutive nature of local and transnational frames of references – an insight that resonates also with the previous understanding of 'scaling' as an ongoing process. Another perspective is offered by Tan's chapter, which argues that connecting local governments with transnational and international actors, such as the Global Refugee Sponsorship Initiative (GRSI) and UNHCR, will increase the prospects of the emergence of a principled approach to the community sponsorship of refugees.

Part III of the volume also contributes to recent debates on how growing disparities between rural and urban localities can inform efforts to theorize local migration law and governance. Even though migration is still primarily seen as an 'urban' phenomenon,¹³² migration scholars are increasingly examining local-level opportunities and challenges of migration in rural and marginalized areas.¹³³ This scholarship has brought up interesting questions for normative discussions on the local turn, such as about the capacity of rural and small town localities, particularly those without longstanding history of migrant settlement, to respond to the arrival of larger numbers of migrants. Research on transnational municipal networks and migration policy has identified other challenges pertaining to, for instance, the underrepresentation of small towns and rural localities in transnational networks in the domain of migration governance.¹³⁴ A 'rural-urban divide' is visible also in scholarship

¹³² Natale et al., "Migration in EU Rural Areas".

¹³³ Woods, "Precarious Rural Cosmopolitanism".

¹³⁴ Oomen, Baumgärtel and Durmus, "Transnational City Networks and Migration Policy".

as local approaches to migration governance in small towns¹³⁵ and rural localities¹³⁶ remain relatively under-theorized. Recently, however, efforts have been made to bridge this schism,¹³⁷ with the tendency to conflate cities with local authorities in research on local governance being called out by migration and legal scholars alike.¹³⁸ Mariana Valverde, in her concluding chapter, picks up this theme to break down in more detail the theoretical and normative implications of such a conflation.

Within *Part III* of this volume, the chapter by Daniel Morales explores head on how these growing discrepancies between urban and rural localities bear on the efforts to theorize the local turn in migration governance. Morales argues that centralized migration powers give pride-of-place to the views of rural residents in the United States and thus shuns perspectives of urbanites, who are more likely to encounter migrants in their locality. He therefore asks us to rethink the allocation of migration powers against this backdrop of the urban–rural divide in an effort to promote pluralization and policy polyphony.

Empirical investigations of local migration governance in urban settings often point towards the relevance of transnational diaspora networks, local social movements and civil society. Luisa Sotomayor and Liette Gilbert highlight the important role of local social movements and networks, many of whom have longstanding local urban histories that have underpinned social justice efforts for irregular migrants.¹³⁹ By contrast, Moritz Baumgärtel and Franziska Pett, while focused on the city-state of Berlin, point out how the broader transmunicipal ‘Safe Harbor’ movement also includes smaller towns, hamlets and rural municipalities.

Finally, several mechanisms that the chapters bring into focus are not exclusive to urban contexts, even if they are more readily associated with urban citizenship or with urban challenges, such as neoliberal service competition. Nikolas Feith Tan’s normative enquiry, for instance, does not privilege cities, as it investigates the potential of local

¹³⁵ Bonizzoni and Marzorati, “Local Immigrant Incorporation Pathways in Small-Scale Cities”.

¹³⁶ Glorius, “The Challenge of Diversity in Rural Regions”.

¹³⁷ Schammann et al., “Zwei Welten? Integrationspolitik in Stadt und Land”.

¹³⁸ Goodhart, “Human Rights Cities: Making the Global Local”.

¹³⁹ Unsurprisingly, the emerging scholarship on local migration regimes in rural settings investigates the possibility for local civil society to influence local migrant reception and inclusion in the absence of a clear political clout of civil society actors. See, for instance, Cabral and Swerts, “Governing Precarious Immigrant Workers in Rural Localities: Emerging Local Migration Regimes in Portugal”.

authorities generally in developing refugee protection through community sponsorship. Similarly, Sotomayor and Gilbert see some potential for reclaiming the project of planning as a collective social practice that could offer openings for migrant justice. Perryman's examination of the interconnections between subnational service provision (the child welfare system) and deportation practices also bears relevance for non-urban settings. Baumgärtel and Pett, finally, argue that it is more appropriate to assess the actions of local governments with reference to specific 'socio-legal constellations' rather than rural/urban dichotomies. That said, they also find that these constellations are shaped significantly by nationally allotted legal powers, of which a city-state like Berlin holds comparatively more than most other cities and towns.

* * *

The detailed description provided in the previous sections makes an extended overview of the book obsolete. It suffices to repeat that *Theorizing Local Migration Law and Governance* is divided into three parts featuring three contributions each. The first offers empirical insights from Canada (Perryman), South Africa (Handmaker and Nalule) and Germany (Baumgärtel and Pett), all of which show how the analysis of specific legal phenomena and developments sheds light on the competing and often even contradictory rationales of migration governance. The chapters in [Part II](#) question the consequences of increases in the legal authority that local authorities enjoy in the field of migration. This includes the sanctuary jurisdiction debate in Canada (Hudson) and the United States (Lasch), as well as a historical account of the mutually constitutive relationship between migration law and the national scale in the British colonial context at the beginning of the twentieth century and more recently, in postcolonial India (Mongia). [Part III](#) demonstrates the relevance that a consideration of the law can play in the development of normative perspectives. The contributors discuss the need for decentralizing of admission competencies (Morales) and reflect on subnational and local actors' potential contribution to the development of refugee protection principles in the context of community sponsorship (Tan). They also probe possibilities in purview of municipal authorities that hold social practices with redistributive capacity, such as (urban) planning, to expand and strengthen migrant justice and sanctuary commitments (Sotomayor and Gilbert). Finally, the concluding chapter by Valverde brings together several of the threads developed in all the chapters to unpack – as well as

criticize – some of the most commonly held (mis)conceptions regarding ‘the city’, the actors that operate at a local scale, and the dynamic and volatile nature of governance at various scales.

We want to remind readers that most contributions broach topics other than the one prioritized in their designated part. Nonetheless, it is our hope that the division of the book into three sections, as discussed in this introduction, will offer the reader a useful roadmap for navigating through the copious and complex theoretical questions that local migration law and governance raise.

Finally, this book follows the example of Darling and Bauder in allowing each contributor to use the terminology that reflects their own scholarly opinions and rationales whilst also maintaining a common ground, namely by denouncing terms such as ‘illegal migrants’.¹⁴⁰ This approach also resonates with this volume’s objective to contribute to theorizing local migration law and governance by foregrounding a broad range of socio-legal perspectives. ‘Local authority’, ‘local government’ and ‘local administration’ will be used synonymously to designate the lowest tier of government in any national legal setting.

¹⁴⁰ Darling and Bauder, “Introduction”.

PART I

Legal Contradictions and Tensions in Local Migration Governance

Crimmigration and Crossover Youth

The Deportation of Former Wards of the State

BENJAMIN PERRYMAN*

1 Introduction

‘The most fundamental principle of [Canadian] immigration law is that non-citizens do not have an unqualified right to enter or remain in the country’.¹ Based on this principle, Canada, like many states, attaches immigration consequences to non-citizens who are convicted of criminal offences.² Deportation regularly follows criminal conduct. Citizenship, in this ‘crimmigration’ context, is formalistic and defined by the federal government, which has exclusive constitutional responsibility over naturalization and aliens.³ Conventionally, it is the state, and the state alone, that determines when a non-citizen can be deported on account of criminality.

A growing migration studies literature challenges this conventional account and posits that migration governance is multi-scalar, even in the context of deportation. This literature reveals a ‘multilayered jurisdictional patchwork’ that involves processes and actors at the substate, national, and international scales.⁴ In order to understand how deportation is truly governed, this literature contends, one must appreciate the

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¹ *Canada (Minister of Employment and Immigration) v. Chiarelli* [1992] 1 SCR 711.

² Bourbeau, “Detention and Immigration”; Menjivar et al., “The Expansion of ‘Crimmigration,’ Mass Detention, and Deportation”; Stumpf, “The Process Is the Punishment in Crimmigration Law”; Aiken et al., “Crimmigration, Surveillance and Security Threats”.

³ Macklin, “Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien”.

⁴ Varsanyi et al., “A Multilayered Jurisdictional Patchwork”.

role that each of these scales plays, or as Resnik more bluntly observes, there is a ‘uselessness of using any single nation-state as the unit of analysis when thinking about the migration of people, law, or objects’.⁵

A multi-scalar account of deportation practices, however, does not determine the valence or contribution of a particular scale. Substate actors, such as local law enforcement, may contribute to deportation processes by criminalizing racialized migrants via traffic stops, other mundane offences, and local ordinances.⁶ Conversely, some cities across the globe, in very different national contexts, employ local-level policies with the common intention of providing ‘sanctuary’ or ‘refuge’ to migrants without status.⁷ Even within a single state, there can be significant site specificity despite the fact that local or other substate officials are implementing a common federal immigration policy.⁸ As a result, the specific impact of multi-scalar migration governance must be evaluated on a case-by-case basis.

What multi-scalar accounts of deportation practices reveal is that rescaling of migration governance can create opportunities for subnational forms of citizenship. For example, where local and state-level governments provide voting rights, protections against deportation, access to identification, and accessible education, migrants without formal citizenship may gain ‘membership via the mere fact of *presence* and *residence* in a city or state, in spite of the powerful boundaries still surrounding formal membership in the nation-state’.⁹ This type of ‘local citizenship’ challenges the normative foundation of citizenship as exclusively within the purview of the state.¹⁰ It does so by creating a form of ‘social legality’ that operates independently of formal legal status and produces a more complex meaning of citizenship.¹¹

⁵ Resnik, “Within Its Jurisdiction”, p. 119.

⁶ Armenta, “Racializing Crimmigration”; Armenta and Alvarez, “Policing Immigrants or Policing Immigration?”; Provine and Doty, “The Criminalization of Immigrants as a Racial Project”; Stuart et al., “Legal Control of Marginal Groups”; Varsanyi, “Immigration Policing through the Backdoor”.

⁷ Bauder and Gonzalez, “Municipal Responses to ‘Illegality’”.

⁸ Coleman, “The ‘Local’ Migration State”; Chavez and Provine, “Race and the Response of State Legislatures to Unauthorized Immigrants”.

⁹ Varsanyi, “Interrogating ‘Urban Citizenship’ vis-à-vis Undocumented Migration”, p. 244.

¹⁰ Spiro, “Formalizing Local Citizenship”; Villazor, “Sanctuary Cities and Local Citizenship”; Motomura, “Immigration Outside the Law”.

¹¹ Flores and Schachter, “Examining Americans’ Stereotypes about Immigrant Illegality”; Flores and Schachter, “Who Are the ‘Illegals’?”.

Beyond contributing to what citizenship means, social legality and presence-based forms of citizenship also engender multidimensional politics when states seek to include or exclude certain migrants.¹² Local protest over the morality and human cost of deportation, in specific cases, can alter how federal immigration officials implement deportation policies.¹³ Scaled up, the politics of belonging can even lead to legal and policy changes at the level of the state, for example, the attempt at formal recognition for undocumented migrants who arrived in the United States of America as children.¹⁴ Accordingly, the multi-scalar migration governance literature also provides a constructivist account of the social and political forces that can shape the creation, interpretation, and application of immigration law.

This chapter applies a multi-scalar account of deportation practices to a specific scenario in Canada: former crossover youth facing deportation as adults. Crossover youth are minors who grow up in the child welfare system and ‘crossover’ to the youth criminal justice system.¹⁵ Where crossover youth are non-citizens, a finding of guilt within the youth criminal justice system may prevent them from becoming a Canadian citizen.¹⁶ Such youth cannot be deported because youth sentences are exempted from ‘crimmigration’ consequences.¹⁷

‘Crimmigration’ consequences result from the intersection between criminal law and immigration law. While criminal courts in Canada do not sentence non-citizens to expulsion, a criminal conviction can lead to a loss of immigration status and deportation, often with minimal consideration of the actual circumstances of the criminal offence. In this sense, the immigration law implications are related to the criminal law and follow directly from the criminal offence even if they are not technically a criminal punishment.

As non-citizens, crossover youth are vulnerable to ‘crimmigration’ consequences, including deportation, if they are convicted of further offences as young adults. Canadian immigration legislation deems adult offenders

¹² Ellermann, “Discrimination in Migration and Citizenship”.

¹³ Ellermann, “Street-Level Democracy”.

¹⁴ Nicholls, *The DREAMers*; Olivas, *Perchance to DREAM*.

¹⁵ Finlay et al., *Cross-Over Youth Project*; Bala et al., “Child Welfare Adolescents & the Youth Justice System”; Bromwich, “Cross-Over Youth and Youth Criminal Justice Act Evidence Law”.

¹⁶ Citizenship Act, R.S.C. 1985, c. C-29, s. 22.

¹⁷ Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 36(3)(e).

‘inadmissible’ and assigns deportation consequences based on the maximum sentence possible *not* the actual circumstances of the offence.¹⁸

Research on crossover youth shows that their recidivism rates are higher than other youth and often linked to personal characteristics associated with involvement in the child welfare system.¹⁹ Race is also a factor that mediates placement, experience, and outcomes within the child welfare system.²⁰ This means that migrant youth are exposed to a non-trivial risk of deportation when placed in the Canadian child welfare system. As a result, non-citizen crossover youth are disadvantaged in two ways. First, they are more likely to become involved with the criminal justice system than children who are raised by their families. Second, they face more severe consequences for their actions than children who are citizens because they can be deported if their criminal involvement continues into young adulthood.

Building on the concept of ‘emplacement’, developed by Çağlar and Glick Schiller,²¹ this chapter argues that the apprehension of migrant children by the Canadian child welfare system deprives some children of the right to have rights. This deprivation is caused by the mutually reinforcing failures of local- and state-level institutions to properly protect migrant children in the child welfare system, including from the state’s own threat of deportation. At the same time, the placement of crossover youth in local institutions enables a politics of resistance to deportation in the context of ‘crimmigration’.

The politics of resistance has relational and legal dimensions, which are both informed by a multi-scalar account of deportation practices. Section 2 shows how placement of migrant children in cities and local child welfare systems creates relational obligations of care that demand a redefining of citizenship. Wards of the state are *of the* state. In other words, when the state exercises its coercive power to apprehend a migrant child because they are in the state’s jurisdiction and in need of protection, the state assumes the role of parent, providing opportunities (and erecting

¹⁸ *Ibid.*, s. 36.

¹⁹ Herz et al., “Challenges Facing Crossover Youth”; Cho and Lee, “Childhood Maltreatment and Repeat Offending in Juvenile Delinquents”; Guarnaccia et al., “Links between Adverse Childhood Experiences, Psychopathological Symptoms and Recidivism Risk in Juvenile Delinquents”; Robertson and Walker, “Predictors of Justice System Involvement”.

²⁰ Pinderhughes et al., “Youth of Color in Care”; Boyd, “Individual Consequences of Racial Disproportionality and Disparities”; Bergen and Abji, “Facilitating the Carceral Pipeline”.

²¹ Çağlar and Glick Schiller, *Migrants and City-Making*.

barriers) to that child's development, and through this process, accepting that child as a member of the state, even if that child is a non-citizen. This creates a 'social legality' of belonging. Section 3 explains how 'social legality' can transform into 'formal legality' via administrative, equitable, and constitutional legal reasoning. An administrative legal regime that grants discretionary power not to deport in compelling circumstances may need to account for the abysmal treatment of migrant children in care. The apprehension of migrant children by the child welfare system may also create fiduciary obligations – owed by the state to wards in its care – that if breached require an equitable remedy that puts former wards in as good a position as they would have been if there was breach of the duty. Government action, at the local and state levels, including a failure to act, may also violate the constitutional rights of migrant children in care. Laws that make it harder for certain groups of children to obtain citizenship, a child welfare system that systematically produces worse outcomes for certain groups, and deportation processes that ignore the experience of former crossover youth may constitute arbitrary and discriminatory disadvantage. To the extent that former crossover youth were denied the equal protection of law, they may be entitled to a constitutional remedy to confer citizenship or prohibit deportation.

The main claim of this chapter is that a multi-scalar analysis of deportation practices can shape legal argument and obligation. This is important because the migration studies literature is often framed in social, political, and moral terms that call for changes to policies for the benefit of migrants rather than in legal terms that demand application of existing principles to migrants. Using a detailed analysis of the interconnection between sub-national child protection services and federal deportation practices, the chapter challenges the traditional lens of analysis that primarily conceives of deportation as implicating only the role of the federal government. The chapter shows that the placement of non-citizen children in the child protection system demands a reconceptualization of citizenship that transforms notions of social legality into formal legality.

2 Emplacement and the Redefining of Citizenship

When children migrate to Canada, as immigrants or refugees, they arrive not just in a new country but in new legal, political, and social spaces. The multi-scalar migration governance literature, discussed earlier, demonstrates that the nature of those spaces can be local, nation-state, or international, depending on the specific jurisdictional context. Çağlar and

Glick Schiller²² conceptualize engagement within these different spaces as ‘emplacement’. They define ‘emplacement’ as:

the relationship between, on the one hand, the continuing restructuring of place within multi-scalar networks of power and, on the other, a person’s efforts, within the barriers and opportunities that contingencies of local place-making offer, to build a life within networks of local, national, supranational, and global interconnections.²³

This definition recognizes that migrants are not simply governed by state and non-state institutions but also engage with those institutions at different levels. The act of leaving, arriving, and existing in these different spaces is thus relational, and these relations are shaped by a panoply of actors, legal regimes, and political processes that operate in a particular space.

For a migrant child apprehended by the child welfare system, the spaces and institutions of most apparent salience are substate, particularly provincial or municipal agencies responsible for child protection. As this section explains, migrants arrive disproportionately in Canadian cities. There, they engage with opportunities and barriers provided by substate institutions, especially in the context of service delivery. One of those services is child protection, which in Canada is implemented by provincial or municipal agencies. For migrant children in care, it is these agencies that shape the opportunities and barriers that influence their lives most immediately. The federal government still governs the acquisition of formal citizenship, but this space and reality is a distant horizon for migrant children in care as well as many social workers who are responsible for securing these children’s best interests.

The importance of federal responsibility for citizenship becomes more immediate and ominous when migrant children in care become involved in the youth criminal justice system. Such crossover youth may be prohibited from becoming Canadian citizens and gaining the full panoply of rights associated with citizenship, including the right not to be deported.²⁴ While many thought or assumed they were Canadian – an understandable assumption for a young adult who has grown up entirely in the care and control of the state – apprehension by the child welfare system does not confer formal citizenship status. This makes former crossover youth

²² *Ibid.*

²³ *Ibid.*, pp. 20–21.

²⁴ Citizenship Act, R.S.C. 1985, c. C-29, s. 22.

vulnerable to ‘crimmigration’ consequences if they are convicted of crimes as young adults.

Far from being a fictitious scenario, this section highlights two recent case studies where a former crossover youth faced deportation from Canada on account of criminality. What is noteworthy about these cases is that they raised public dialogue on the meaning of citizenship and resulted in public calls for the redefinition of citizenship in the face of potential deportation.

2.1 *Cities as Sites of Migration and Apprehension*

In Canada, between 2011 and 2016, fully two-thirds of all immigration was to the five most populated cities and nine out of ten migrants relocated to an urban centre.²⁵ This is not a uniquely Canadian phenomenon. Globally, migration to cities is ‘a constitutive element of modernity’.²⁶ This can place cities in tension with state authorities. Cities that attempt to integrate irregular migrants or prevent the removal of non-citizens ‘take a direct policy stance against national immigration and citizenship policies’.²⁷

Under Canada’s federal constitutional order, only the federal government and provincial governments have authority to regulate in their respective jurisdictional areas. Cities ‘are creatures of [provincial] statute and can only act within the powers conferred on them by the provincial legislature’.²⁸ Formally, they have no legal authority over immigration. However, practically, cities and other substate actors play a crucial role in the integration of migrants.²⁹ For example, the federal government may fund city libraries or non-profit organizations to deliver language classes and other integration services to migrants even though regulation of city libraries and non-profit organizations are not federal responsibilities.

Given the services many major Canadian cities are responsible for regulating and administering, either directly or by delegation from provincial or federal governments, it is unsurprising that cities are key actors in

²⁵ Statistics Canada, *Immigration and Ethnocultural Diversity*.

²⁶ Smith and Guarnizo, “Global Mobility, Shifting Borders and Urban Citizenship”, p. 614.

²⁷ Kaufmann, “Comparing Urban Citizenship, Sanctuary Cities, Local Bureaucratic Membership, and Regularizations”, p. 443.

²⁸ *London (City) v. RSJ Holdings Co. Ltd.* 2007 SCC 29, para. 37.

²⁹ Rodriguez, “The Significance of the Local in Immigration Regulation”; Motomura, “Immigration Outside the Law”.

integrating migrants. Though constitutional authority for civil and political rights is vested at the provincial level, in practice, major municipalities are responsible for public education, welfare provision, social housing, policing, and child protection. Each of these services comes with a unique legal regulatory regime as well as governmental and non-governmental employees who interpret and apply that regime. For many migrants, these are the government officers who matter the most – far more than any official in the federal immigration department.

Child protection falls under provincial jurisdiction in Canada, and in each province, there is a department or ministry that is responsible for child protection legislation and service delivery. In some provinces, service delivery is delegated to children's aid societies, which are agencies mandated by provincial law to deliver child protection services in a specified territorial jurisdiction. In practice, this means that there is often a children's aid society for a given city, for example the 'Children's Aid Society of Toronto'. Such societies develop local policies and deliver child protection services in their respective city. In cities where there is a sizeable population of non-citizen children in care, those policies may relate to the unique immigration and citizenship needs of non-citizen children. In other provinces, these frontline child protection services are delivered by provincial employees, often without any tailoring of the services to the unique needs of non-citizen children. Other than providing some funding for children who are refugee claimants or government-assisted refugees (and Indigenous children), the federal government is not responsible for child protection. The federal government does, however, retain jurisdiction over the naturalization and citizenship of children in care, but the initiation of such processes is left to provincial child protection authorities or their children's aid society delegates.

If emplacement entails migrants navigating networks of power to overcome barriers and make the most of opportunities, municipal service delivery becomes one site where multi-scalar migration governance takes shape. Migrants, like all people, have economic and social needs that involve engaging with state service delivery regimes. How these regimes treat migrants or specific classes of migrants influences the extent to which this multi-scalar governance acts as a barrier or opportunity. This is especially the case for municipal child welfare agencies that are responsible for apprehending children in need of protection.

Until recently, many child welfare agencies made little to no effort to secure Canadian citizenship for wards in their care, it was simply 'not something that has been required to be monitored' as part of standard

best practices.³⁰ Worse, research shows that migrant children in care regularly assume that their child welfare worker is taking care of their most pressing needs, including the acquisition of citizenship, but these assumptions are often misplaced.³¹

The reasons for this type of systemic failure are contested. At best, it is the result of child welfare workers who do not have an adequate understanding of the unique needs of migrant children or the resources to respond to those needs.³² Others point to a more pernicious explanation that situates the apprehension, inadequate care, and potential displacement of migrant youth within Canada's historic and ongoing race relations.³³

Anti-Black racism is part of Canada.³⁴ So is xenophobia.³⁵ At the nation-state level, Canada has a long history of immigration policies designed to exclude non-White migrants, either explicitly or substantively.³⁶ This racism has significant implications for the treatment of migrant children in the child welfare system.

While there is no formal discrimination in child protection in Canada, recent studies show stark disparities based on race. In Toronto, for example, when a report is made to children's services, Black families are twice as likely to be investigated and Black children are more likely to be apprehended. Poverty, not abuse, is the strongest predictor of placement in care. Once in care, Black children are more likely to be adopted or 'age out' of care, whereas White children are more likely to be reunited with their families. All in all, on a population basis, Black children are overrepresented in care by a factor of five times.³⁷

These racial dynamics do not mean that non-White migrant children are *per se* targeted by child protection services. It does, however, suggest that there is an intersectionality between immigration status and race that

³⁰ Hare, "Newcomer, Immigration, and Settlement Sectors", p. 65.

³¹ *Ibid.*

³² *Ibid.*

³³ Bergen and Abji, "Facilitating the Carceral Pipeline"; Nath, "Curated Hostilities and the Story of Abdoul Abdi".

³⁴ Maynard, *Policing Black Lives*; Inniss, "Toward a Sui Generis View of Black Rights in Canada".

³⁵ Zaman, "Racialization and Marginalization of Immigrants".

³⁶ Bashi, "Globalized Anti-blackness"; Aiken, "From Slavery to Expulsion"; Johnston, *The Voyage of the Komagata Maru*.

³⁷ Ontario Association of Children's Aid Societies, "Race Matters in the Child Welfare System"; Ontario Human Rights Commission, *Interrupted Childhoods*; Contenta et al., "CAS Study Reveals Stark Racial Disparities for Blacks, Aboriginals".

may affect emplacement for some migrants. Indeed, studies of separated refugee children show that they are subject to both anti-refugee and anti-youth discourses.³⁸ To the extent that Blackness intersects with non-citizenship, this disproportionate treatment of Black children and families has led some scholars to argue that the child welfare system is complicit in facilitating a 'pipeline that first normalizes the separation of largely racialized, poor, and/or immigrant families and then reframes foster children as threats to the social order requiring their incarceration and expulsion'.³⁹

Even if we do not accept that Canada is consciously complicit in an apprehension to deportation pipeline, the emplacement of migrant children in the child welfare system functions as a barrier to their full integration in Canadian society, particularly with respect to gaining Canadian citizenship and all the inherent rights that such status entails. This makes former crossover youth vulnerable to deportation if they engage in criminal activity as young adults. At the same time, the emplacement of migrant children in poor systems of care may also challenge our conception of citizenship where former wards of the state face deportation because the state, as parent, failed to obtain citizenship on their behalf.

2.2 *Redefining Citizenship in Response to Former Crossover Youth*

The importance of cities in multi-scalar migration governance, including in the context of former crossover youth, has implications for how citizenship is defined. Globalization has changed the social fabric of cities.⁴⁰ Transnational mobility, transnational migrant networks, neoliberal restructuring of states that deemphasizes public authority, and securitization of borders are factors related to changing cities that affect the national characteristic of citizenship.⁴¹ Through these changing dynamics of cities and their place within the world, citizenship is being:

(1) rescaled – the hegemony of the national-scale political community is being weakened by the formation of communities at other scales; (2) reterritorialized – the link between the nation-state's territorial sovereignty and citizens' political loyalties are being challenged; and (3) reoriented – away from the nation as the predominant political community.⁴²

³⁸ Bryan and Denov, "Separated Refugee Children in Canada".

³⁹ Bergen and Abji, "Facilitating the Carceral Pipeline", p. 43.

⁴⁰ Netto, *The Social Fabric of Cities*.

⁴¹ Smith and Guarnizo, "Global Mobility, Shifting Borders and Urban Citizenship".

⁴² Bhuyan and Smith-Carrier, "Constructions of Migrant Rights in Canada", p. 217.

The rescaling, reterritorialization, and reorientation alter the role cities play in conceptualizing citizenship and belonging.

The implications of these changes are unsettled. Some scholars draw a connection between residence in cities and conceptions of 'local citizenship' that confer entitlement to services and possibly protection from deportation.⁴³ Others suggest that belonging within cities requires the development of non-legal roadmaps to establish the temporal meaning of community and to situate migration within that meaning.⁴⁴

These iterations of local citizenship propose alternative normative foundations of citizenship. In its most extreme form, local citizenship 'proposes an ideal in which citizenship is no longer bound to an a priori political community but is based on the mere reality of presence and residence in a place'.⁴⁵ This is not unlike conceptions of nation-state citizenship that require nothing more than birth in a country, it is just that the scale of place is different, shifting from the nation-state to the city. Relationally focused conceptions of local citizenship require something more. The concept of emplacement developed by Çağlar and Glick Schiller is capable of constituting that something more.⁴⁶ Emplacement recognizes that a migrant's engagement with local barriers and opportunities creates relations between that person and local networks. These relations then transform what it means to be a citizen and what it means to belong.

Just as the evolving approach to nationality at international law has not displaced the state, developing concepts of local citizenship also do not displace the state. 'The real significance of urban citizenship for cosmopolitan democracy is not that it would provide an alternative basis to territorial federation, but that it could transform national identities and nationalist ideologies from below and from within'.⁴⁷

The pathway through which this transformation takes place is relational. Citizenship is constituted through performative acts and social processes at the municipal level.⁴⁸ This does not have to be limited to engagement

⁴³ Spiro, "Formalizing Local Citizenship", p. 560; Villazor, "Sanctuary Cities and Local Citizenship", p. 576.

⁴⁴ Motomura, "Immigration Outside the Law", p. 209.

⁴⁵ Kaufmann, "Comparing Urban Citizenship, Sanctuary Cities, Local Bureaucratic Membership, and Regularizations", p. 444.

⁴⁶ Çağlar and Glick Schiller, *Migrants and City-Making*.

⁴⁷ Rainer Baubock, "Reinventing Urban Citizenship", p. 157.

⁴⁸ Çağlar and Glick Schiller, *Migrants and City-Making*.

through service provision, but service interactions will undoubtedly form part of this constitutive process, whether viewed as barriers or opportunities within the concept of emplacement.

What municipal citizenship also enables is space for migrants to more readily become political actors.⁴⁹ This does not alleviate tensions between residents and newcomers. What it does, however, is bring to the forefront the question of ‘who is an established resident, legitimate local actor, or who is acceptable as a new resident and, thus, who has the right to local sociopolitical, cultural, and economic space and who does not’.⁵⁰ Confrontation and consensus around this question need not exclude traditional nation-state conceptions of belonging, but it will not be limited to those formal definitions of citizenship.

In this context, migrant children who are apprehended by child welfare systems can make claims to both placed-based and relationally based citizenship. When children are apprehended by local child protection services, they are placed in care. For crossover youth, this often means residential care in group homes or other state-run institutions with concomitant poor outcomes on important determinates of development such as education, health, employment, and criminal involvement.⁵¹ The opportunities and barriers of these ‘care’ placements inevitably shape who migrant youth become. Relationally, migrant children who become wards of the state are legally *of the state*. The state stands *in loco parentis* (in the place of a parent) especially for apprehended children who are not placed in foster care or adopted. Thus, the act of apprehension becomes a relationship of both responsibility and control.

One important site of responsibility and control is applications for citizenship, which until 2017 could not be made directly by minors.⁵² Even today, the practice of applying for citizenship as a minor requires a guardian or the provision of additional information by the child.⁵³ As a result, responsibility and control of citizenship applications for migrant children

⁴⁹ Nyers and Rygiel, *Citizenship, Migrant Activism and the Politics of Movement*.

⁵⁰ Smith and Guarnizo, “Global Mobility, Shifting Borders and Urban Citizenship”, pp. 619–20.

⁵¹ Wright et al., “Responding to Crossover Youth: A Look Beyond Recidivism Outcomes”; Walsh and Jagers, “Addressing the Needs Crossover Youth”; Gharabaghi, *A Hard Place to Call Home*.

⁵² Citizenship Act, R.S.C. 1985, c. C-29, s. 5.

⁵³ *Ibid.*

in care continues until those children ‘age out’ of the child welfare system as young adults.

It is at this point of aging out where former crossover youth are most vulnerable to ‘crimmigration’ consequences. Non-citizens who are convicted of crimes are inadmissible to Canada and subject to deportation.⁵⁴ This applies equally to former crossover youth who spent their entire childhood in care, even where child protection agencies failed to apply for citizenship on their behalf.

The recent cases of Abdoul Abdi and Abdilahi Elmi show that this vulnerability to deportation is not fictitious for former crossover youth. Both Mr Abdi and Mr Elmi came to Canada as child refugees fleeing persecution in Somalia. Both were apprehended by child protection services, in Nova Scotia and Ontario, respectively, who failed to apply for Canadian citizenship on their behalf.⁵⁵ In Mr Abdi’s case, his family attempted to apply for citizenship on his behalf, but child protection services ‘intervened on the basis that as a ward of the state only DCS [Department of Community Services] could apply for citizenship’.⁵⁶ Both faced a tumultuous childhood and became crossover youth.⁵⁷ In Mr Abdi’s case, he was transferred between thirty-one different placements between the ages of 6 and 18, many of which were group homes or other institutionalized settings.⁵⁸ Because they were non-citizens, both Mr Abdi and Mr Elmi became inadmissible and deportable when, as young adults, they were convicted of criminal offences.

What makes these case studies interesting, from the perspective of multi-scalar migration governance, is that neither Mr Abdi nor Mr Elmi was deported. Mr Abdi’s deportation order was overturned by the Federal Court on two occasions.⁵⁹ Mr Elmi’s deportation was temporarily halted by Canada following an interim measures request from the UN Human Rights Committee.⁶⁰

⁵⁴ Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 33–53.

⁵⁵ *Abdi v. Canada (Public Safety and Emergency Preparedness)* 2018 FC 733; Keung, “At the UN’s Request, Canada Suspends Deportation of Former Child Refugee to Somalia”.

⁵⁶ *Abdi v. Canada (Public Safety and Emergency Preparedness)* 2018 FC 733, para. 13.

⁵⁷ *Abdi v. Canada (Public Safety and Emergency Preparedness)* 2018 FC 733; Keung, “At the UN’s Request, Canada Suspends Deportation of Former Child Refugee to Somalia”.

⁵⁸ *Abdi v. Canada (Public Safety and Emergency Preparedness)* 2018 FC 733, para. 12.

⁵⁹ *Abdi v. Canada (Public Safety and Emergency Preparedness)* 2018 FC 733.

⁶⁰ Keung, “At the UN’s Request, Canada Suspends Deportation of Former Child Refugee to Somalia”.

Central to both outcomes was advocacy that challenged the conventional account of citizenship as strictly within the purview of the nation-state. For example, Muscati and Macklin argued: 'The issue is not whether Mr Abdi is a model member of the Canadian community and so 'deserves' to stay. What matters is that he is already a product and member of this society'.⁶¹ Black Lives Matter – Toronto ensured that Canadians were aware of the federal government's efforts to deport a former crossover youth to a country too dangerous for Canadian officials to visit.⁶² These types of interventions recast the state at a different scale, highlighting not just the federal state's role in effecting deportation but also the provincial state's role in making migrant children in care precarious by preventing them from acquiring citizenship. This lack of status then became a 'gateway to a range of traumatic vulnerabilities that are systemic in nature [and] ... experienced disproportionality and specifically by poor and racialized people'.⁶³ At this scale, the 'local citizenship' of Mr Abdi and Mr Elmi mattered and challenged Canada's assertion that citizenship at the level of the nation-state was determinative politically and morally.

In Mr Abdi's case, the federal government decided not to pursue further deportation proceedings.⁶⁴ Mr Elmi's case remains pending while the UN Human Rights Committee considers a complaint that his deportation would violate international law. Following Mr Abdi's case, the federal government changed its policy manual that governs what factors immigration officials must consider before deciding whether to deport a long-term resident of Canada. The province of Nova Scotia implemented a new policy to ensure that the citizenship status of wards in its child welfare system was tracked and that there was an individualized plan for each to ensure that they gained status if needed. These changes are important insofar as they acknowledge that emplacement in the child welfare system may redefine citizenship in a manner that requires recognition, but like much of the multi-scalar migration governance literature, the changes are grounded more in political, social, and moral arguments than in legal arguments. This is something that is changing.

⁶¹ Muscati and Macklin, "Abdoul Abdi Case: A Test of Canada's Commitment to Rules and Compassion".

⁶² Maynard, "Black Life and Death across the U.S.-Canada Border".

⁶³ Nath, "Curated Hostilities and the Story of Abdoul Abdi", p. 12.

⁶⁴ Canadian Press, "Abdoul Abdi Relieved Federal Government Won't Pursue Deportation, Lawyer Says".

3 Courts and the Transformation of Social Legality to Formal Legality

At international law, no one can be arbitrarily deprived of the right to remain in their ‘own country’. What constitutes one’s ‘own country’ is determined based on residency and attachment to place *not* citizenship.⁶⁵ This has led the UN Human Rights Committee to develop a jurisprudence on the right to belong that focuses on a non-citizen’s sociological connection to the state where they reside and comparing that attachment to their sociological connection to the state of citizenship. Where relative attachment is stronger to the country of residence, removal may constitute an arbitrary deprivation and violation of international law.⁶⁶ However, one of the problems with this international human right is that it is not always respected by states, including Canada. Decisions of the UN Human Rights Committee are not technically binding on Canada and have been largely ignored.⁶⁷

If a redefined conception of citizenship premised on ‘social legality’ is to be accepted legally in Canada, it needs to find recognition in domestic law. There are three avenues for this recognition: (1) administrative discretion, (2) fiduciary duties, and (3) equality rights. None of these avenues has been expressly applied in the context of former crossover youth facing deportation from Canada. Each has strengths and weaknesses in this context. Crucial to recognition of all three avenues will be insights from the multi-scalar governance literature discussed in this chapter, particularly the concept of emplacement, that highlight the interconnections of different scales and the role they play in shaping the people and the circumstances that appear before courts.

3.1 *The Administrative Discretion of Immigration Officials Not to Deport*

Canadian immigration law is punitive. Penal populism creates the political conditions for Parliament to pass laws, such as the *Faster Removal of Foreign Criminals Act*, that make it easier to attach ‘crimmigration’ consequences to the criminal conduct of non-citizens.⁶⁸ The Supreme Court

⁶⁵ Liss, “Right to Belong”.

⁶⁶ *Ibid.*

⁶⁷ Snidermanm, “Jama Warsame Is a Citizen of Nowhere”.

⁶⁸ *Faster Removal of Foreign Criminals Act*, S.C. 2013, c. 16.

of Canada, for its part, has held that the objective of immigration legislation is to prioritize security over integration ‘by removing applicants with [criminal] records from Canada, and by emphasizing the obligation of permanent residents to behave lawfully while in Canada’.⁶⁹ This is part of the securitization of migration.⁷⁰

Nonetheless, immigration officials retain some discretion not to deport a long-term resident even where their criminality is well founded.⁷¹ The scope of this discretion is unsettled but may be broader where the person concerned is a long-term resident.⁷²

In Mr Abdi’s case, his counsel urged the Federal Court to recognize a broad scope of discretion not to deport in circumstances where the person concerned was a former crossover youth for whom the state had failed to obtain citizenship. As Nath notes, the Court was presented with excruciating detail on the intensity of harm Mr Abdi experienced in care, as well as the experience of similarly situated individuals, but this was not the focal point of the Court’s decision:

The series of losses facing Abdoul [and presented to the Court] are incredibly violent – the loss of home, the loss of one’s state’s protection, or in Arendtian terms, the loss of belonging to any community. These losses are recognized minimally. In the state’s submission to the court, all *Charter* and international human rights arguments are described as ‘speculative and premature’, leading one commentator to write: ‘Our government argues that the rights of children are so irrelevant that they should not even be spoken about’. [citations omitted]⁷³

In response, the Court resolved the case based on the failure of immigration officials to even consider the arguments that were presented, but the Court did not provide guidance on how those arguments should have been treated if they were properly considered.⁷⁴

Following *Abdi v. Canada (Public Safety and Emergency Preparedness)*, it may be possible to recognize an expanded scope of discretion not to deport in circumstances where the person concerned was failed as a child in care. This would require an explication of emplacement and a discussion

⁶⁹ *Medovarski v. Canada (Minister of Citizenship and Immigration)* 2005 SCC 51, para. 10.

⁷⁰ Macklin, “Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien”.

⁷¹ *Tran v. Canada (Public Safety and Emergency Preparedness)* 2017 SCC 50, para. 6.

⁷² *Cha v. Canada (Minister of Citizenship and Immigration)* 2006 FCA 126, para. 22.

⁷³ Nath, “Curated Hostilities and the Story of Abdoul Abdi”, p. 12.

⁷⁴ *Abdi v. Canada (Public Safety and Emergency Preparedness)* 2018 FC 733, para. 87.

of the different scales of failure that took place, especially substate policies that prevented non-citizen children in care from acquiring the protections of citizenship. A multi-scalar account of migration governance and deportation practices is helpful here because it reveals the causal pathway between the state's apprehension of migrant children and the state's deportation of those children who become former crossover youth. The strength of this avenue is the existing precedent that at least requires consideration by immigration officers of circumstances beyond the scale of the nation-state, including the provincial and city scales responsible for child protection. But the weakness of this avenue is the narrow jurisdictional scope of the Federal Court. In Canada's federal system of government, provincial superior courts are responsible for the family law and criminal law dimensions of former crossover youth. The Federal Court is traditionally focused on immigration consequences and security rather than what might be decades of emplacement that preceded a discrete criminal conviction that prompted the 'crimmigration' consequences at issue. The multi-scalar account of deportation practices challenges this traditional focus by revealing the interconnections between child protection and deportation. This may demand an expanded focus when the Federal Court reviews exercises of administrative discretion by immigration officials.

3.2 *The Fiduciary Duties Owed by Child Welfare Agencies to Wards of the State*

If responding to the multi-scalar dimensions of former crossover youth is beyond the scope of the Federal Court, an alternative avenue for transforming social legality into formal legality is to look to courts that have jurisdiction to consider the broader, multi-scalar circumstances of a former crossover youth. One possible avenue is a claim for breach of fiduciary duties in a provincial superior court responsible for family law.

Under Canadian law, a fiduciary duty can arise in various relationships where 'one party, the fiduciary, [must] act with absolute loyalty toward another party, the beneficiary ... in managing the latter's affairs'.⁷⁵ This duty arises from the power the fiduciary holds over the more vulnerable beneficiary and the potential misuse of that power to the detriment of the beneficiary. It protects the 'integrity of the relationships' not the rights of the parties.⁷⁶

⁷⁵ *Alberta v. Elder Advocates of Alberta Society* 2011 SCC 24 (2011), para. 22.

⁷⁶ Rotman, "Understanding Fiduciary Duties and Relationship Fiduciarity", p. 988.

Fiduciary relationships are characterized by ‘an undertaking of responsibility’ towards a ‘person or class of persons’ whose ‘legal or substantial practical interests’ are vulnerable to the fiduciary’s exercise of discretion.⁷⁷ They arise in social or economic interactions, deemed important by law, where the ‘high trust and confidence’ necessitated by the relationship creates ‘an *implicit* dependency and *peculiar* vulnerability of beneficiaries to their fiduciaries’.⁷⁸ Such relationships can be between private actors or between government and individuals or classes of individuals, though the general performance of government functions does not in itself create a fiduciary obligation.⁷⁹ Types of private fiduciary relationships include relationships between executor-beneficiary, lawyer-client, physician-patient, broker-investor, director-corporation, and parent-child. Types of public fiduciary relationships include the relationship between the Crown (as represented by government) and Indigenous peoples.⁸⁰

The fiduciary duty in the parent-child context arises from ‘obvious reasons’, according to the Supreme Court of Canada, that extend from the fact that ‘society has imposed upon parents the obligation to care for, protect and rear their children’.⁸¹ It is this relationship of care that grounds the fiduciary obligation in the family law context.⁸² Unlike other fiduciary duties, the parent-child duty does not require an undertaking of responsibility on the part of the parent.⁸³ As a result, a parent may be liable to their child for breach of their fiduciary duty if they do not act in the child’s best interests, for example, where they sexually abuse the child in their care, knowingly expose them to sexual abuse, or fail to intervene to prevent abuse when they knew or ought to have known that abuse was occurring.⁸⁴

When a child is apprehended by a child welfare agency, however, liability for breach of fiduciary duties becomes more complex. In Canada, constitutional responsibility for child protection rests with provincial governments who have a ‘transcendent statutory duty to promote the best

⁷⁷ *Alberta v. Elder Advocates of Alberta Society* 2011 SCC 24, paras. 29–34.

⁷⁸ Rotman, “Understanding Fiduciary Duties”, p. 988.

⁷⁹ *Alberta v. Elder Advocates of Alberta Society* 2011 SCC 24, para. 37.

⁸⁰ Aho, “Equitable Compensation as a Tool for Reconciliation”; Chamberlain, “The Crown’s Fiduciary Duties to Aboriginal Peoples as an Aspect of Climate Justice”.

⁸¹ *M.(K.) v. M.(H.)* [1992] 3 SCR 6, para. 62.

⁸² Scott and Chen, “Fiduciary Principles in Family Law”; *Kerr v. Baranow* 2011 SCC 10, para. 208.

⁸³ *M.(K.) v. M.(H.)* [1992] 3 SCR 6, para. 63.

⁸⁴ *M.M. v. R.F.* (1997) 52 BCLR (3d) 127, 1997 CanLII 14477 (CA), para. 46; *M.(K.) v. M.(H.)* [1992] 3 SCR 6, paras. 61–62; *R. A. v. J.M.* 2013 ONSC 5439, paras. 22–28.

interests, protection and well-being of the children in their care'.⁸⁵ But this does not necessarily mean that failure to adequately care for children who are wards of the state will constitute a breach of fiduciary duties.

In *K.L.B. v. British Columbia*, the Supreme Court of Canada held that the province did not owe fiduciary duties to state wards placed in abusive foster care settings, though the Court did find that the province could be vicariously liable for a failure to properly supervise such settings.⁸⁶ Following this reasoning, the Court held in a later case that there is no general fiduciary duty imposed on government actors responsible for children to secure their best interests:

The maxim that parents should act in their child's best interests may help to justify particular parental fiduciary duties, but it does not constitute a [general] basis for liability. The cases on the parental fiduciary duty focus not on achieving what is in the child's best interest, but on specific conduct that causes harm to children in a manner involving disloyalty, self-interest, or abuse of power — failing to act selflessly in the interests of the child. This approach is well grounded in policy and common sense. Parents may have limited resources and face many demands, rendering it unrealistic to expect them to act in each child's best interests. Moreover, since it is often unclear what a child's 'best' interests are, the idea does not provide a justiciable standard. Finally, the objective of promoting the best interests of the child, when stated in such general and absolute terms, overshoots the concerns that are central to fiduciary law. These are ...: loyalty and 'the avoidance of a conflict of duty and interest and a duty not to profit at the expense of the beneficiary'.⁸⁷

The absence of a general fiduciary duty, however, does not prohibit liability for specific conduct that causes harm where the beneficiary is a defined person or class of persons who is under the requisite degree of control needed to establish a fiduciary relationship.

Under the guise of such specific circumstances, several class action proceedings have been initiated against provinces for systemic failure that caused harm to children in care. In *Papassay v. The Queen (Ontario)*, the Court refused to summarily dismiss a class action brought by former children in care who alleged that the province had breached its fiduciary duty to them in failing to seek compensation on their behalf for 'physical or sexual abuse before and/or during their Crown wardships'.⁸⁸ This failure

⁸⁵ *Syl Apps Secure Treatment Centre v. B.D.* 2007 SCC 38, para. 41.

⁸⁶ *K.L.B. v. British Columbia* 2003 SCC 51.

⁸⁷ *E.D.G. v. Hammer* 2003 SCC 52, para. 23.

⁸⁸ *Papassay v. The Queen (Ontario)* 2015 ONSC 3438, para. 3.

to secure the wards' legal interests was considered a potential breach of the fiduciary duty owed by guardians to children in their care.⁸⁹ In *T.L. v. British Columbia (Children and Family Development)*, the Court approved a class action settlement between former children in care and the province resulting from a guardianship social worker's breach of fiduciary duties.⁹⁰ The parties agreed that the social worker had harmed children in his care by neglecting them, misappropriating their funds, and failing to plan for their welfare, and that the province was vicariously liable for this harm.⁹¹ In the specific context of migrant children in care, a class action has also been commenced against a province alleging, amongst other things, that the failure to apply for citizenship for wards of the state is a breach of fiduciary duties and that the province knew or ought to have known that the failure secure citizenship for migrant children in care would cause them immediate- and long-term harm.⁹² The multi-scalar governance literature is likely to play a role in explicating these harms should this case advance to trial. By showing the connection between the child protection system's failure to acquire citizenship for non-citizen children in care and the subsequent risk of deportation of those children as former crossover youth, the multi-scalar governance literature can qualify harm caused by state failure of non-citizen children in care.

The strength of the fiduciary avenue for transforming social legality into formal legality is that it transforms emplacement into obligation not discretion. Fiduciary duties are premised on relationships and the implications of asymmetrical power in those relationships. In this sense, the emplacement of migrant children in the child welfare system, followed by a failure to secure them citizenship, is not just a denial of the right to have rights, it is also a fundamental breach of the obligation to preserve the integrity of the relationship between guardian and child. Fiduciary law better captures the social dimension of the relationship breakdown and the juridical reason that law provides a responsive remedy.

Two doctrinal aspects of fiduciary law also make it a promising avenue for former crossover youth facing deportation. First, there is no limitations period for fiduciary claims, which means that such claims can be raised well after a migrant child ages out of care. This is important because

⁸⁹ *Ibid.*, para. 75.

⁹⁰ *T.L. v. British Columbia (Children and Family Development)* 2020 BCSC 1728.

⁹¹ *Ibid.*, para. 14.

⁹² Gallant, "Lawsuit Accuses Ontario Government of Leaving Foreign-Born Crown Wards in the Lurch".

former crossover youth may not even realize that child welfare agencies failed to apply for citizenship on their behalf. Second, the remedies available following a breach of fiduciary duty include 'equitable compensation'. In *Frame v. Smith*, Justice Wilson, dissenting but not on this point, explained that the purpose of equitable compensation is 'to restore to the plaintiff what has been lost through the defendant's breach or the value of what has been lost'.⁹³ If what has been lost from the state's neglect of migrant children in care is access to Canadian citizenship and the safety from deportation it provides, then equitable compensation for that loss could include a grant of Canadian citizenship or a stay of deportation.

The weakness of the fiduciary avenue is the need to bring such claims in provincial superior courts that do not normally consider immigration law. Additionally, actions in provincial superior court can easily take two to three years to be heard and cost tens of thousands of dollars. Given these access to justice barriers, it is unsurprising that to date, the fiduciary claims advanced in this context have occurred through class action proceedings. A pre-requisite of such proceedings is that there are common issues between class members, which diminishes the ability of this mechanism to respond to particularized harms of individuals.

3.3 *The Constitutional Right to Equality and Non-discrimination*

The final avenue for transforming social legality into formal legality is the Canadian constitution and its guarantee of equality rights. Section 15 of the *Canadian Charter of Rights and Freedoms*⁹⁴ provides: 'Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability'.

The test for discrimination under section 15 requires a claimant to prove: (1) that a law or government action 'creates a distinction on the basis of an enumerated or analogous ground' and (2) that this distinction constitutes arbitrary or discriminatory disadvantage.⁹⁵ A law will amount to arbitrary or discriminatory disadvantage where it 'fails to respond to the actual capacities and needs of the members of the group and instead

⁹³ *Frame v. Smith* [1987] 2 SCR 99, para. 149.

⁹⁴ Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11.

⁹⁵ *Kahkewistahaw First Nation v. Taypotat* 2015 SCC 30, paras. 19–20.

imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage'.⁹⁶

In Mr Abdi's case, he argued before Canadian immigration officials that the state's denial of citizenship to him as a child was discriminatory. Canada's *Citizenship Act* prevented him from applying for citizenship directly, and it made the application process more onerous for state wards who, like him, were not adopted. The *Citizenship Act* also prohibited crossover youth from obtaining citizenship because of their record of youth offences. These barriers were magnified by the provincial child welfare agency's failure to have any internal policy on securing citizenship for migrant children in its care and its efforts to prevent Mr Abdi's family from applying for citizenship on his behalf on the basis that he was a state ward. On judicial review, the Federal Court found that immigration officials had completely ignored these submissions:

Mr. Abdi provided detailed submissions on his particular and unique facts, including the fact that he was a long-term ward of the state. With respect to his lack of Canadian citizenship, he highlighted the fact that the [child welfare agency] intervened to remove his name from his aunt's citizenship application. These factors may be relevant considerations with respect to a s. 15 *Charter* value of non-discrimination in the [delegate]'s referral decision. But they were not considered. There is no indication in the record or in the [delegate]'s decision that she turned her mind to any of these considerations.⁹⁷

As a result, the Court held that the decision to refer Mr Abdi to a deportation hearing – a *pro forma* process that resulted in an automatic deportation order in the circumstances – was unreasonable and set it aside.⁹⁸

Had immigration officials or the Court engaged with the constitutional arguments, there are strong reasons to believe that the test for discrimination would have been met in this context of a former crossover youth facing deportation. The *Citizenship Act* makes a distinction between state wards who are adopted and state wards who are not adopted. The former are entitled to citizenship on application regardless of the amount of time they have been in Canada and even if they have certain involvement with the youth criminal justice system, whereas the latter require three years of residence before applying and are prohibited from taking

⁹⁶ *Ibid.*, para. 20.

⁹⁷ *Abdi v. Canada (Public Safety and Emergency Preparedness)* 2018 FC 733, para. 87.

⁹⁸ *Ibid.*, para. 94.

the oath of citizenship if similarly involved with the youth criminal justice system.⁹⁹ The *Citizenship Act* makes a distinction for applications by minors, including state wards, by requiring such applications to be made by ‘a person who has custody of the minor or who is empowered to act on their behalf ... unless otherwise ordered by a court’.¹⁰⁰ These distinctions make it more difficult for migrant children in care to obtain citizenship – difficulties that are compounded where provincial child welfare agencies lack policies and expertise for migrant children in care. By making it more difficult for migrant children in care to obtain Canadian citizenship, the law reinforces, perpetuates, and exacerbates the disadvantage of an already vulnerable group, imposing an insecure status upon them. Rather than provide for them, as children in need of protection, the law makes it more likely that they will be deportable should they become involved in the criminal justice system as young adults. This is discriminatory and contrary to section 15 of the *Charter*.

The strength of the constitutional avenue for transforming social legality into formal legality is that it transforms emplacement into a rights violation, one that can capture the multi-scalar nature of the state conduct that makes former crossover youth vulnerable to deportation. Placement of non-citizen children in care, even for *bona fide* child protection reasons, imposes discriminatory disadvantage on those children because of Canada’s multi-scalar deportation practices. Those practices make non-citizen children in care more likely to be involved in the criminal justice system and less likely to acquire the protections of citizenship, resulting in a non-trivial risk of deportation. Understood as a rights violation, this imposition of discriminatory disadvantage requires an appropriate remedy. Section 24(1) of the *Charter*¹⁰¹ provides that ‘[a]nyone whose rights or freedoms ... have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances’. This is a broad remedial power that could include remedies akin to those provided for breach of a fiduciary duty, including a grant of citizenship or a stay of deportation. Importantly, this type of remedy can be provided by the Federal Court in the context of an immigration proceeding.

⁹⁹ Citizenship Act, R.S.C. 1985, c. C-29, ss. 5, 5.1, 22.

¹⁰⁰ *Ibid.*, s. 5.

¹⁰¹ Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

The weakness of the constitutional avenue is its complexity and increased cost. Constitutional cases turn on having an adequate evidentiary record to explain the relevant social facts that shape the underlying rights claim.¹⁰² For example, a claimant would need to present evidence on the vulnerable nature of children in care and the phenomenon of crossover youth since this is beyond the scope of ordinary judicial knowledge. In Mr Abdi's case, such evidence was provided by two university professors with expertise in child protection and youth justice.¹⁰³ But this evidence is costly to obtain and likely beyond the capacity of most former crossover youth on account of their marginalization.

4 Conclusion

The multi-scalar migration governance literature reveals that migrants are emplaced in different state and substate spaces when they arrive in a new country. One of those spaces is cities, which often provide the services and points of engagement that are of most immediate significance to migrants as they build their lives in a new country.

The enhanced role of cities in place-making has redefined citizenship or at least added new conceptions of citizenship that challenge the notion that the national scale is the predominant political community that confers belonging. What has emerged is a conception of 'local citizenship' that is based on residence and relationships at the local scale, and which extends from a migrant's engagement with opportunities, barriers, and networks at that scale to create a form of social legality. This has implications for the politics of belonging where federal immigration authorities seek to deport a person who lacks formal citizenship but possesses 'local citizenship'.

Emplacement, redefining citizenship, and the politics of belonging are shaped by the specific migratory context. This chapter examined these concepts in the context of migrant children in Canada who are apprehended by provincial child welfare agencies. The literature and case studies discussed show that migrant children in care often do not receive the support they need, particularly in obtaining Canadian citizenship. At the same time, migrant children are at risk of crossover into involvement with the criminal justice system that can expose them to deportation precisely because of

¹⁰² Perryman, "Adducing Social Science Evidence in Constitutional Cases".

¹⁰³ *Abdi v. Canada (Public Safety and Emergency Preparedness)* 2018 FC 733, para. 42.

the state's failure to secure citizenship on their behalf. Where deportation is threatened, redefined conceptions of citizenship and competing authority over belonging leads to political confrontation. This confrontation can prevent federal authorities from deporting former crossover youth where the social legality they possess is politically powerful.

Social legality, however, does not confer formal legality. One of the shortcomings of the multi-scalar migration governance literature is that it rests on political, social, and moral claims rather than on legal claims. If a redefined conception of citizenship is to be transformed into formal legality, there must be an avenue for recognizing these political, social, and moral claims in domestic law.

In this chapter, three such avenues were explored in the context of former crossover youth facing deportation from Canada: (1) administrative discretion, (2) fiduciary duties, and (3) equality rights. Each of these avenues comes with strengths and weaknesses, both theoretically and practically. Administrative discretion confers legal authority on immigration officials to temper the punitive force of 'cimmigration' consequences in compelling circumstances, such as where the state played a role in depriving a former crossover youth of obtaining citizenship and the right to have rights. But the inherent nature of discretion is that it does not have to be exercised and when applied in the context of immigration law, it may not fully capture the multi-scalar dimensions of the experience of former crossover youth. Fiduciary duties transform relationships of care into obligations that if breached may require an equitable remedy. But this area of law is highly technical and such claims would have to be brought in courts that are not normally engaged with immigration law. The constitutional guarantee of equality may transform emplacement into a rights violation where citizenship laws and the failure of child welfare agencies disadvantage migrant children by denying them the protections afforded by citizenship. But constitutional claims are complex and expensive, requiring legal submissions and an evidentiary record that many former crossover youth would be unable to generate.

Nonetheless, what is common across all these avenues is the transformation of 'social legality' into a legitimate legal claim. As multi-scalar migration governance continues to redefine citizenship, these avenues may be pressed into force in domestic courts when former crossover youth face deportation from Canada. This will shape both political and legal contestation of the principle, recognized under immigration law, that non-citizens do not have an unqualified right to enter or remain in Canada.

From Control to Deterrence

Assessing Border Enforcement in South Africa

JEFF HANDMAKER AND CAROLINE NALULE

1 Introduction

Prior to 1994, South Africa was infamous for its racialized policies and seemingly limitless measures of social control and internal movement through a regime of apartheid, or racialized separation. Despite much pressure from the international community, the government was stubbornly resistant to change, reinforcing its control through police and security forces that were “always in the front line in the enforcement of apartheid ... (and) ensured that black South Africans were kept in their places in segregated and inferior institutions.”¹

South Africa’s racialized control over movement extended to how the state controlled migrants at its external borders.² An essential feature of these measures has been – and to a significant extent continues to be – how South Africa maintains bilateral agreements with neighboring governments, which is the first of the country’s *two-gates* system, the other being individualized entry through a border post.³

Those who have managed to cross the border and enter South Africa in an unregulated manner, whether through a border post or a gap in the fence, particularly from Mozambique and Zimbabwe, have often been confronted with a hostile reception.⁴ While typical of the realities of

¹ Cawthra, *Policing South Africa*, p. 1.

² Handmaker and Singh, “Crossing Borders.”

³ As observed by Crush, “Covert Operations,” long before South Africa’s democratic elections in 1994, entry into the country was through what Crush termed “two gates,” namely formal entry into the country by way of the Aliens Control Act, and various bi-lateral treaties between South Africa and neighboring countries to govern the mobility of temporary migrant workers in the country’s highly profitable mining and agricultural industries.

⁴ Seda, *Border Governance in Mozambique*, p. 62; Johnstone and Simbine, “The Usual Victims,” p. 170.

(forced) migration globally, and the desperation of those who would do anything to cross the border for a perceived improvement of their lives, these particular experiences have shattered the idealistic vision that many migrants had of South Africa when it became a liberal democracy, following the country's first democratic elections in 1994.

From the very beginning of this democratic transition, scholars cultivated a perception, that was shared by policymakers, politicians, and the general public, of South Africa being inundated with (African) migrants that they were undesirable.⁵ As in many parts of the world, antiforeigner sentiment spawned an aggressive enforcement of the Aliens Control Act based on the general misperception that South Africa was faced with a *flood* of migrants, especially from neighboring countries.⁶ Migrants in general have largely been seen to be coming for reasons that are perceived as harmful to South African society. There was particular concern raised by international organizations such as the UN High Commissioner for Refugees (UNHCR) and International Organization for Migration (IOM) that economic migrants, in an attempt to regularize their status, would overwhelm the country's otherwise liberal asylum system. The South African government reinforced this perception of being inundated by migrants with the development of a so-called white list for handling asylum applications that implicitly assumed certain countries from where asylum seekers were coming were "safe."⁷

To date, with some exceptions, most of the scholarship on migration in South Africa, including by the current authors, has been in relation to legal and policy developments and especially compliance with international law, demographic surveys, and studies of civil society responses to migrants.⁸ In this chapter, we focus on the emergence of post-1994 migration policies and enforcement practices, arguing that several aspects of what Valverde refers to as forms of "everyday legal governance," including governance through uses (rather than persons or rights), are visible

⁵ Minnaar and Hough, *Who Goes There?*

⁶ Crush, "The Discourse and Dimensions of Irregularity."

⁷ Handmaker, "No Easy Walk," p. 94.

⁸ The first of two large research projects on migration in South(ern) Africa has been the Southern African Migration Project, a joint project between Queens University in Canada and the Institute for Democracy in South Africa, which produced a large number of qualitative surveys from the mid-1990s. Later, from the 2000s, the African Centre for Migration and Society (based at the University of the Witwatersrand) produced methodologically driven, larger-sample surveys and analyses, including with regard to xenophobia in the country.

in South Africa's postapartheid migration and border control regime, whereby past practices of racialized control over the mobility of non-white persons have been reproduced in the postdemocratic order following elections in 1994.⁹ This provides a different and important perspective on more than two decades of migrant and border policy development and enforcement and sheds light on why, despite considerable efforts at reform, migration policy, and its enforcement in South Africa remain stubbornly resistant to change.

To illustrate this, we show how everyday legal governance is present in three salient features of South Africa's migration and border control regime. The first salient feature that we discuss in [Section 2](#) concerns the racialized underpinnings of this regime, with origins in South Africa's apartheid-era policies of influx control. The contemporary manifestations of this racialized regime are marked by xenophobia and especially Afrophobia. We highlight detention and deportation policies that have not only victimized foreigners in general, mainly though not exclusively from other African countries but have also victimized black South Africans. The fact that it has not been possible to orient the country's migration and border control regime around a culture of accountability and rights-based principles is even more noteworthy, in light of the sustained efforts of various legal mobilization actors, from NGOs to the South African Human Rights Commission, through reports, public advocacy, and court-based litigation. In [Section 3](#), we discuss how efforts to cultivate a rights-based enforcement culture have been further hindered by the transplantation of ideas from abroad, and in particular from the United States. These policies were not only based on failed models of deterring perceived economic migrants, but they were also manifestly ill-suited to the South African context. These transplanted policies reinforced South Africa's already racialized everyday forms of legal governance of migration. Moreover, these policies were disjointed in relation to the multiple actors involved in migration and border control. Despite this patchy and racialized enforcement, we show that the transplantation of problematic ideas around migration and border control never fully lost their appeal and can still be traced to the 2020 Border Management Authority Act. Finally, in [Section 4](#), we discuss a third salient feature of the everyday governance of migration in South Africa, which is a prevalence of official corruption that has further mired South Africa's regime of migration and

⁹ Valverde, "Taking Land Use Seriously."

border control. Legal governance efforts to combat the systemic problem of bribe-taking, which also has resonance in South Africa's policies of influx control, have remained elusive.

To explicate how these three salient forms of everyday forms of migration governance have operated in South Africa and why the country's border and migration regime has reproduced earlier approaches to enforcement and resisted rights-based approaches, we draw on Mariana Valverde's notions of everyday governance, which operate across what she has termed different and overlapping *scales of governance* in relation to space and time.¹⁰ This involves a specific mode of thinking in "understanding how legal tools have changed," and in particular the bases for arresting and detaining migrants, and for determining their potential legal status as refugees.

In the course of analyzing these legal tools of border enforcement, we highlight features of South Africa's predemocratic and more recent history of racialized migration and border control, and in particular two "formative events"¹¹ that have affected how this history of regulating cross-border movement is regarded by policymakers and by South Africans. We argue that border enforcement practices have ultimately been guided less by national and international standards and more by national policies and systemic enforcement practices (and especially corruption) that have not changed very much from the previous, pre-1994 democratic dispensations. Accordingly, in relation to the three salient features we have described previously, we highlight three spaces where the everyday governance of migration is especially visible: first, in the concentrated local spaces of South Africa's land borders and urban centres; second, in South Africa's migrant detention centers – in particular the notorious Lindela Center; and third, in the refugee reception offices that have faced ever-greater pressures as the number of offices has increasingly been reduced. These land borders have historically been flashpoints of armed conflict while Lindela Detention Center and refugee reception offices have been notorious for the widespread prevalence of corruption, also at its sea and air borders, which in this particular contribution we pay less attention to.

We argue that South Africa's policies and practices of migration and border control are consistent with Valverde's conceptualization of everyday legal governance as largely taking the form of local enforcement,

¹⁰ Valverde, "Practices of Citizenship and Scales of Governance."

¹¹ *Ibid.*, p. 231.

whereby “struggles around constitutional rights” need to be primarily understood in relation to “local struggles in which the legal ‘funnel’ for political and social disputes is local law.”¹² More specifically, we show how the everyday enforcement of migration and border control is only to a very limited extent regulated by judicial oversight and is much more the product of local norms and structures of authority.

We conclude that South Africa’s efforts to deter immigrants have been a policy of arbitrary enforcement that in its highly localized enforcement of migration and border controls has been “deployed in everyday legal governance.”¹³ This enables us to fundamentally question whether a succession of changes to South Africa’s migration policy and enforcement have truly marked a historic break from the country’s apartheid past.

2 Racialized Underpinnings in Detention and Deportation

Having emerged from a history of racialized control of both internal and external mobility, South Africa’s postcolonial, postapartheid migration regime in 1994 was firmly oriented around an unreconstructed approach of controlling the admission into, residence in, and departure from South Africa. Under the auspices of the ominously named Aliens Control Act of 1991, the latest iteration of decades of racialized legislation, and consistent with other apartheid-era policies, South Africa’s approach was essentially one of zero tolerance, whereby the policy regime categorized most spontaneous arrivals of migrants as *prohibited persons*. This official policy of zero tolerance was accompanied by a range of nebulous exceptions that were mostly at the discretion of locally placed immigration officials, mostly operating at the country’s many border posts.

2.1 Post-1994 Enforcement Saw Little Change

As Crush observed, in principle, the racialized nature of this policy meant that things had not moved on very much following democratic elections, and the formal introduction of a liberal-constitutional, rights-based system of governance in 1994.¹⁴ In other words, while other aspects of South Africa’s governance system gradually transformed by way of legislation, rights-based

¹² Valverde, “Taking Land Use Seriously,” p. 35.

¹³ *Ibid.*, p. 55.

¹⁴ Crush, “The Discourse and Dimensions of Irregularity.”

guidelines, and training, the Aliens Control Act of 1991 transmitted most racialized aspects of the apartheid migration and border control regime into the post-1994 democratic regime in South Africa.¹⁵ In practice, those who spontaneously presented themselves at the border during this period had little formal guarantee that they would be allowed in, although already corruption was endemic, and many people who could afford a bribe did get through.¹⁶ Further, as was the case prior to 1994, the majority of migrants bypassed the border post altogether. Reinforcing these spaces of local governance, an electric border fence, colloquially known as *the snake* that had been constructed in the 1980s at the border with Mozambique by the South African apartheid regime and that had once been set at lethal mode, ostensibly to deter militant groups, remained in place, albeit at a nonlethal voltage in detection mode.¹⁷ By the late 1990s, border controls and migration policies in South Africa were brought into effect through external measures (at the border) and internal measures (primarily in urban areas), which in practice were based on racial categories that, once again, were essentially unchanged from the predemocratic apartheid era.

As was the case prior to 1994, these policies did not necessarily target migrants from particular countries. Apart from asylum seekers who generally presented themselves to the authorities with travel documents and appeared on the white list referred to earlier, a generalized profiling of (suspected) undocumented migrants has been in place on the basis of racialized criteria. This led to a number of persons being apprehended and taken into detention when they possessed a valid visa or permit to reside.¹⁸ There has been a robust policy basis for this as well; particularly under the Aliens Control Act, but also incorporated into subsequent legislation, such as the 2002 Immigration Act, it has been, administratively speaking, a straightforward measure to detain and deport any suspected undocumented migrant.

2.2 *Unreliable Statistical Data and Emergence of a “White List”*

Statistics on migration have been anything but reliable.¹⁹ Nevertheless, based on the figures that were made available, there was an apparent

¹⁵ Crush, “Apartheid’s Last Act?”

¹⁶ Perbedy and Crush, “Invisible Trade, Invisible Travellers.”

¹⁷ Kotzé and Hill, “Emergent Migration Policy,” p. 20.

¹⁸ South African Human Rights Commission, “Illegal,” Handmaker and Parsley, “Migration, Refugees and Racism.”

¹⁹ Danso and McDonald, “Writing Xenophobia,” p. 124.

trend that migrants from neighboring countries were the most heavily represented in the migration landscape, albeit moving mostly in a circular pattern.²⁰ Some of the migrants from neighboring countries sought asylum in postapartheid South Africa, namely Angolans in the 1990s and the Zimbabweans in the late 2000s. In addition, asylum seekers in South Africa have come, sometimes in their thousands, from Ethiopia, Nigeria, DRC, Bangladesh, Pakistan, Malawi, Somalia, India, and Ghana.²¹

On the basis of this unreliable data, the “white list” emerged; this was reflected, statistically speaking, in the government rejecting, more than 90% of asylum applications; it was claimed that most of these applications were from economic migrants.²² In turn, this situation reinforced a widespread view among post-1994 migration scholars that the South African government’s migration policy had “given rise to a costly yet ineffective asylum system that does not achieve its intended goals and attracts individuals better suited to other forms of regularization.”²³

As a consequence of the high asylum rejection rates and lack of alternative regularization pathways, the number of “undocumented migrants” in South Africa has remained a matter of great speculation.²⁴ Meanwhile, the government response has comprised a sequence of migration, asylum, and border control policies and practices, many of which have been subject to legal challenge.

2.3 *Efforts at Legal Reform*

It has already been mentioned that the policy framework governing migration remained largely unchanged since the period prior to elections in 1994. In fact, it was only after Amendments were made to the Aliens Control Act in 1995 that detention could even be reviewed by a judge, the so-called ouster clauses.²⁵ The amendment introduced was the first of

²⁰ Crush, “The Discourse and Dimensions of Irregularity.”

²¹ Statistics South Africa, “Documented Immigrants in South Africa.”

²² Government of South Africa, White Paper on International Migration, p. 27.

²³ Mthembu-Salter et al., “Counting the Cost of Securitising South Africa’s Immigration Regime,” p. 6.

²⁴ *Ibid.*

²⁵ As Hlophe, “Ouster Clauses: Meaning and Effect” explains on p. 371, the justification for legal provisions that disallowed a judge from reviewing the reasonableness of a decision taken by a government official – including an immigration official – was that to do so “would require the executive to disclose confidential information that might endanger national security,” a provision that was broadly interpreted by the judges at the time who routinely gave deference to the executive.

many subsequent legal and policy reforms, which in this case referred specifically to section 55 of the Aliens Control Act, allowing, for the first time, judicial review of a decision by an immigration officer to detain a migrant; this provision was later also provided for in respect of asylum seekers when it was incorporated into section 29 of the Refugees Act. However, in practice, such reviews have rarely taken place.²⁶

Eventually, upon the enactment of the new Immigration Act (IA 2002), which reproduced the xenophobic language of the Aliens Control Act, and particularly the term *prohibited person*, the Department of Home Affairs (DHA) gained the power to apprehend, detain, and deport any “illegal foreigner.” An illegal foreigner/prohibited person was described as any foreigner found to be in South Africa in contravention of the Act.²⁷ Prohibited persons were described as including those carrying infectious or communicable diseases, persons wanted for the commission of serious crimes such as genocide, terrorism, anyone previously deported and not rehabilitated, a member of a group advocating for racial hatred, or utilizing crime and terrorism, and anyone found with a fraudulent visa, passport permit or identification document.²⁸ Additionally, the IA empowered the Minister and Director-General to declare persons as “undesirable” if they were

likely to become a public charge, are identified as such by the Minister, have been judicially declared incompetent, have been ordered to depart in terms of the Act, are a fugitive from justice, they have a previous criminal conviction without the option of a fine, or have overstayed the prescribed number of times.²⁹

In any event, either category of person could be subject to detention and eventually deportation.³⁰ Some measures in the IA were even more rigid than before. For example, the IA ignored the 1995 Amendments to the Aliens Control Act that allowed one to request that his or her detention be confirmed by the court upon apprehension. Furthermore, under the IA 2002, a detained foreigner could be detained for 30 days without recourse to court. The Constitutional Court eventually held these provisions to be unconstitutional and ordered an amendment in compliance therewith.³¹

²⁶ South African Human Rights Commission, “Illegal,” p. 14.

²⁷ Immigration Act, 2002: sections 3(1)(g) & 1 (xviii).

²⁸ *Ibid.*, section 29.

²⁹ *Ibid.*, section 30(1).

³⁰ Mfubu, “Prohibited and Undesirable Persons,” p. 182.

³¹ *Lawyers for Human Rights v Minister of Home Affairs & Others* (CCT38/16) [2017] ZACC 22.

2.4 *Clinging to Long-Established Norms of Enforcement, Particularly Regarding Detention*

Despite court decisions declaring border policies to be unconstitutional, particularly in relation to arbitrary detention practices as well as prescreening procedures and long decision-making periods for asylum seeker determinations,³² South African police and DHA officials have clung to long-established, local norms of enforcement. From the mid to late 1990s, this included detaining asylum seekers who were still awaiting decisions on their applications, whether or not they were holding up-to-date permits. It had seemed irrelevant to the authorities that a failure to obtain timely renewals or obtaining of relevant permits might be due to structural and administrative obstacles.

This was especially problematic for asylum seekers and refugees following the closure of several regional refugee reception offices that had served as a third space of local governance.³³ The closures of these offices were contested by both NGOs and refugees' associations who mounted successful court challenges.³⁴ A number of positive court judgements notwithstanding, and further reinforcing our contention that local norms guided by the arbitrariness of officials whose decision to detain, delay, or otherwise hinder access to due process procedures (including by way of bribe-taking) have a much stronger hold in practice than judicial pronouncements, the DHA has been slow to comply with the court orders, if it has complied at all.³⁵

Detentions and deportations of those deemed to be "prohibited persons," "illegal foreigners," or "undocumented persons" in South Africa have raised significant concerns among scholars and human rights activists, with one scholar referring to South Africa as a "prolific deporter."³⁶ The level of deportations peaked at 113,554 in 2013.³⁷ Deportations dropped to 24,266 deportations during 2018–2019.³⁸ After 2013, the number

³² Handmaker, "Who Determines Policy?" and Amit, "Winning Isn't Everything."

³³ Lawyers for Human Rights, *Monitoring Policy*, 31–38.

³⁴ Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others [2017] 1107/2016, ZASCA; The Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others [2017] 279/17, ZACCT; Minister of Home Affairs and Others v Somali Association of South Africa and Another [2015] 831/13, ZASCA; Minister of Home Affairs and Others v Somali Association of South Africa and Another [2015] 67/2015, ZACCT.

³⁵ Johnson, "Constructing and Contesting State-urban Borders."

³⁶ Vigneswaran, "The Complex Sources of Immigration Control," p. 8.

³⁷ Department of Home Affairs, "Annual Report 2018–19," p. 104.

³⁸ *Ibid.*

of deportations went down, following a so-called Special Dispensation for Zimbabweans.³⁹ This was in response to the perceived high inflow of Zimbabweans at the time.⁴⁰ However, nationals of other African countries still constituted 99% of all deportations.⁴¹ Roni Amit revealed that the DHA had been violating both the Immigration Act and the Constitution by detaining persons beyond the acceptable 48 hours before they could ascertain their immigration status and detaining persons that are protected under the Refugees Act.⁴² The situation did not seem to have improved in the years that followed, according to an open letter by Lawyers for Human Rights (LHR), a local NGO, to the President of the Republic on World Refugee Day in 2018:

... it appears that the immigration system does not now operate as it should. It has come to the attention of the public that people are wrongfully and unlawfully detained under the current immigration legislation; that the process of arrest and detention of would-be immigrants is arbitrary and, therefore, violates the rights of citizens and other residents; that corruption and bribery are rife; that those detained in cells in South Africa's main awaiting-repatriation detention facility are often subjected to inhumane treatment and indignity; [i]f the composition of the population at the Lindela repatriation facility is anything to go by, it would suggest that only people of African origin are arrested and deported as illegal aliens ...⁴³

Once again, there is resonance with South Africa's past. In her research on the practices of citizenship and the growing criminalization of border control measures, Valverde has argued that the temporal dimension of governance, particularly in relation to prolific use of detention, is not disconnected from the racist policing of migrants and other cultural minorities.⁴⁴ Indeed, as discussed in [Section 2.5](#), the racialized character of South Africa's migration policy has been reflected quite broadly in xenophobic attitudes, in official governance, in the media and in most other aspects of daily life, mainly to the detriment of low-skilled migrants.⁴⁵

³⁹ Government of South Africa, White Paper on International Migration, p. 30.

⁴⁰ Van Lennep, "Migration III: Interpreting the Data."

⁴¹ Government of South Africa, White Paper on International Migration.

⁴² Amit, "Breaking the Law: Breaking the Bank", pp. 27–39.

⁴³ Lawyers for Human Rights, "Open Letter to President Ramaphosa on World Refugee Day," 20 June 2018; Lawyers for Human Rights, Monitoring Policy pp. 11, 31.

⁴⁴ Valverde, "Practices of Citizenship and Scales of Governance," p. 226.

⁴⁵ Handmaker and Parsley, "Migration, Refugees & Racism in South Africa."

2.5 Growing Xenophobia

Through a combination of unfocused, though racialized targeting of (suspected) foreigners, unclear statistical data (that nevertheless suggested an influx of foreigners from particular countries), an arbitrary policy regime broadly allowing for the stopping and detaining of persons and numerous media reports and scholarly articles that suggested a *flood* of foreigners in the country, xenophobia quickly took hold within the police and other border enforcement officials as well as among the general public, following democratic elections in 1994. This xenophobia has been directed at not just foreigners in the country but also South Africans who were considered to be “too dark” or have a “strange manner of dressing”; they have been subject to being apprehended, detained and even deported.⁴⁶ Violence has also been widespread. Aggressive police enforcement of border control laws has been conducted in a manner that has resembled the previous government’s earlier, apartheid-style enforcement of racialized pass laws as part of a policy of influx control, which regulated the internal mobility and residence of persons in South Africa on the basis of legally defined, racial categories.⁴⁷ A particularly disturbing example that took place in 2000 was recorded on video and leaked to the public – something rather unique in its time – confirmed the South African Police’s use of detained, Mozambican immigrants as live targets during training exercises with dogs.⁴⁸ Such attitudes toward African migrants were not exceptional; as Handmaker observed during multiple police trainings that he conducted in the late 1990s, racialized attitudes toward foreigners, as well as South Africans who *looked like* foreigners, was deeply embedded in the local norms of border enforcement officials whose careers had extended well into the pre-1994 period.⁴⁹

Xenophobia has also been reinforced by an institutional continuity. Not long after elections in 1994, suspected undocumented persons were sent to Lindela Repatriation Center, as a precursor to their deportation. Located in the municipality of Krugersdorp, to the west of Johannesburg, Lindela Center is a former residential hostel. Here, Valverde’s temporal dimension of governance is important to note. The facilities at Lindela

⁴⁶ South African Human Rights Commission, “Illegal”; *The Star*, “Police Assault South African Mistaken for Illegal Immigrant,” 11 March 2001.

⁴⁷ Handmaker, “Stop Treating People Unjustly”; Human Rights Watch, *Prohibited Persons*; Handmaker and Parsley, “Migration, Refugees and Racism.”

⁴⁸ Handmaker and Parsley, “Migration, Refugees and Racism,” p. 40.

⁴⁹ Handmaker, “Stop Treating People Unjustly.”

had originally been used to house migrants from neighboring countries who had been recruited as migrant laborers for the mining industry; it was part and parcel of South Africa's elaborate migration system. Rail links existed between Lindela Center and neighboring Mozambique. In 1996, Lindela, became a privately run holding center procured under the authority of the DHA.

Although detention facilities have existed in each of South Africa's nine provinces, from police cells to prison wings and former detention facilities that were used for suspected pass law offenders, virtually all persons who were suspected to be without legal residence in the country and marked for deportation have been sent to Lindela.⁵⁰ As an example of everyday legal governance, there has been coordination with local police forces for the purpose of apprehension and detention (also in local police cells), but the enforcement of migrant detention at Lindela has been a particularly unaccountable space of local governance, run through private contractors on behalf of the DHA, which established a permanent presence in the facility.

Not surprisingly, the lawfulness of detentions in, and deportations from Lindela have on numerous occasions been called into question by human rights lawyers. For instance, lawyers have argued that asylum seekers who entered the country without documentation were often detained pending a decision on their asylum application, even though the stated policy of the DHA was not to hold such persons if it appeared that the application would take "unreasonably long to process."⁵¹

Yet, xenophobia in South Africa has been featured as more than a specific form of stigmatization. Rather than being directed at people on the basis of individual criteria, it can be regarded as a consequence of long-standing policies of racialized, socio-spatial separation, with clear origins in the country's previous apartheid regime.⁵² As a vivid and deeply unsettling illustration of this point, from the late 1990s, in scenes reminiscent of apartheid-era forms of enforcement (and the treatment of black persons generally, where violence was commonplace), South Africa began experiencing an exponential rise in attacks against foreigners, both by officials and the general public.⁵³

Some have argued that the rise in attacks against mainly African foreigners have been fueled by various myths regarding migrants and

⁵⁰ Lawyers for Human Rights, *Monitoring Policy*.

⁵¹ Handmaker, "Who Determines Policy," p. 295.

⁵² Landau, "Loving the Alien"; Tewolde, "Am I Black, Am I Coloured, Am I Indian?."

⁵³ Handmaker and Parsley, "Migration, Refugees and Racism."

reproduced in sensationalist media reports that have affirmed an increasingly widespread belief that strong controls were needed to counter a perceived threat of uncontrolled migration of millions of people.⁵⁴ Yet, actual evidence based on South African census results indicated that there were estimated to be 423,000 foreigners in 1996, a number that increased only slightly to 463,000 in 2001.⁵⁵ By 2011, the overall number of foreigners in the country increased more significantly and reported at 2,173,409, or a mere 4.2% of the entire South African population.⁵⁶ Therefore, while it could not be denied that there had been an increase in migration to South Africa since the dismantling of apartheid, as mentioned earlier, much of this migration has been temporary and circular. In any event, there was scant evidence to suggest that the levels of migration were anywhere near the scale claimed by politicians and reported in the media.

Increasingly frequent attacks on foreigners culminated in the first *formative event* that we highlight in this chapter, in this case, the 2008 wave of xenophobic violence that resulted in the deaths of more than sixty people and the displacement of hundreds of thousands. These attacks drew the world's attention to the scale of xenophobia in South Africa. The attacks were also widely reported in the media, although notwithstanding the xenophobic views expressed by the media, doubts have been raised whether or not the media was directly *complicit* in the violence.⁵⁷ Since the 2008 wave, there have been smaller, though still serious incidents occurring almost every year, targeting mainly self-employed and low-income foreign workers. Indeed, it is clear that the systemic fear of and hatred toward foreigners in South Africa has not abated from the late 1990s until the present day.⁵⁸

2.6 Government Responses to Xenophobia and Racialized Enforcement

Whatever the underlying causes or triggers, the government's response to xenophobia and racialized enforcement has been underwhelming.

⁵⁴ See Freedom of Expression Institute, "Is the Media Contributing to South African Xenophobia?" and Danso and McDonald, "Writing Xenophobia."

⁵⁵ Statistics South Africa, "Census 2011," p. 16.

⁵⁶ *Ibid.*, p. 128.

⁵⁷ Smith, "Violence, Xenophobia and the Media."

⁵⁸ Landau et al., "Xenophobia in South Africa"; Dodson, "Locating Xenophobia"; Everatt, "Xenophobia, State and Society"; Crush and Ramchandaran, "Migrant Entrepreneurship"; Oatway and Skuy, "Documenting Violence Against Migrants in South Africa."

Rather than acknowledging the underlying causes of xenophobia as systemic and embedded in local norms of enforcement, which has manifested in racialized hatred, discrimination, and violence, directed toward migrants and South Africans alike, the government has persistently taken a position of denial, maintaining that it does what it can do address xenophobia. Moreover, the government insists that its migration policy framework is perfectly in line with its international and regional commitments. As Landau argues in relation to the government's limited efforts to break the cycle of racialized violence, "such objectives and responsibilities are not supported by the legal and administrative mechanisms" that ought to give concrete effect to those commitments.⁵⁹ To the contrary, South Africa's post-1994 migration and asylum policies and laws over the ensuing years have explicitly aimed to discourage the migration of particularly low-skilled workers and others who are (falsely) deemed to be a drain on the public purse, and in particular to demonize asylum seekers and refugees.⁶⁰

For instance, in 2011, an amendment to the Immigration Act reduced the validity period of asylum transit permits, which were renamed as *visas*, that were obtained at a border post from fourteen to five days; this was ostensibly done in order to facilitate entry, though in practice the limited period of legalized travel, coupled with long waiting times at refugee reception centers, made it much more difficult for asylum seekers to regularize their status in the country. Measures like this that purported to be based on good intentions (in this case to encourage asylum seekers to apply in a timely manner), but in fact made things more difficult for them, represent vivid illustrations of the temporal dimension of governance, whereby, according to Valverde an "old scale" of governance is:

sometimes put on the shelf, but the complex apparatus of overlapping and multiple scales of governance that has developed (within and intertwined with law) continues to exist even when only a particular, perhaps new technique or scale is being used.⁶¹

In this case, despite referring to the new permit as a visa, the change placed asylum seekers in just as precarious a position as they were before, if not

⁵⁹ Landau, "Introducing the Demons," p. 8.

⁶⁰ *Ibid.* For a detailed discussion on policy and legislative changes, see Handmaker and Nalule, "Border Enforcement Policies and Reforms."

⁶¹ Valverde, "Practices of Citizenship and Scales of Governance," p. 235.

more so, rendering them highly susceptible to detention and deportation if they were subsequently found with expired permits had they not managed to reach a refugee processing center in time, located in just a few locations in South Africa's urban areas.⁶² Additionally, the Act repealed an earlier provision on cross border permits, which, previously, the DHA could issue to citizens or residents of countries sharing a border with South Africa.⁶³ These persons also happened to be the majority of its arriving migrants. This clawback to the country's earlier migration regime based on bilateral agreements contradicted South Africa's official position on regional free movement of persons, contained in a Protocol that South Africa had ratified in 2005.⁶⁴

From a temporal perspective of everyday forms of governance, such a bilateral approach to regularizing immigration status of SADC citizens, as a visible historical remnant of its *two gates* migration policy, was most visible in relation to Zimbabwean, Angolan and Lesotho nationals who were resident in South Africa. These nationals have been given the opportunity to apply for Special Dispensations to study, work or operate a business in South Africa for a stipulated period, and these Dispensations have been periodically reviewed.⁶⁵ However, only few nationals of these countries have met the strict criteria for receiving this dispensation, excluding low-skilled and low-income earners. Additionally, the beneficiaries of these dispensations have not been eligible for permanent residence or citizenship status.

South Africa's postapartheid general policies on immigration and border control and forms of everyday governance have undoubtedly been motivated by security concerns that can be regarded as echoes of the previous regime.⁶⁶ The securitized and racialized character of South Africa's border control policies is not only traceable to pre-1994 forms of apartheid-era border enforcement. As discussed in [Section 3](#), the extensive involvement of US government and reliance on advisors seeking to transplant US migration policy and border control mechanisms has also played a role in reinforcing these older patterns of racialized border enforcement.

⁶² Immigration Amendment Act, 2011, section 23.

⁶³ *Ibid.*, section 16.

⁶⁴ Southern African Development Cooperation, Protocol on the Facilitation of Free Movement of Persons.

⁶⁵ Immigration Act, 2002, section 31(2)(b).

⁶⁶ Crush and Tshitereke, "Contesting Migrancy."

3 Transplantation of US-Styled Policy Approaches to Immigration and Border Control

US government officials became actively involved in conducting surveys of South African border control mechanisms, making recommendations, training South African officials and even participating in government task teams developing policy since at least 1996/97. In what became another *formative event*, the United States sent over a team of border control officials to review South Africa's air, land, and seaports and to make policy- and practice-based recommendations. This was notwithstanding the fact that border management systems in the United States had not only consistently failed to achieve their stated objectives but had raised a number of serious human rights concerns as well.⁶⁷

Soon afterwards, the United States established an office in Johannesburg, joining officials of the United Kingdom who had been investigating cargo operations in Durban.⁶⁸ In 1997, a report by an Inspection Team from the US Immigration and Naturalization Service (INS) was released, "pursuant to a request from the South African Government to the United States Department of State."⁶⁹ According to the report, the request was in relation to the South African Government's efforts "to assist that government combat the growing crime problem."⁷⁰ The INS Inspection Team, which was composed of border control and inspections officials from various sea, air and land border posts in the United States, was split into four teams, making assessments of selected land borders, seaports and airports in South Africa. Its aim was (in part) to "provide a working methodology by which other problems can be identified and attacked."⁷¹ The report strongly encouraged the South African government to prioritize "control of illegal immigration (as) one of its top priorities."⁷²

Without specification, and with an unexpected reference to recognizing the role of local norms, the US INS Report recommended that "the community" be more involved in border policing, based on a claim that "the community has a vested interest in border control."⁷³ Emphasis in the

⁶⁷ Human Rights Watch, "Crossing the Line," and Human Rights Watch, *Slipping Through the Cracks*.

⁶⁸ Sunday Independent, "US to Lend a Hand in SA's Fight Against Illegal Aliens."

⁶⁹ Immigration and Naturalization Service, South African Border Assessment, p. 2.

⁷⁰ *Ibid.*, p. 2.

⁷¹ *Ibid.*, p. 12.

⁷² *Ibid.*, p. 4.

⁷³ *Ibid.*, p. 7.

1997 US INS report was placed on holding train, ship and airline companies accountable for border control, through a comprehensive system of fines, based on a contention that this would be a “force multiplier to border control.”⁷⁴ Moreover, the report claimed that “numerous intelligence documents, both national and international, had concluded that the illegal alien situation in South Africa (was) out of control”; the “tremendous pressure” the authorities in South Africa were facing was acknowledged, ranging from increasing air traffic to porous land borders. These pressures, the report argued in an especially nebulous manner, arose from “(p)eople (who had) become refugees by weather changes that affect agricultural production and political changes that affect human rights.”⁷⁵

3.1 *Collective Approach to Border Control*

The 1997 report by the US INS became the basis of a National Inter-departmental Policy called the Collective Approach to Border Control (CABC).⁷⁶ The CABC policy became the core document regulating the coordination of border control between the four South African agencies responsible for immigration and border control: South African Defence Force (Military), Revenue Service (Customs), and Police Service and Home Affairs, with Home Affairs as *de facto* the lead agency. Additional role players in the National Inter-departmental Structure (NIDS) with complementary functions included the National Intelligence Agency, South African Secret Service, and the Departments of Trade and Industry, Health, Agriculture, Foreign Affairs, Environmental Affairs & Tourism, Correctional Service, Transport, Public Works, Justice, and Welfare.

According to Piet Grobler, then Provincial Commander (Western Cape) in the Border Police section of the South African Police Services (SAPs), and a former member of the NIDS, the CABC sought to get beyond a previously disjointed approach and create a “unified and accountable command structure for border control.”⁷⁷ The CABC addressed the various aims and functions of various levels of border control officials, from the national level to the port of entry level.⁷⁸ It recommended a phased

⁷⁴ *Ibid.*, p. 8.

⁷⁵ *Ibid.*, p. 12.

⁷⁶ Operational Working Team on Border Control, *Border Control Collective Approach*.

⁷⁷ Grobler, “Collective Approach to Border Control: Policing and Refugees,” p. 73.

⁷⁸ Operational Working Team on Border Control, *Border Control Collective Approach*, pp. 10–11.

program of action, planned to take place over a one-and-a-half-year period, from mid-1997 until the end of 1998, in order to bring the three main agencies (Customs, Immigration and Police) “under one roof,” allocating existing staff to new positions and assigning new roles rather than hiring additional staff.⁷⁹

The Report was to be followed by a Business Plan, to be drawn up by an Inter-Agency Structure. It was communicated in 1997 to Handmaker by a well-placed source who requested to remain anonymous that there were other proposals submitted to the NIDS Task Team for consideration, in addition to the US-led NIDS report. These proposals, which were not made publicly available, included a National Intelligence Coordinating Committee Report to the Cabinet committee on Safety and Intelligence; the Customs Law Enforcement Task Group document for the Executive Head for SA Revenue Services and a draft document prepared by Mr. I Lambinon, who was the then Director-General for the Department of Home Affairs.

It became clear that the US-styled NIDS report was the most influential, and unsurprisingly, its rigid approach to border control did not adequately take into account constitutional and human rights ramifications. Moreover, despite the introduction of the CABC policy, South Africa continued to grapple with the coordination or joint-institutional approach to border control and management. To this day, the three agencies responsible for border control – SAPS, Department of Home Affairs and South African Military – have unclear mandates and overlapping functions.

3.2 *The Spaces Filled by Agencies Responsible for Border Control*

SAPS has always been primarily responsible for enforcing internal controls, in comparison with other key border enforcement agencies, enforcing internal control measures (detecting, apprehending, and temporarily detaining suspected undocumented migrants) and also managing several of the land border posts. This has included highly concentrated spaces of local governance such as the Lebombo border post, one of South Africa’s most important land border crossings, located in what is known as the *Maputo corridor*, and where high levels of bribery have been reported, although migrants (mostly small-scale entrepreneurs) report to have

⁷⁹ *Ibid.*, p. 15.

otherwise been treated favorably.⁸⁰ In addition to their role in the everyday governance of persons moving through these concentrated spaces that have long-cultivated local norms of enforcement, the police have also been responsible for detecting illegal smuggling of goods and prohibited items (drugs, weapons, etc.) and, together with the South African Revenue Services (SARS), regulating the transport of legal goods.

The DHA has not only been primarily responsible for policy making, but it also fulfils a key role exercising formal control over the country's external borders as well as internal enforcement. It regulates the entry and exit of people through the borders and handles more complicated determinations on residential status (temporary permits and permanent residence permits). Moreover, the DHA manages dedicated migrant detention centers (to which the police refer migrants in lieu of deportation), and it makes determinations of refugee status through designated refugee reception offices. Hence, in all three of these spaces of local governance, the DHA exercises its control over both policy and enforcement.

The role of the military, the third key border enforcement agency, the South Africa National Defence Forces (SANDF) has broadly been to secure South Africa's land borders. Initially, there was hesitation, given the violent border conflicts of the 1980s. In fact, from 2003, President Thabo Mbeki issued an order to actually *remove* the SANDF from operating at the borders. However, by 2009, as South Africa was preparing to host the 2010 World Cup, the then President Jacob Zuma rescinded this decision as the police services on whom the function had been deployed reportedly lacked the capacity to execute it.⁸¹

While the SAPS and DHA manage the formal border posts, the role of the SANDF has largely been confined to patrolling the difficult-to-govern spaces around the perimeter fence that separates South Africa from neighboring Mozambique and Zimbabwe; this includes the monitoring of US-supplied electronic detection systems. However, as Handmaker personally observed during a field visit in January 2001 at Lebombo border post, in practice, the majority of unauthorized detections are never followed up on, due to a lack of personnel. Twenty years later, the situation appears not to have altered much as the SANDF has maintained that, in its border management function, it still operates at less than optimum capacity.⁸²

⁸⁰ Perbady and Crush, "Invisible Trade, Invisible Travellers," p. 121.

⁸¹ McMichael, "The Re-militarisation of South Africa's Borders."

⁸² Heitman, "SANDF Personnel Strength."

The SANDF has specified its role in border management to the Parliamentary Monitoring Group thus:

patrolling the land borders by foot and mobile patrols, establishing observation and listening posts, operating vehicle control points, providing a reaction force and follow-up operations which would include the extended border area, conducting roadblocks 20 kilometers to the rear of the borderline in conjunction with the South African Police Service, and collecting information by conducting intelligence operations.⁸³

Beyond the formal roles of US officials in these local spaces of migration control and border enforcement, specific forms of (racialized) everyday migration governance in South Africa have drawn significant inspiration from the US-style proposals recommended by INS officials, both in reports and through participation in policy task teams. Furthermore, these forms of racialized migration governance have been reinforced by several, US-sponsored field trips to visit US border control installations, including the South African government's preoccupation with securitization and control. While direct empirical evidence is lacking as to what extent these policy transplants and field visits to US border posts has actually influenced South African border enforcement practices, there are strong correlations between South African border enforcement practices and a legacy of racism in the treatment of immigrants in the United States.⁸⁴ These correlations include a South African police culture with roots in the country's apartheid past with the US border control culture, both of which have been highly militarized.

3.3 *Racist Correlations in Governing through Uses*

Apartheid-era policing of migration and border control is an example of what Valverde refers to as governing through uses; as she observes, "uses, unlike persons, are not rights bearers at all."⁸⁵ By prioritizing the use (of borders) over the persons (border crossers), border officials have reinforced a highly managerial, arbitrary, and ultimately futile approach to border crossing and internal border enforcement. Both in policy and practice, migrants have been persons who are regarded to have little to no rights (e.g., to remain resident in the country). Moreover, there is an

⁸³ Parliamentary Monitoring Group, *Border Control: Briefing by Chief of Joint Operations*.

⁸⁴ Murdza and Ewing, *The Legacy of Racism within the U.S. Border Patrol*.

⁸⁵ Valverde, "Taking Land Use Seriously," p. 38.

important temporal dimension, namely that the very same institutional structures that were set up to enforce South Africa's notorious policy of *influx control* were later utilized by the immigration authorities, from an institutional culture that cultivated unaccountable administrative procedures akin to the treatment of criminal suspects (e.g., fingerprinting and detention) to the use of the very same detention cells that had once held pass law violators. Strikingly, this approach to everyday migration governance was reproduced in the 1990s and into the 2000s, with efforts on the part of the police during high-profile, large-scale operations such as Sword and Shield (1996), Operation Passport (1998), Operation Crackdown (1999, 2002, and 2011), and Operation Fiela (2015), some of which were ostensibly meant to fight crime, acting as a cover for border control.

Immigrants not only formed a significant proportion of those who were arrested in these *crime-fighting operations*, they were not afforded the basic protections that criminal suspects were. Moreover, the lack of regard for migrants as rights holders cultivated a situation of impunity and widespread abuse of power by border control officials. Sometimes, the approach to border control governance was explicit; for example, during Operation Crackdown, which resulted in the arrests of more than 7,000 people (a large proportion of whom were migrants), the police tore up persons' valid identity documents and utilized other illegal tactics in order to "make immigrants illegal."⁸⁶

This treatment of foreigners, which has been accompanied by a popular characterization of them being "drug dealers" and "thieves,"⁸⁷ reinforces South Africa's racialized, everyday governance of border control, whereby "the processes of border control ... have become more security- and crime-oriented."⁸⁸ Moreover, South African border officials' approaches resonate with Valverde's observations on how governments have "deliberately blurred the lines" separating "state officials who govern citizenship and immigration from police forces."⁸⁹ The behavior of immigration officers toward foreigners in South Africa also resonates Graham Hudson's observations in his contribution to this book, which evaluates

⁸⁶ Klaaren and Ramji, "Inside Illegality," pp. 36–37.

⁸⁷ Alfaro-Velcamp and Shaw, "Criminalising Immigrants in South Africa."

⁸⁸ Valverde, "Practices of Citizenship and Scales of Governance," p. 217. Other authors, such as Stumpf, "The Crimmigration Crisis" and Hernández, Crimmigration Law have characterized the criminalization of immigration control as crimmigration.

⁸⁹ Valverde, "Practices of Citizenship and Scales of Governance," p. 217.

how security networks operate at different levels of governance, rendering as illusory any notion of *sanctuary* for foreigners.

South Africa's racialized approach to the everyday governance of migration and border control has persisted throughout the 2000s and 2010s. According to Vigneswaran, these operations were initiated by the police, at times without the prior approval of the DHA, and it was only after the police had made their arrests, totaling 54,373 during Operation Crackdown (2002), that they requested "DHA assistance to check the documents of suspected 'illegals' and take responsibility for detention and deportation."⁹⁰ Hence, the "SAPS officials, while never formally adopting a policy on illegal migration, have intermittently ... described the enforcement of immigration laws as a potentially useful method of dealing with certain categories of criminals."⁹¹

Vigneswaran further argues that the DHA appears to have surrendered street-level migration enforcement to the SAPS who have conducted most of the crackdowns and raids on migrants, usually under the guise of fighting crime.⁹² It is no surprise, therefore, that police detention facilities contain a higher number of "illegal immigrants" than the Lindela Repatriation Center where in fact they should be held. Apparently in 2019, Lindela was "operating at 30% of its full capacity," while the SAPS was complaining of the burden of detaining immigrants in jails.⁹³ What also tends to happen in practice is that crime crackdown operations are concentrated in areas with high populations of immigrants (both documented and undocumented), such as Hillbrow and Yeoville in Johannesburg.⁹⁴

Consequently, the police have emerged as the lead agency in everyday migration enforcement, with the DHA only coming on board to verify the status of those arrested. Studies have concluded that "beat policing is responsible for the largest proportion of arrests of undocumented migrants."⁹⁵ What then would have been the lead agency in migration control has had to follow the lead of others, buttressing the lack of coordination among the various agencies that have a role in border management. Following his study on South African immigration control and

⁹⁰ Vigneswaran, "Enduring Territoriality," p. 797.

⁹¹ *Ibid.*

⁹² Vigneswaran, "The Complex Sources of Immigration Control."

⁹³ Van Lennep, "Lindela and South Africa's Defective Deportation Regime."

⁹⁴ Vigneswaran et al., "Criminality or Monopoly?" p. 477–479; Smith, "South Africa Faces Human Rights Backlash"; Brock, "In South Africa, Immigration Feeds Corrupt Officials."

⁹⁵ Steinberg in Vigneswaran, "Enduring Territoriality," p. 798.

enforcement, Vigneswaran concludes that “the DHA not only failed to bring other departments into line, and transform itself, its own enforcement activities were routinely driven by the other actors’ ongoing performance of immigration enforcement functions.”⁹⁶

4 Official Corruption

In addition to well-documented allegations of the mishandling of migrants, the extent of official corruption in the everyday enforcement of South Africa’s post-1994 migration regime has been endemic, similarly illustrating both the temporal and spatial features of Valverde’s scales of governance.

In the South African context, official corruption is a well-established phenomenon. A number of studies, media reports, and reports by both government and independent institutions have highlighted the prevalence of corrupt practices within South Africa’s post-1994 immigration regime.⁹⁷ Moreover, the paying of bribes in exchange for not being arrested reaches back in history to apartheid-era enforcement of influx control, which governed overtly racialized spaces where white and non-white residents were permitted to live, work, and recreate. These spaces were regulated on the basis of so-called pass laws. If one didn’t have a pass to be in a particular area, there were vulnerable to arrest, a fine, and detention. Finally, as in the past, suspected pass law offenders were often subject to bribes, not only by white but also by black police officers.⁹⁸

Just as Valverde’s temporal dimension of governance is evident here, as with the three main border enforcement agencies’ jostling for control over particular spaces of migration enforcement, the spatial dimension also clearly applies. In addition to the fact that the practice of corruption in South Africa has not changed substantially over time since the country’s enforcement of influx control, the very same spaces that had previously been used to govern pass law offences – including facilities for the interrogation and detention of suspected offenders – have continued to be used to control migrants.

Tom Lodge has observed that the prevalence of corruption, prior to 1994 was not regarded as “endemic” across all levels of bureaucracy in South Africa; rather, “it tended to be concentrated in those areas in which

⁹⁶ Vigneswaran, “Enduring Territoriality,” p. 796.

⁹⁷ Amit, “Queue Here for Corruption.”

⁹⁸ Frankel, “The Politics of Police Control,” p. 487.

officials encountered people who were particularly rightless and defenseless.⁹⁹ By the same token, post-1994, the existence of corruption in South Africa has not only been endemic at the country's land borders but also in refugee status determination/reception centers where applications for asylum have been processed.¹⁰⁰

4.1 *Prevalence of Corruption in the Post-1994 Immigration Enforcement Regime*

In their research on immigration enforcement at Beitbridge and in Johannesburg, Vigneswaran and colleagues identified a “loosely-bound network of transport operators, negotiators, hawkers, guides, and (to a lesser extent) officials that run the human smuggling industry” and “have created a parallel border management system to the official border post.”¹⁰¹ This network, it is further revealed, acts in collusion with some SAPS officials at the Beitbridge border post.¹⁰² One researcher anecdotally narrated some of his observations at the Beitbridge border as follows:

Because of the high volumes of people moving on a regular basis, border officials often use their authority to undermine immigration processes such as the ones related to the granting of days for Zimbabweans who need to get their passports stamped for a visitors visa (sic). While they are supposed to evaluate immigrants on a cases by case basis (travel purpose, resources one has etc.) to determine how many days to grant one to stay in the country (According to law, Zimbabweans can get as many as 90 days a year), border officials often impose 30 days as the maximum. They then communicate with bus drivers and *malayitshas* so that they can inform their passengers to have some money ready for them to “buy more day” if they intend on staying in the country longer.¹⁰³

Away from the border, and into the metropolitan areas where police frequently arrest foreigners, as mentioned earlier, the police were said to “routinely engage in intimidation and extortion of, and simple theft from, Zimbabweans and migrants of other nationalities.”¹⁰⁴

⁹⁹ Lodge, “Political Corruption in South Africa,” p. 171.

¹⁰⁰ Amit, “Queue Here for Corruption.”

¹⁰¹ Vigneswaran et al., “Criminality or Monopoly?,” p. 471.

¹⁰² *Ibid.*, p. 472.

¹⁰³ This information was contained in an email exchange dated 2 December 2020 between Nalule and an ethnographic doctoral researcher whose research was conducted at the Beitbridge border, and nearby Musina town in South Africa.

¹⁰⁴ Vigneswaran et al., “Criminality or Monopoly,” p. 472.

The police are not the only authorities that engage in corrupt activities, Amit's research has revealed that a significant number of asylum seekers and refugees experienced corruption at various stages right from the border through gaining access into a refugee reception office, and in the office itself.¹⁰⁵ These findings have been further substantiated by two reports of independent organizations: Corruption Watch and Lawyers for Human Rights.¹⁰⁶ So what has been done to try and combat it through legal governance?

4.2 *Legal Governance to Combat Corruption Remains Elusive*

While South Africa has a well-developed legal framework aimed at combating corruption in public and private sectors, its capacity to penetrate the spaces of local migration governance – whether at the border posts, at detention centers or in refugee reception offices – has proven to be very elusive.

The major piece of legislation that has sought to accomplish this is the Prevention and Combating of Corrupt Activities Act of 2004. The enforcement of this legislation is in part overseen by the Office of the Public Protector, among other public bodies that can equally investigate allegations of corruption. Moreover, the DHA established a Counter Corruption and Security unit that has sought to work together with other law enforcement agencies. In the White Paper on Home Affairs, the DHA acknowledged that “the poor quality of services and high levels of corruption at the DHA” has provided the impetus for its “Turnaround program” in 2007.¹⁰⁷ It is to this program that the DHA accredited the improvement of services within the DHA to the citizens of South Africa. However, noticeable changes in the civic services have not been experienced at a comparable level in the immigration services, which falls under the same Ministerial body.

The prevalence of corruption in the local spaces of migration governance appears to be part of a long, institutional history that seems very difficult to break with. It has already been mentioned earlier how the practices at border posts, such as Lebombo have reproduced pre-1994 practices and where the payment of bribes is endemic. A similar situation

¹⁰⁵ Amit, “Queue Here for Corruption.”

¹⁰⁶ Corruption Watch, *Asylum at a Price*; Lawyers for Human Rights, *Costly Protection*.

¹⁰⁷ Department of Home Affairs, “White Paper on Home Affairs.”

exists at the Beitbridge border post with Zimbabwe.¹⁰⁸ At Lindela Center too, extortion and bribery have long been documented by the South African Human Rights Commission and NGOs.¹⁰⁹ Following revelations of a Commission of Inquiry, in 2019 it was reported that African Global Operation, a facilities management company that had previously operated as Bosasa, had not only paid millions of South African Rands to politicians, government officials and even journalists but had also managed to secure over 12 billion Rands in government contracts, reportedly also based on bribes.¹¹⁰ Finally, at Refugee Reception Offices, across the country, bribery, and corruption is endemic.¹¹¹

The 2017 White Paper on International Migration acknowledged this systemic corruption and accordingly sought to establish a new paradigm that might deter the “unacceptable levels of corruption.”¹¹² However, it did not explicitly set out any strategy on how the government plans to deal with corruption in the management of international migration.

The government has expressed its hope that streamlining border management under the Border Management Authority Act will help in its fight against systemic corruption, although based on the experiences so far, it is not so clear how this will be accomplished. This has reinforced skepticism among critics of the Border Management Authority Act who argue that the DHA is generally ill-suited to be the lead agency in the Border Management Authority Act and its failure to manage internal corruption will only spread to the new Authority.¹¹³

Even within Parliament, widespread skepticism over DHA’s competence persists. In a 2021 meeting between DHA officials and the Parliament’s select committee on security and justice, one member was concerned over the “litany of issues of corruption and money irregularities that the department is embroiled in,” in addition to personnel shortages and budgetary constraints.¹¹⁴ Accordingly, a number of members “agreed that until the department was able to overcome its current structural and systematic problems, it would not be ready to implement the authority.”¹¹⁵

¹⁰⁸ Peyper, “Tempers Flare as Bribes Block Border Crossing Between SA and Zimbabwe.”

¹⁰⁹ South African Human Rights Commission, “Illegal.”

¹¹⁰ Bornman, “How Lindela Became Bosasa’s Meal Ticket.”

¹¹¹ Amit, “Queue Here for Corruption.”

¹¹² Government of South Africa, White Paper on International Migration, p. 72.

¹¹³ Maunganidze and Mboyizo, “South Africa’s Border Management Authority Dream Could Be a Nightmare.”

¹¹⁴ Gilili, “Home Affairs Vows to Speed up Border Management Authority.”

¹¹⁵ *Ibid.*

While it may be premature to cast judgement on the effectiveness of the Border Management Authority Act, serious concerns remain as to whether this new intervention will be effective in curbing corruption that is prevalent in South Africa's migration and border control practices.

5 Conclusion

In reflecting on Valverde's temporal and spatial scales in relation to the governance of migration policy and border control in South Africa, it is striking to us how the past and present governance of mobility has reproduced apartheid-era forms of arbitrary control as well as the very spaces where South Africa's highly securitized policies have been enforced for many decades. This is particularly evident in the two formative events highlighted in this chapter, namely, the 2008 wave of xenophobic violence that mirrored racialized violence during the apartheid era and misguided interventions by US government officials that only served to reinforce the racialized culture of enforcement that South Africa has been struggling to rid itself of in its post-1994 liberal constitutional order.

Despite persistent efforts at policy reform, the country's migration and border control policies not only fall short of South Africa's constitutional values but also make clear how everyday forms of local governance have far greater traction. The approach of the South African government to migration has reflected a persistent preoccupation with security and control, while failing to tackle widespread xenophobia and endemic corruption. Furthermore, the everyday, racialized forms of governance that persist in local spaces of migration governance – in particular the border posts, Lindela deportation center and refugee reception offices – are systemic and deeply embedded in local norms that were established long ago during the country's predemocratic period of racialized apartheid policies. Hence, rather than make serious reforms that would represent a true break from its ignominious past, South Africa has been widely criticized for maintaining a border enforcement policy that is outright abusive. Even from a pragmatic standpoint of governance, its policies and everyday forms of governance are evidently counterproductive, not only in light of the country's profound labor and economic needs but also in relation to South Africa's aspirations to be a pathbreaker in rights-based governance.

Among the prolific literature that has been produced on this topic over the past twenty years, some have explained South Africa's restrictive policy, and rising xenophobia as a result of continuities from the previous

regime.¹¹⁶ Others have specifically pointed to xenophobia in the country as “a stratagem for the retaining of hegemony at a moment marked by fierce labor struggles and an insurgent citizenship of the poor, beyond the reach of neoliberal governance.”¹¹⁷

Our analysis not only affirms these earlier analyses but has also taken a different vantage point. Observing how everyday governance operates in both its temporal and spatial dimensions is an unsettling reminder of South Africa’s apartheid past revealing that migration policies and border control practices are very much stuck in the past, with little to no resonance with rights-based principles.

What we can conclude from this analysis of South Africa’s migration and border control enforcement over roughly a twenty-year period is that, unlike other economic blocks where free movement of labor has been encouraged and even a pillar of intergovernmental relations, South Africa has experienced a migration system that is just as rigid and arbitrary than prior to 1994 when there was a *two-gates* system. In other words, through local measures of everyday legal governance, and despite its extensive constitutional and international human rights commitments, the country has maintained a system of racialized migration governance that is not unlike the forms of racialized labor control of the pre-1994 past.

There is certainly more research to be done. For example, an earlier study by Patrick Bond and others has argued how economic policies in South Africa are directly connected with serious challenges faced in the areas of “migration, and devastating xenophobia against black foreign nationals in South Africa.”¹¹⁸ Moreover, as a matter of pragmatism, it is important to critically interrogate how South Africa’s unforgiving approach reveals an unfathomably strong hold to the liberal notions of a nation-state, which in the unreconstructed setting of migration governance, maintains a system characterized by mistreatment and inequalities. More specifically, South Africa’s unreconstructed system of migration enforcement constrains the opportunities that migrants and South Africans alike have to participate in South Africa’s economy. Finally, so far as the current models of migration policy and everyday legal governance are concerned, it is unsettling to see that, at the time of writing, the political party making the greatest progress in South Africa is Action SA, which has been pushing for a radical

¹¹⁶ Klotz, “Migration after Apartheid.”

¹¹⁷ Schierup, “Under the Rainbow,” p. 1052.

¹¹⁸ Bond and Ruiters, “Uneven Development and Scale Politics in Southern Africa,” p. 178.

anti-immigrant agenda.¹¹⁹ As a rights-based party, it is hoped that the still-dominant African National Congress party will take the lead in pushing for a truly alternative approach to the migration policies and enforcement that have been experienced since 1994 (and before), governing through *persons* (with rights) rather than through its current approach of governing through *uses*. Our contention is that this is likely to lead to more productive outcomes, both socially and economically. Along a similar line, as Landau argues, while steering away from antifoforeigner rhetoric, there could be a more deliberate push for local governance solutions “where citizens or ‘locals’ have direct interests.”¹²⁰

Changing the systemic nature of these practices that reflects a pattern of dysfunctionality also requires a fundamental, strategic rethink for migration advocacy organizations. To be more specific, organizations need to not merely mobilize international law in order to amplify the rights of migrants and refugees. Organizations must also disrupt the systemic nature of the current system and find ways of reversing the rigidity of arbitrary and racialized migration and border control policies that are deeply embedded in local norms, yet are having a deeply corrosive impact on both South Africa’s domestic economy and the economy of the sub-region.

¹¹⁹ Felix, “The Enemy Is Not Foreigners.”

¹²⁰ Landau, “Wither Policy?”

The “Safe Harbor” of Berlin

Socio-Legal Constellations and Complex Strategies of Divergence

MORITZ BAUMGÄRTEL AND FRANZISKA PETT

1 Introduction

In a joint statement in September 2018, the mayors of the German cities of Berlin, Bremen and Hamburg declared that it was their “shared humanitarian duty to do everything to save people from drowning, to bring migrant vessels to safe harbors, and to admit refugees in accordance with European and national asylum rules.”¹ This municipal declaration, though certainly not the first even in Germany, stood out for being proclaimed by the only three cities that also constitute a state (*Land*) in the constitutional structure of the Federal Republic of Germany. Explicitly affirming their status as “city-states” (*Stadtstaaten*), the mayors committed to remaining “engaged in the accommodation and integration of refugees” – though only insofar as these are already admitted to Germany in accordance with agreements that the federal government has made with other EU Member States.² This qualification, while easy to gloss over, hides a larger puzzle when it comes to the actions of local authorities, especially those that enjoy comparably more competencies: Will they use their elevated legal status and the resulting additional discretion confrontationally and in defiance of restrictive national policies, or more subliminally, to exert political influence “softly” or even avoid political debates altogether? Moreover, what are the motives that underpin the approaches that they decide to adopt?

This chapter explores these questions by examining the case study of Berlin and specifically the conduct of its local government following widespread mobilization in Germany calling for increased high sea rescue

¹ Senatskanzlei, “Stadtstaaten bleiben sichere Häfen für Flüchtlinge” (our translation).

² *Ibid.*

by a popular social movement known as *Seebrücke* (in English: “pier”). While Berlin is usually regarded as a supporter having first declared itself a “safe harbor” (*sicherer Hafen*) and then created the municipal “Cities of Safe Harbors” Alliance, we argue that its role is more nuanced in reality. Building upon theorizations concerning local “strategies of divergence,”³ the chapter shows that the local authorities in Berlin deploy multiple and seemingly contradictory strategies that, although challenging restrictive national policies in principle, are guided by distinct strategic considerations, notably including legal ones, rather than only by humanitarian motives. The example of Berlin also highlights the interconnection between strategies and the extent to which legal competencies delineate their outlook.

Looking at the reason behind such “complex” strategies of divergence, this chapter further contends that the approach taken by municipal actors, in this case in Berlin, is shaped fundamentally by the various “socio-legal constellations” that they are confronted with. The introduction of this novel concept allows us to unpack the contextual specificity of municipal strategies in an analytically meaningful way by drawing attention to two sets of factors (and their interplay): first, the interaction of local authorities with civil society actors (here: *Seebrücke*), which have an influence on both its willingness and political capacity to take certain actions; and second, the legal position of the local government in larger constitutional structures. In concrete terms, Berlin has been able to “prove” its political commitment to *Seebrücke* by exploiting its hybrid legal status as a “city-state” to file a legal challenge against the national government at the federal level.⁴ This circumstance, in turn, allows the local government to be less forthcoming on the interest of forced migrants in other areas, most notably when it comes to housing.

In a final instance, we discuss how the coexistence of these multiple distinct (yet interrelated) socio-legal constellations confronting cities with specific challenges and opportunities complicates our normative assessment of local authorities “decoupling”⁵ from national policies – and the “local turn”⁶ in migration policy in general. Particularly in the case

³ Oomen et al., “Strategies of Divergence.”

⁴ “Berlin klagt gegen Seehofer im Streit um Flüchtlingsaufnahme.”

⁵ Scholten, “Agenda Dynamics and the Multi-Level Governance of Intractable Policy Controversies.”

⁶ Zapata-Barrero et al., “Theorizing the ‘Local Turn’ in a Multi-Level Governance Framework of Analysis.”

of legally resourceful cities such as Berlin, scholarship must account for the possibility of municipal approaches that are contradictory and potentially ambiguous in outcome, yet pragmatic from a city’s own perspective, which raises questions about the promise of legally empowering cities in this area.

Before proceeding, we need to clarify the choice of our case study. As the country’s capital and largest city with around 3.7 million inhabitants, Berlin is an “atypical” case to consider for the purpose of identifying and explaining strategies of divergence. It is widely perceived as a cosmopolitan and diverse city of immigration, even if this outlook is arguably rather recent.⁷ While such features are shared by “global cities”⁸ in other countries (making the case study theoretically relevant also for this reason), we are interested in Berlin primarily because of its hybrid legal status. The fact that it is not “just” a municipal entity but also a *Land* empowers it in a manner that is rare: Constitutional law and practice in Western countries have largely marginalized the potential of cities to address issues of public policy.⁹ The case study of Berlin therefore offers instructive insights on the outlook of strategies of divergence where local authorities’ (presumably) growing appetite for political influence in the domain of migration is somewhat matched by their actual legal position. While we observe that more legal authority does empower cities, the results are not necessarily only positive when viewed from the perspective of migrants and migrant rights defenders.

In terms of methodology, this chapter adopts a socio-legal approach that combines a legal analysis of the demands of German constitutional and administrative law with empirical insights. More specifically, seven semi-structured interviews were conducted during the period between September and November 2020 with municipal representatives in Berlin (and the neighboring city of Potsdam) as well as members of migration advisory councils and the local chapters of *Seebrücke*. Interviewees were initially selected using a “key informant” sampling method to target the most relevant people in the field, which was followed by “snowball” sampling based on information provided during these first interviews. The purpose of these conversations was to gauge the origins, content, and motivation of Berlin’s strategies of divergence pertaining to sea rescue

⁷ Lanz, “Berlin oder Das umkämpfte Terrain der Einwanderungsstadt.”

⁸ Sassen, *The Global City*.

⁹ Hirschl, *City, State*.

and refugee admissions, as well as the attitudes held by interviewees concerning these strategies and the considerations that, actually or presumably, lie behind them.

The remainder of this chapter features five more sections, with the next one providing a short background of both the *Seebrücke* movement, which has sought to mobilize German society in favor of high sea rescue, as well as the “Cities of Safe Harbors” (*sichere Häfen*) Alliance, co-founded by Berlin. Thereafter, we zoom in on Berlin’s strategies of divergence to highlight the coexistence of multiple, seemingly contradictory strategies in different competency areas. The following section looks at the interaction between the city authorities and the *Seebrücke* movement, which has its origins in the city and continues to critically appraise Berlin’s actions and motives. Here, we claim that it is the combination of the pressure as exerted by the social movement and the legal authority held by Berlin as a *Land* that explains the latter’s specific strategic choices to take first legislative, and eventually judicial action against the federal German government. The final substantive section discusses the normative implications of such complex strategies of divergence, where it appears that local authorities navigating differing “socio-legal constellations” leads to ambiguous results from a migrant rights perspective. The conclusion summarizes the findings as well as their relevance for scholarship theorizing the “local turn” in migration policy and proposes avenues for future research.

2 From the *Seebrücke* Movement to the “Safe Harbor” Alliance

The *Seebrücke* movement came into being in 2018 after a rescue ship of the organization *Lifeline* had been prohibited to dock at an Italian harbor, despite having more than 200 rescued migrants on board. A “small circle of activists in Berlin”¹⁰ used this crisis moment to create a “decentralized, open-source campaign” that achieved nationwide mobilization even of people who had not joined political protests before.¹¹ The initiators thus set the direction for the strategic approach that *Seebrücke* has taken since: In practice, the movement is made up of numerous engaged

¹⁰ Schwiertz and Steinhilper, “Countering the Asylum Paradox through Strategic Humanitarianism,” p. 208.

¹¹ Schwiertz and Keß, “Safe Harbours: The Cities Defying the EU to Welcome Migrants.”

individuals who become active by protesting and exercising pressure on political actors to change their migration policies. Many of these activists have created local *Seebrücke* chapters, of which there are currently 180, both in large metropolitan cities like Berlin and in medium-sized and small and rural municipalities.¹² Deliberately engaging in a “switching of solidarity to the local scale as a tactic in light of the shrinking space of contentious solidarity on both the European and national level,”¹³ *Seebrücke* has also called on local authorities to publicly declare themselves open to refugees and opposed to the criminalization of high sea rescue. The result has been the initiation of a movement of so-called safe harbors that is composed of 267 cities and towns.¹⁴ With the EU’s asylum and migration policy prioritizing border control rather than the admission of refugees – and many migrants consequently embarking on dangerous journeys to get to Europe – cities of “safe harbor” argue that they can “take on responsibility” where the German government fails to do so.¹⁵

In concrete terms, *Seebrücke* expects local authorities of “safe harbor” cities to make full use of their political resources. Local municipal councils that seek to become safe harbors have to officially declare themselves such. *Seebrücke*’s further demands from local authorities an active support for maritime rescue, admission of more than required by the established quota, support for admission programs, making sure that people settle into the community, networking on national and European levels, entry into the “Cities of Safe Harbor Alliance,” and transparency in their actions. Since declarations alone leave significant room for symbolic politics that is not followed up with concrete actions, *Seebrücke* also tracks the progress of cities with criteria that it considers vital for safe harbors. These, as well as *Seebrücke*’s evaluation of the process, are publicly available online.¹⁶

¹² *Seebrücke* thus represents at the same time a grass-roots social movement as well as a civil society actor with an organizational structure. While we are mindful of the differences and even tensions that exist between the two concepts (see, e.g., De Bakker et al., “Social Movements, Civil Society and Corporations”), we still use both terms to refer to *Seebrücke*, which seems appropriate both in this case and for the purposes of this chapter.

¹³ Fischer and Jørgensen, “Scale-Switching as a Response to a Shrinking Space for Solidarity,” p. 157.

¹⁴ *Seebrücke*, “267 Sichere Häfen.”

¹⁵ *Ibid.*

¹⁶ *Ibid.*

2.1 Berlin as a “Safe Harbor”

Discussions about Berlin becoming a safe harbor started in 2018. However, local political actors including parts of the local government brought forward arguments against signing a declaration. According to critics, it was not up to Berlin as a city and even a federal state to decide on these issues but rather to await a nationwide, if not European decision. There also was concern that it would be “presumptuous” for a small city-state of 3.7 million inhabitants to criticize the actions taken at higher levels of government and attempt to change matters that are outside of their legal competencies.¹⁷ Proponents of a safe harbor declaration responded that such actions would never be taken at a higher level considering that the attitude of the German government leaned more toward deportation than refugee admission or inclusion. Within Berlin’s local government, discussion arose specifically also on whether the adoption of “safe harbor” policies should directly involve Mayor Michael Müller and his office. This was eventually done to underscore the urgency of the issue.¹⁸ In addition, the open support of the Mayor of Berlin, who is also a member of the Social Democrats (SPD), demonstrated that the safe harbors “project” was widely endorsed and therefore not merely a partisan initiative by the two more left-leaning coalition partners, the Green (*Bündnis 90, Die Grünen*) and the Left (*Die Linke*) party.

However, Berlin’s commitment to the cause of *Seebrücke* and the safe harbor movement goes beyond being one of the first cities to sign a declaration of support. Since 2019, cities that signed declarations have the additional option of joining the inter-city alliance “Cities of Safe Harbors.” Berlin was one of the Alliance’s founding cities, with Mayor Müller opening the inaugural conference in June 2019.¹⁹ The stated aim of the Alliance is to bring together local authorities around Germany to share capacities and resources to promote bottom-up a migration policy that stands in solidarity with refugees and the movement created by *Seebrücke*. Furthermore, the Alliance demands that the national government accelerate and deepen its cooperation with municipalities that are willing to welcome refugees. By 2021, the Alliance had grown to over 100 member cities and towns.²⁰

¹⁷ Interview with the Secretary of State for Integration in Berlin, conducted on September 7, 2020 (our translation).

¹⁸ *Ibid.*

¹⁹ Senatskanzlei, “Michael Müller eröffnete Kongress ‘Städte zu sicheren Häfen’ der Initiative Seebrücke.”

²⁰ Stadt Potsdam, “Städte Sicherer Häfen: Die Mitglieder.”

3 Multiple, Coexisting, and Complex Strategies of Divergence in Berlin

To be sure, the proactive approach taken by the authorities in Berlin is not unique: Other cities and towns have started similar initiatives, with many even developing comprehensive local policies in the area of refugee reception and inclusion. This holds true not only for German cities of safe harbor but also localities across Europe, leading migration scholars to pivot toward theoretical frameworks of “multilevel governance” that take into account developments at the local level.²¹ Recounting this rich body of literature²² is beyond the scope of this chapter. In addition, these approaches also (even if implicitly) downplay the significance of legal frameworks and questions of legal interpretation in how local authorities come to decide on how they act,²³ which this chapter identifies as highly relevant. We consequently build on the more specific notion of “strategies of divergence” as introduced by Oomen et al. to analyze in concrete terms how the local government in Berlin inhabits and shapes the “discretionary spaces” that are offered by the applicable legal frameworks.²⁴ In fact, we are able to identify multiple such strategies, seemingly contradictory at first glance, which can however be distinguished by reference to the specific competencies that they address.

To recount, Oomen et al. challenge conventional theorizations of multilevel governance as presenting levels as largely static and unchanging. They instead decide to “foreground and classify the strategies that local authorities adopt to make use of and enlarge the discretionary spaces that are offered (or indeed foreclosed) by domestic law.”²⁵ The authors differentiate local migration and integration policies that diverge from national ones along two axes: the legal nature of the action in question on the one hand and their explicit or implicit outlook on the other hand. The result is a fourfold typology of strategies of divergence that include defiance (extralegal and explicit), dodging (extralegal and implicit), deviation (legal and explicit), and dilution (legal and implicit). The subsequent paragraphs identify three such strategies in the context of Berlin. While

²¹ See introduction to this volume.

²² For an overview of this body of work, see Caponio, Scholten and Zapata-Barrero (eds.), *The Routledge Handbook of the Governance of Migration and Diversity in Cities*.

²³ See Baumgärtel and Miellet, introduction to this volume.

²⁴ Oomen et al., “Strategies of Divergence.”

²⁵ *Ibid.*, p. 3609.

the possibility of their combination is not explicitly discussed by Oomen et al. in their article, their taxonomy is still useful for the purposes of our analysis because it allows us (a) to name and compare the complex heterogeneous strategies, which emerge in relation to different legal questions confronting the local authorities and (b) highlight their potential effects, which may target the national and European levels as well.

The first instance of divergence is one of dilution, an implicit and legal practice with which Berlin, in its capacity as a city-state, effectively takes in more forced migrants than assigned. According to Section 45 of the German Asylum Act (*Asylgesetz*), states are required to admit a certain number of asylum seekers following a yearly preset quota known as the “Königstein key” (*Königsteiner Schlüssel*).²⁶ The implementation of these quotas is tasked to a central distribution agency,²⁷ with states being allowed to interfere with the automated mechanism only through “targeted” actions.²⁸ More specifically, and according to Section 51, states can decide to disperse asylum seekers for humanitarian reasons, which have been further defined by state representatives in the so-called “Hamburg catalogue”. These encompass, among others, minors older than 16 years whose parents are applying for asylum in a particular state, elderly persons unable to travel, or persons in need of or providing care.²⁹ According to Berlin’s State Secretary Tietze, the city has used this instrument “very actively” to go beyond its nationally designated quotas.³⁰ In our view, one of the likely pragmatic reasons for this usage is the disproportionate number of asylum seekers arriving in German cities in general,³¹

²⁶ For a description of the key as well as its genesis, see Bartl, “Institutionalization of a Formalized Intergovernmental Transfer Scheme for Asylum Seekers in Germany.”

²⁷ Section 46(2), Asylum Act (*AsylG*), promulgated on 2 September 2008 (Federal Law Gazette I, p. 1798), last amended by Article 2 of the Act of 11 March 2016 (Federal Law Gazette I, p. 394). The application of the distribution key falls on the Federal Office for Migration and Refugees (BAMF), which executes it through the usage of a computer-based system commonly known under the acronym “EASY” (*Erstverteilung von Asylbewerbern*, translated as “initial distribution of asylum seekers”).

²⁸ Arbeitsgruppe der EASY-Beauftragten, “Asyl: Ausnahmen von Verteilungsentscheidungen mit dem System EASY.”

²⁹ *Ibid.*

³⁰ Interview with the Secretary of State for Integration in Berlin, conducted on September 7, 2020.

³¹ Large cities such as Berlin “function as hubs for initial reception and transit ... and are often the end destination of the refugees’ journeys”; the infrastructures and social (diaspora) networks that they offer likewise attract many newly arrived forced migrants. See Katz et al., “Cities and Refugees – The German Experience,” p. 4.

which necessarily also implies the presence of higher numbers of vulnerable migrants that would fall within the categories set by the “Hamburg catalogue.” However, the regular if not frequent usage of such hardship categories has not received much public attention as online research confirms.³² It therefore counts as an instance of *dilution* where the centrally organized dispersal system is set aside by legal means and implicitly, meaning without the city flagging it, leading to localized results that do not challenge the structure of the national system.³³

In a second instance, this time related to refugee admission, Berlin opposes the national government more explicitly. The legal question pertains hereby to Section 23(1) of the Residence Act (*Aufenthaltsgesetz*) allowing states to “order a temporary residence permit to be granted to foreigners from specific states or to certain groups of foreigners.” Importantly, however, the provision also stipulates that “[i]n order to ensure a nationwide uniform approach, the order requires the approval (*Einvernehmen*) of the Federal Ministry of the Interior.”³⁴ In line with the demands by *Seebrücke*, Berlin took two different types of actions to challenge the requirement for approval by the national authorities. Berlin, joined by the state of Thuringia, put forward an amendment proposal to the Federal Council of Germany (*Bundesrat*) that would lower the requirement from approval to a mere consultation (*Benehmen*) of the Federal Ministry of the Interior.³⁵ After this proposal was rejected by the Federal Council and its reigning majority of conservatives states, Berlin decided to take further action by filing a case against the national government before the Federal Administrative Court.³⁶ The main legal claim, in this context, has been that the approval of such temporary residency permits exists only insofar as it ensures national uniformity, which is however not

³² A Google News search for “Hamburger Katalog” AND Berlin did not yield any relevant results. A more general Google search, using the same key words, resulted in forty-nine results, only three of which were relevant. These include, next to the specialist publication referred to in footnote 28, pages providing legal advice by the Berlin Refugee Council and *Schwulenberatung Berlin*, an LGBT counselling center.

³³ Oomen et al., “Strategies of Divergence.”

³⁴ Section 23(1), Residence Act (*AufenthG*), promulgated on 25 February 2008 (Federal Law Gazette I p. 162), most recently amended by Article 4b of the Act of 17 February 2020 (Federal Law Gazette I p. 166).

³⁵ Bundesrat, “Gesetzesantrag der Länder Berlin, Thüringen: Entwurf eines Gesetzes zur Änderung des § 23 Absatz 1 Aufenthaltsgesetz.”

³⁶ Mai, “Berlin will grundsätzliche Klärung.”

actually threatened by the actions of a state that holds the capacity to take in more refugees.³⁷

Berlin's actions arguably fall within the category of *defiance*, designating a strategy of divergence that is explicit and outside the law. For one, Berlin's Interior Senator Andreas Geisel, after conducting a widely media-tized visit to Greece, took an openly confrontational course in describing the national government's reluctance to transfer large numbers of people from the burnt-down Moria camp as "embarrassing."³⁸ The legal proceedings, likewise, made national headlines; the parliamentary group of the SPD in the *Bundestag* even joined Berlin as a plaintiff in March 2021, which was unexpected given that the party was also a part of the national government.³⁹ At the same time, it seems appropriate to classify Berlin's strategy as extralegal, though arguably in a broader sense than proposed by Oomen et al. While not illegal in the sense of already taking *ultra vires* measures that would entail adjudication of a *fait accompli*, the State of Berlin defends an interpretation of Section 23(1) of the Residence Act that, judged by the conduct of the federal government and other German states, is not seen as legally permissible, at least until the Federal Administrative Court declares otherwise. This course of action is clearly meant to lead to "a change in the law" that "produce[s] large-scale results."⁴⁰ It is notable that Berlin's defiant legal challenge to national frameworks follows an initial push for legal reform, even if these efforts failed in the present case.

Berlin's hesitancy to use another provision, namely Section 22 of the Residence Act, marks an interesting contrast to this strategy of defiance. This provision offers the possibility to grant admission "for the purpose of admission from abroad in accordance with international law or on urgent humanitarian grounds" – though on an individual basis.⁴¹ Legal experts assert that local authorities in Berlin could use this basis to facilitate admissions specifically in the case of transfers from the Greek camps because of their inadequate reception conditions.⁴² Likewise, it could be a ground to facilitate family reunifications if read in conjunction with Art. 6

³⁷ *Ibid.* as well as interview with Member of *Seebrücke* Berlin, conducted on November 21, 2020.

³⁸ "«Beschämend»: Berlins Innensenator kritisiert Seehofer."

³⁹ Starzmann, "SPD-Bundestagsfraktion unterstützt Berliner Klage gegen Seehofer."

⁴⁰ Oomen et al., "Strategies of Divergence."

⁴¹ Section 22, Residence Act.

⁴² Lehnert, "Rechtliche Spielräume der Bundesländer bei der Aufnahme von Geflüchteten aus griechischen Lagern," pp. 6–7.

of the German Basic Law, which holds that the family “shall enjoy the special protection of the state.” Civil society representatives interviewed for this chapter criticize Berlin for not using this particular provision and the discretionary space that it offers,⁴³ with Berlin’s Refugee Council explicitly demanding such a step in a policy document prepared for the state elections in 2021.⁴⁴

A third strategy of divergence appears in Berlin’s approach to housing those who have reached in the city, which is another key priority identified by *Seebrücke* under the category “communal arrival.”⁴⁵ Section 47 of the Asylum Act places an obligation on asylum seekers to remain in a reception center until a decision on their application has been made and up to a maximum of eighteen months after their arrival (six months in the case of families).⁴⁶ Interestingly, Berlin in its role as a *Land* has made use of the broadly discretionary Section 49(2) of the Asylum Act to relieve vulnerable asylum seekers of this obligation.⁴⁷ This policy, which is unique in Germany,⁴⁸ was mentioned as a notable though largely implicit welcoming practice by Berlin’s State Secretary Tietze.⁴⁹ The impact of this strategy of *dilution* is however limited in practice by the shortage of available affordable housing in Berlin,⁵⁰ due to which most asylum seekers still end up in accommodation provided by the local authorities. This outcome is highly problematic from the perspective of the refugees who arrive: Some of the housing in Berlin as provided by the local authorities is designated as a reception center (in the sense of Section 47 of the Asylum Act) rather than a “collective accommodation” (as established under Section 53), one key difference being that asylum seekers residing in the latter are allowed to work and rent an apartment.⁵¹ However, in several instances, the designation provided by the local government did not correspond to the narrow definition of a reception center provided in Section 44 of the Asylum

⁴³ Interview with Member of *Seebrücke* Berlin, conducted on November 21, 2020.

⁴⁴ Flüchtlingsrat Berlin, “Berlin braucht eine menschenwürdige Flüchtlingspolitik.”

⁴⁵ *Seebrücke*, “Forderungen.”

⁴⁶ Section 47(1), Asylum Act.

⁴⁷ More specifically, Section 47(2) holds that “The obligation [to reside at a reception center] may be terminated for reasons of public health, for other reasons of public security and order, or for other compelling reasons.”

⁴⁸ Berlit et al., *Jahrbuch des Migrationsrechts für die Bundesrepublik Deutschland* 2020, p. 442.

⁴⁹ Interview with the Secretary of State for Integration in Berlin, conducted on September 7, 2020.

⁵⁰ Berlit et al., *Jahrbuch des Migrationsrechts für die Bundesrepublik Deutschland* 2020, p. 442.

⁵¹ Flüchtlingsrat Berlin, “Berlin braucht eine menschenwürdige Flüchtlingspolitik,” p. 41.

Act.⁵² In other words, Berlin's ostensible dilution strategy, which would have been favorable for migrants, is effectively transformed into an extra-legal but implicit strategy of *dodging* national laws, according to the Berlin Refugee Council for the purposes of deterring migrants.⁵³

There are more aspects of Berlin's local policies (and wider practices) that could have been discussed here; most notably, the question of deportations has loomed large in the city; even the different parties within the local government coalition are not presenting a united front.⁵⁴ However, crucial for our chapter is the insight that within the same locality, there can be multiple and, from the vantage point of migrants and their supporters, contradicting strategies of divergence – as well as the occasional nonusage of discretionary spaces, in Berlin's case when it comes to Section 22 of the Residence Act. While this is in line with recent scholarship that highlights variance in local policies (as opposed to earlier works that seem to have presumed a more unitary “local dimension”),⁵⁵ we have further been able to show how these strategies can still be classified using the four-fold taxonomy by Oomen et al., which offers us a tool to describe and map them in their heterogeneity.

4 Interaction between the *Seebrücke* Movement and Berlin's Local Government

Those familiar with past and present narratives on Berlin as a city might not be surprised to read that Berlin's “safe harbor” policies are complex, even contradictory. The notion of Berlin as a diverse and cosmopolitan “global city” is rather recent, with urban scholar Stephan Lanz identifying three stages in its urban governance of migration: The notion of a “nationally homogenous city” (from 1871) was replaced first by a “multi-cultural, differential” dispositive (from 1981) and later, from 2001, by said less nationally focused, more cosmopolitan vision.⁵⁶ Even then, however, “against a backdrop of social polarization and fragmentation processes, exclusionary elitist and racist discourses [have been] on the rise as well,” with historian Paul Nolte and especially former SPD politician Thilo

⁵² *Ibid.* and Classen, *Ratgeber für Geflüchtete in Berlin*, pp. 121–122.

⁵³ Flüchtlingsrat Berlin, “Berlin braucht eine menschenwürdige Flüchtlingspolitik,” p. 41.

⁵⁴ “Breitenbach und Geisel: Keine Lösung im Abschiebestreit.”

⁵⁵ See, for instance, Spencer and Delvino, “Municipal Activism on Irregular Migrants” and Van Breugel, “Towards a Typology of Local Migration Diversity Policies.”

⁵⁶ Lanz, “Berlin oder Das umkämpfte Terrain der Einwanderungsstadt.”

Sarrazin giving these factions a voice from the early 2000s onward.⁵⁷ In short, the outlook of the city (in its broadest sense) has been shaped by discourses that change as the social and urban structures and demographic composition of Berlin themselves evolve – a finding that resonates with scholarship underlining the impact of structural forces such as economic globalization on local approaches to migration governance, including at different scales of governance.⁵⁸ While it is important to keep all of this in mind, our narrower focus on the Berlin’s recent policies concerning the support of sea rescue and the transfer and reception of forced migrants allows us to demonstrate how these are shaped specifically by the interaction between the local government and the *Seebrücke* movement. It is here, in our view, that we find important explanations for the adoption of the complex set of strategies outlined in [Section 3](#).

To better understand the dynamic between the local authorities and *Seebrücke*, it is helpful to consider first where the City “stood” at the time when the movement gained traction in 2018. During our interviews, we asked to what extent Berlin was a safe harbor even before signing its declaration – prior engagement toward similar goals would speak in favor of any subsequent strategies genuinely seeking to advocate admitting and integrating refugees. According to State Secretary Tietze, “some formats and part of the demands of initiatives like *Seebrücke* had already been a part of the government’s agenda during the coalition talks”⁵⁹ in autumn 2016, thus prior to the rise of *Seebrücke*. This is confirmed by statements made by Berlin’s Mayor Müller in December 2016 that Berlin still had capacities to accept refugees and that “we can perhaps do even more than we have done up to this point.”⁶⁰ It should be noted in this context that *Seebrücke* with its specific agenda draws on the similar, though somewhat less popular *Save Me* campaign in Germany in 2008, which sought to establish a permanent refugee admissions program.⁶¹ Still, the importance of the inclusion of refugees (as well as asylum seekers and persons with

⁵⁷ Lanz, “Be Berlin! Governing the City through Freedom,” p. 1316.

⁵⁸ See, for example, Glick Schiller and Çağlar, “Towards a Comparative Theory of Locality in Migration Studies.”

⁵⁹ Interview with the Secretary of State for Integration in Berlin, conducted on September 7, 2020 (our translation).

⁶⁰ Fiedler and Hackenbruch, “So viele Flüchtlinge leben in den Bezirken.” (our translation).

⁶¹ Schwartz and Steinhilper, “Countering the Asylum Paradox Through Strategic Humanitarianism,” pp. 204–206. As the authors explain, this campaign was launched by the Bavarian Refugee Council and accomplished a public commitment by fifty German cities to host resettled refugees.

exceptional leave to remain) were already flagged in the Senate's 2007 integration concept, which portrayed diversity "as an asset that shall be fostered by public policy."⁶²

All this evidence points to Berlin having taken a principally progressive approach already prior to the mobilization that led to the safe harbor declaration and the establishment of the Safe Harbor Alliance. A member of *Seebrücke*, however, takes a more critical perspective:

Berlin always emphasizes that their signature only affirmed what they have already been practicing: a refugee policy based on solidarity. I'm not so sure about that. I believe that there still is much room for improvement. It's partly symbolic politics to make such a claim about oneself, even though that does not mean that it is totally useless. A clear commitment to taking in people, that is definitely very valuable ... But obviously a lot more would have to happen to really fill it with content and to implement it in practice.⁶³

Besides offering a more differentiated evaluation, the quote illustrates the ambivalent relationship between local governments, in our case in Berlin, and civil society actors, which could variably be "cooperating, tolerating, or conflicting."⁶⁴ This stands in contrast to early scholarship on the "local turn" in migration policy that often stressed the collaborative, results-oriented interaction between these actors.⁶⁵ Still, in the case of Berlin and *Seebrücke*, it even goes beyond Ambrosini's piercing metaphor of "battleground" of asylum and immigration policy,⁶⁶ which still does not fully capture the story: "allies" and "adversaries" at the same time and depending on the policy question, the two actors' strategies are both distinct *and* co-productive. The terrain of the "battleground" is a rather distinctive one, resembling more the volatile and situational interaction of business competitors in a growth market, which find their interest converge and diverge at different moments. At the same time, it represents a strong "bond" in the sense that it generates dynamics with potentially far-reaching consequences such as changing the accepted interpretation of Section 23(1) of the Residence Act, which would elevate the competency of all states, including city-states such as Berlin and allow more autonomous

⁶² Gluns, "Refugee Integration Policy and Public Administration in Berlin," p. 10.

⁶³ Interview with Member of *Seebrücke* Berlin, conducted on November 21, 2020 (our translation).

⁶⁴ Ambrosini, "The Battleground of Asylum and Immigration Policies," p. 380.

⁶⁵ Filomeno, *Theories of Local Immigration Policy*, p. 31.

⁶⁶ Ambrosini, "The Battleground of Asylum and Immigration Policies."

action on refugee admissions. The possibility for such a change adds a concrete dimension to recent studies that, looking at the ambitions behind Berlin’s policies and the mobilization by *Seebrücke*, have concluded that these “urban solidarities ... transcend municipal boundaries.”⁶⁷

It has been pointed out that multilevel governance frameworks have done poorly in integrating the “horizontal” dynamics between state and nonstate actors into their largely “vertical” approach focused on different levels of government.⁶⁸ Not surprisingly, they therefore do not provide enough conceptual material to explain how, even within the same locality and a relatively narrow timeframe (2018–2020), the interaction between local authorities (like the ones in Berlin) and a forceful civil society movement (like *Seebrücke*) can bring about the complex and partially contradictory set of strategies outlined in Section 3. “Scalar thought” and “multi-scalar” perspectives fare only marginally better. While both *Seebrücke* and the Safe Harbor Alliance are arguably involved in “a profound transformation in the very logic of governance” that is of “immanently political character” and “embedded ... in hierarchies of power,” it is not obvious what is gained analytically by the mere characterization of these specific interactions as a part of “processes of scaling.”⁶⁹

We claim that this theoretical vacuum can be filled (at least partially) by distinguishing various constellations that local authorities find themselves in, which are defined by both social *and* legal realities – the relevance of latter being worth noting given that they have been frequently sidelined in migration scholarship.⁷⁰ These factors, in their combination, place a local government in different strategic positions vis-à-vis the same civil society actors depending on the issues that are at stake. Furthermore, in their sum and also considering their interplay, these socio-legal constellations allow us to grasp the strategies taken by the local authorities in Berlin in their variance and seeming inconsistency.

What we mean by socio-legal constellations is best illustrated by means of example: In the case of Berlin, the first strategy of divergence that we identified (in Section 3) was one of dilution, with the local authorities invoking “humanitarian reasons” in accordance with Section 51 of the Asylum Act to accept especially vulnerable migrants beyond their designated state (*Königsstein*) quota. Given that these are mostly refugees

⁶⁷ Bauder, “Urban Migrant and Refugee Solidarity Beyond City Limits.”

⁶⁸ Campomori and Ambrosini, “Multilevel Governance in Trouble.”

⁶⁹ Baumgärtel and Miellet, Introduction to this volume, p. 1.

⁷⁰ *Ibid.*

that already find themselves in Berlin when these decisions are taken, we observe the pragmatic recognition of the *status quo* rather than an attempt to change it. This, in turn, reduces the incentives for the local authorities to engage in a substantive public debate on this practice. In such a case, local migrant rights defenders would likely question the progressiveness of the policy and draw attention to the relatively narrow scope of Section 51, whose application is therefore an exception rather than a rule. They would also start scrutinizing the vulnerability categories defined in the “Hamburg catalogue,” which are determined by the representatives of the states (Länder), including Berlin. It should be mentioned here that *Seebrücke* members are already critical of the selectiveness of the local government, for example, in the context of the state admission program whose legality is currently being assessed in court:

Given the number [of admissions] that is on the table, there is a risk that [the local authorities] will make a very strict selection. In fact, that’s already the case: only unaccompanied minor girls. There aren’t enough of these, and it is absurd! Behind it lies a racist prejudice that Arab and African young man are prone to violence.⁷¹

Rather than opening Pandora’s Box regarding the application of Section 51 of the Asylum Act, the local authorities thus stick to a dilution strategy. Even during our interview, State Secretary Tietze mentioned the provision but did not elaborate on his claim that the City was using it “very actively.”⁷² One possible reason for this lies in the scope of Section 51, presently appropriately narrow from the point of view of the local authorities, as well as the fact that their – in this context pragmatic – approach does not fully resonate with the principled goals of *Seebrücke* and other progressive movements.

In the case of the second strategy of divergence, we observe an entirely different socio-legal constellation. Pursuing a defiant approach, Berlin is pushing for a new interpretation of Section 23(1) of the Residence Act, one that would essentially remove the requirement of consent by the federal authorities to adopt state admissions programs. The interests of Berlin’s local authorities and *Seebrücke* are hereby fully aligned in opposition to the national government and the limitations that, based on Section 23(1),

⁷¹ Interview with Member of *Seebrücke* Berlin, conducted on November 21, 2020 (our translation).

⁷² Interview with the Secretary of State for Integration in Berlin, conducted on September 7, 2020.

are placed on the city’s admission program. Accordingly, the *Seebrücke* member who we interviewed was positive about the fact that Berlin used its specific legal status to launch judicial proceedings against the Ministry of the Interior. He even expressed the hope that such open defiance of restrictive national policies would become “a role model” for other cities.⁷³ This assessment was made in clear awareness of the inherent limitations of legal action:

The lawsuit is an important step, but it will not lead to a quick solution. The proceedings are intricate and can last for months or years ... Well, now they are taking legal action, before, you had the feeling that they are resting on [the argument that], “oh, Seehofer [the Minister of the Interior of the Federal Government] prohibits this,” and thereby releasing themselves from the duty to act themselves.

The last part of the quote illustrates that the decision to take legal action proves to local civil society that Berlin “very much stands up” for the shared goal of creating noncentralized admission programs.⁷⁴ That said, it is analytically significant that the local authorities are using their specific, constitutionally allocated competencies to show their support. This sets them apart from all (but two) other cities in Germany that do not have this option, effectively elevating Berlin’s importance as a strategic partner for *Seebrücke*. On the flipside, the movement created the political momentum that allowed the City of Berlin to push for this expansion of its competencies through the initial legislative initiative and eventually the legal proceedings, both in full confrontation with the national government. It is also hard to believe that without the mobilization achieved by *Seebrücke*, the SPD would have joined Berlin as a plaintiff against the national government, of which it was a coalition partner. In short, in this specific socio-legal constellation, the relationship between Berlin and *Seebrücke* seems almost symbiotic as both could act in ways that they would not be able in the absence of the other.

The previous quote brings up another aspect: As the movement’s stand-in plaintiff, Berlin seems to feel less pressure to take other measures. Notable is yet again the contrast with its nonusage of Section 22 of the Residence Act permitting admissions on an individual basis. This (lack of) action is mentioned by *Seebrücke* members but does not seem to be

⁷³ Interview with Member of *Seebrücke* Berlin, conducted on November 21, 2020 (our translation).

⁷⁴ *Ibid.*

as important a factor in their evaluation of the local government's overall performance, which illustrates how Berlin's status as a city-state works to its advantage. In general, the highly specific socio-legal constellation arising from the debate on Section 23(1) enables the local government in Berlin to position the city-state as a true champion of admission programs and even as a potential role model for safe harbors when its policies are actually more ambiguous in practice – and the eventual outcome of the legal proceedings uncertain.

Berlin's third and final strategy (or rather strategies) of divergence arose regarding the question of housing. Here, what in principle appears to be a dilution strategy – using Section 49(2) of the Asylum Act to relieve vulnerable asylum seekers of a duty of residence – turns out to be a *dodging* of established categories of housing to the detriment of newly arrived refugees and asylum seekers. The fact that the latter runs clearly against *Seebücke's* demand for “communal arrival” explains the implicit nature of the local authorities' actions in this area. The situation certainly could have been otherwise: academic reports approvingly note the principled decision “[to] consider ... the accommodation of vulnerable persons in collective reception centers *per se* as unreasonable (in derogation from the general principle).”⁷⁵ Were the implementation of this policy not structurally inhibited by Berlin's pressured housing market – and members of *Seebücke* recognize that it is “a city-wide problem that there is not enough affordable housing”⁷⁶ – the local authorities would almost certainly have made their legal yet uniquely progressive reading of Section 49(2) more explicit to buttress Berlin's standing as a welcoming city. All in all, this example shows how economic factors are also relevant when it comes to the formulation of strategies of divergence, though it is yet again the strong presence of migrant rights supporters and their organizations that is likely at the root of the decision of the local authorities in Berlin to keep their approach to housing questions under wraps.

In conclusion, there is a strong and intimate link between the *Seebücke* movement and the strategies of divergence adopted by the local authorities in Berlin. That is in itself not surprising given the immense success of the mobilization, which eventually led to the creation of the Safe Harbors Alliance. However, this section also revealed that the two actors link up in rather different socio-legal constellations,

⁷⁵ Kluth et al., *Addressing Vulnerabilities of Protection Seekers in German Federalism*, p. 5.

⁷⁶ *Ibid.* (our translation).

with their interests aligning on some occasions and being at odds in others. These constellations also have an impact on their legal and political capacities. The decision of the City of Berlin to instigate legal proceedings against the federal authorities on the interpretation of Section 23(1) of the Residence Act is closely linked to the rise of *Seebrücke* in a twofold way: not only does Berlin use its heightened legal capacity (as a city-state) to bring such a case and thus accommodate the demands of the movement, but it also simultaneously benefits from the political momentum created by the latter pushing for state admission programs in Germany and beyond. Given all of this, the metaphor of migration and asylum policy being a “battlefield” only describes an abstract condition where the concrete terrain, alliances and specific tactical decisions are contingent on the specific socio-legal constellations in which local authorities and civil society find themselves.

5 Normative Implications of Complex Strategies of Divergence

One persistent assumption, both in migration scholarship and more generally, is that large, metropolitan cities will be welcoming to migrants. As “global cities”⁷⁷ that are “characterized both by a relatively high scale of migration ... and by a growing complexity of diversity,”⁷⁸ they often tend to consider the arrival of newcomers as a given and as desirable, with local authorities being responsible for managing the *how*, rather than the *if*, of the phenomenon. Berlin appears to be a typical specimen in this regard, with both the local government and the majority of the population embracing an “urban imaginary”⁷⁹ that considers Berlin to be open to migrants and progressive in the formulation of its policies. The signing the safe harbors declaration was, from this perspective, not just in line with governing policy but arguably inevitable once the political movement initiated by *Seebrücke* had gained sufficient political momentum. A quote from State Secretary Tietze serves to illustrate this self-image:

It is of course the aspiration of Berlin as a metropole governed by Red-Red-Green [the SPD, the Green and the Left Party] to be open to people in need. And that also means to go beyond your magisterial competencies to give a signal to people in need ... [and] to create a ‘safe harbor’ through

⁷⁷ Sassen, *The Global City*.

⁷⁸ Scholten, “Cities of Migration,” p. 242.

⁷⁹ Hoekstra, “Governing Difference in the City.”

extraordinary formats in which one can also, by means of state-specific admission programs, set in motion relocation and resettlement.⁸⁰

From this angle, the creation of the Cities of Safe Harbor Alliance can also be interpreted as a measure to stay abreast of the movement. Even if only declaratory in nature, these commitments are as genuine as they are self-speaking, being rooted in the social and political reality typical of many other global cities. Normatively speaking, the example of Berlin thus seems to support arguments for a reorientation of migration policy toward urban, cosmopolitan areas for the purpose of protecting diversity and affirming migrant rights.⁸¹

That said, our evaluation shows that the picture is more nuanced when it comes to concrete local policymaking and implementation. Some decisions that are favorable to forced migrants (such as the legal proceedings) are flagged while others (such as the regular usage of Section 51 of the Asylum Act) are not; more importantly still, there are policies such as the dodging of established categories of housing for migrants that are straight up dubious from the perspective of migrant rights. To be sure, the theorem that large cities are necessarily more open and welcoming to newcomers has already been challenged on empirical grounds: Particularly when one takes a process perspective, it turns out that “in some cities ... the transformation into a superdiverse city is more problematic and accompanied by political upheaval, while in other cities it seems to be a more smooth process.”⁸² Previous research has in fact demonstrated that even local authorities that pioneer progressive reception policies are forced to navigate the “conflicting demands” of stakeholders.⁸³ Such pulls in different directions are also palpable in Berlin, where the cosmopolitan imaginary is arguably still recent and subject to contestation.⁸⁴ In our interviews, local civil society members likewise suggested that the local government in Berlin will seek to “accommodate ... different constituencies” by adopting varying approaches to different policy questions.⁸⁵ Taken by itself, this insight would not be as

⁸⁰ Interview with the Secretary of State for Integration in Berlin, conducted on September 7, 2020 (our translation).

⁸¹ See chapter by Morales in this volume.

⁸² Crul et al., “Conclusions: Coming to Terms with Superdiversity?,” p. 226.

⁸³ De Graauw, “Municipal ID Cards for Undocumented Immigrants.” See also Hinger, “Integration through Disintegration?”

⁸⁴ Lanz, “Berlin oder Das umkämpfte Terrain der Einwanderungsstadt.”

⁸⁵ Interview with Member of Seebrücke Berlin, conducted on November 21, 2020 (our translation).

normatively problematic considering that conflict seems unavoidable in a city as large and diverse as Berlin – as long as the general trend, in spite of setbacks, points to an increasingly welcome and open attitude.

Still, our specific findings lead us to take a more skeptical attitude. With multiple policies co-existing simultaneously, it becomes even more pressing to question the reasons behind the discrepancy between the “overarching discourse” and “actual policy practices,” a finding also made by Hoekstra in her study of local migration policies in The Hague and Amsterdam.⁸⁶ Hoekstra’s explanation is that “policy actors locate difference ... unevenly across spatial scales, urban areas, and population groups,” which leads her to emphasize that “municipal policy actors make sense of difference in relation to the urban context.”⁸⁷ While this is a generally sensible interpretation also of the situation in Berlin, our findings suggest that policy practice may be less “fragmented”⁸⁸ than it first appears. Although seemingly contradictory strategies of divergence are rooted in various socio-legal constellations, there are good reasons to believe that they still form part of a wider whole; at the very least, evidence demands us to consider their interrelation. Based on its interaction with its constituencies and especially the *Seebrücke* movement, the local government in Berlin decided to defy the national government on the question of state admission program but kept a relatively low profile in diluting national quotas through “beyond quota” admission of vulnerable migrants who are already present. Not only is the prior better suited to show support with the *Seebrücke* movement (which, after all, pushes for systemic change to introduce local-level admissions), but it also enables Berlin to divert attention away from legal categories of vulnerability that could, in principle, be expanded. What is more, the preponderance of questions of legal interpretation renders both these strategic actions and their interrelation concrete: They require the involvement of the same legal officers and departments. Indeed, as State Secretary Tietze revealed during our interview (which took place shortly prior to the launching of the court proceedings), the possibility of taking legal recourse was undergoing a process of “internal review,” the question being “what the better way is to lead this contest also legally speaking.”⁸⁹

⁸⁶ Hoekstra, “Governing Difference in the City,” p. 375.

⁸⁷ *Ibid.*, pp. 375–376.

⁸⁸ *Ibid.*

⁸⁹ Interview with the Secretary of State for Integration in Berlin, conducted on September 7, 2020 (our translation).

Taken in isolation, our observation that Berlin's approach is reflective of (rather than evidence against) deliberateness on the part of the local authorities could be perceived positively if reactive, ad hoc decision-making is the alternative. At the same time, much has been made in the past of the "pragmatic problem-coping" character of local governments as one of the reasons behind "the emergence of inclusionary local immigration policies in the context of restrictive national immigration policies."⁹⁰ The example of Berlin shows that this dichotomy is not helpful: While clearly adjusting their responses to particular socio-legal constellations as they present themselves, the *combination* of the strategies still forms what can be seen as a coherent whole. Put differently, deploying a complex set of strategies of divergence represents a pragmatic approach from the perspective of the local government. Echoing Hoekstra's claim that "the notion of pragmatism ... should be unpacked,"⁹¹ we must then ask what the normative consequences are. Our analysis in [Section 3](#) shows that our view of pragmatism as strategic deliberativeness does not necessarily entail only positive outcomes from the perspective of forced migrants. Even in the "global city" of Berlin, socio-legal constellations lead the local authorities to adopt a set of strategies that generally resonates with local migrant rights supporters but also retains significant gaps in protection. While "urban imaginaries" existing within a city certainly matter, practical outcomes are thus also shaped by the opportunities that present themselves to city governments, with the symbolically most rewarding options not necessarily being the ones that are most beneficial for migrant populations.

One final normative aspect that arises from our analysis concerns the question of the legal competencies of local authorities. More specifically, given that "[i]ssues of immigrant settlement and integration ... tend to bear more directly on cities than on the countryside,"⁹² *should* cities such as Berlin be legally empowered? While we still believe that such empowerment would overall be favorable for forced migrants, our case study does caution against overly firm normative conclusions. On the one hand, we find that even Berlin, a city-state with significantly more legal powers compared to other German cities, still adopts complex strategies of divergence with ambivalent outcomes. Providing further legal competencies for local

⁹⁰ Filomeno, *Theories of Local Immigration Policy*, p. 30.

⁹¹ Hoekstra, "Governing Difference in the City," p. 376.

⁹² Hirschl, *City, State*, p. 174. See also the chapter by Morales in this volume.

authorities does not, therefore, *necessarily* improve the situation of forced migrants. While this might not be too surprising of a finding, it is still striking in the case of Berlin, where the overall context seems particularly favorable for migrants: a legally resourceful city governed by a center-left/left coalition that is also experiencing social and political tailwind, in the form of the *Seebrücke* movement, for its principally cosmopolitan and inclusive orientation. On the other hand, had the city-state of Berlin more competencies, most notably to introduce a state admission program, no high-profile legal action would have to be launched against the national government – this would open up the space to discuss other relevant questions, such as Berlin’s housing policies or the scope of vulnerability criteria. The legal fight over competencies thus stifles the emergence of other debates that could be meaningful for the practical enjoyment of migrant rights, but possibly also more troublesome from the municipality’s perspective. Strikingly, this downside of formal debates concerning the scope of legal authority echoes issues that have arisen in the United States in the context of sanctuary policies.⁹³

6 Conclusion

Berlin, a cosmopolitan “global city” located in the heart of Europe, has the reputation of being open and welcoming to refugees. This was true already prior to 2018, marking the arrival of the *Seebrücke* movement, which has stood up for increased sea rescue and human rights-compliant policies based on direct admission to cities and towns. Since then, the local authorities in Berlin continue to be perceived as supportive of this mobilization – and plausibly so, having publicly declared the German capital a “safe harbor” that would be willing to host stranded refugees, and even creating the Cities of Safe Harbor Alliance, which rallies over 100 German cities and towns in solidarity with *Seebrücke* and the refugees the movement seeks to protect.

This being said, our chapter shows that is worthwhile to take a closer look at the strategies that Berlin has adopted in practice. Even within the narrow timeframe of our study focusing on the three years following the rise of *Seebrücke*, we find that Berlin adopts multiple, at first glance contradictory strategies to diverge from the restrictive policies of the national government. More specifically, using the conceptual framework by

⁹³ See Lasch’s chapter in this volume.

Oomen et al., we were able to identify the coexistence of strategies of defiance, dilution and dodging, as well as inaction, on different policy questions. Berlin's authorities are defiant insofar as state admission programs are concerned, initiating first legislative and then legal proceedings to get rid of the legal requirement of obtaining prior consent from the national government. By contrast, the local government does not make use of another legal basis in the same Residence Act to proceed with transfers on an individual basis. Dilution and dodging strategies can be found when it comes to providing accommodation for refugees: The City does not flag its decision, although unique among all German states, to dispense vulnerable refugees of a duty of residence. Its implicit strategy can be understood against the backdrop of pressures in the housing market and the fact that in practice, many refugees still end up in reception centers that are wrongly designated as such, thereby barring its inhabitants from work or looking for private accommodation. In short, the actual approach taken by the municipality in Berlin is much more complex and indeed ambivalent for migrants than its vocal support for *Seebrücke* would suggest.

To explain the existence of these complex strategies of divergence, we referred to the multitude of "socio-legal constellations" in which they arise. Particularly in a context where the rise of the *Seebrücke* movement has given rise to considerable civil society pressure, the local government in Berlin finds itself in various rather specific strategic positions as shaped by legal and social realities. Most notably, its legal status as a city-state enables it to file legal proceedings against the national government on the question of state admissions programs. This puts it in an almost symbiotic relationship with *Seebrücke*, which has achieved considerable political mobilization for this point. By contrast, the local authorities have little to show but much to lose were the issue of housing to gain greater salience among migrant rights supporters. Importantly, those differing socio-legal constellations should be considered in their interplay, with the decision to launch openly defiant legal proceedings dampening at least some of the pressure that Berlin could face on other fronts, such as on housing. Having identified both the strategies of divergence and the socio-legal constellations that underlie them, we finally cautioned against normative perspectives that all too quickly embrace legal empowerment of cosmopolitan cities such as Berlin as a silver bullet to securing the rights of refugees and other forced migrants. While it is true that their urban imaginaries are mostly pro-migrant, the example of Berlin demonstrates that local authorities may find ways to position themselves within such a frame while also pursuing policies that are not congruent with it. Whether

or not legal empowerment would diminish such ambivalent strategies is an open question; the fact that the city-state of Berlin already enjoys relatively more constitutional powers as compared to other German cities renders us at least somewhat skeptical in this regard.

Having considered only one case study, our findings would have to be tested in other contexts, both in and outside Germany, and in large as well as medium-sized and small cities. We would hypothesize that strategies of divergence are more likely to be fractured and complex in large and especially in legally resourceful cities that face a greater variety of socio-legal constellations. That said, our framework would place any strategy of divergence, even a "singular" one adopted by a smaller town, within a particular socio-legal constellation. More empirical case studies and comparisons are needed to further delineate the relation between strategies of divergence and socio-legal constellations: Ideally, the taxonomy of the former should be matched by a separate set of categories of the latter. If we reach a better understanding of the prevalence of particular socio-legal constellations and the strategies of divergence that they produce, we would also be able to draw firmer normative conclusions as to whether greater involvement of cities and other subnational authorities in migration is desirable at the end of the day.

PART II

Accounts and Critiques of Legal Processes of Scaling

Sanctuary Cities and Urban Securitization in Federal States

GRAHAM HUDSON

1 Introduction

Cities have become key players in all manner of policy areas concerned with the mobility of humans, labor, and capital. They co-govern settlement and integration programs, help administer temporary foreign work regimes, bolster migrant civic engagement, and provide access to core social services such as health, education, transit, and housing. Many cities also contradict national immigration policies through sanctuary policies and other strategies of inclusion that help growing numbers of non-status or unauthorized migrants navigate exclusionary national and provincial/state laws. The sheer scale of local involvement in migration changes the way we understand cities, borders, citizenship, and constitutions.¹ This is especially true of federal states, which promise local autonomy but which, in truth, have established records of delimiting municipal authority and redirecting centrifugal forces in the service of nation-building.² Sanctuary policies and other aspects of local migration governance provide opportunities to reflect on the robustly democratic heritage of federalism, including its capacity for managing the tensions, contradictions, and occasional violence that erupts when a plurality of political communities occupy the same physical space.

But federalism comes in many forms, and the form that predominates in *doctrine* represents a different history – a different set of functions.³

¹ See Hirschl, *City, State: Constitutionalism and the Megacity*, Delvino and Spencer, *Migrants with Irregular Status in Europe: Guidance for Municipalities*, Gebhardt, “Irregular Migration and The Role of Local and Regional Authorities,” and Koser, “Dimensions and Dynamics of Irregular Migration.”

² Valverde, “Games of Jurisdiction: How Local Governance Realities Challenge the ‘Creatures of the Province’ Doctrine.”

³ Resnik, “Federalism(s) Forms and Norms: Contesting Rights, De-Essentializing Jurisdictional Divides, and Temporizing Accommodations.”

In the context of Canada and the United States, judicial interventions in disputes about jurisdiction are premised on the twin myths of dual sovereignty and political neutrality. The former describes sovereignty as a finite resource, exhaustively divided between federal and local scales with each level of government reigning supreme in its allotted sphere. The latter holds that the role of courts is to police this division of powers by enforcing the plain language of constitutional text. In this way, disputes about migration center around how to classify the “core” subject matter of a policy and then to determine which level of government is “naturally” authorized to govern it. Given that the act of defining is the act of deciding, and that the judges who ultimately decide these questions are appointed by federal governments, the myth of judicial impartiality was indispensable to the core function of federalism: preserving political stability. At root, the symbolic depoliticization of judicial interventions serves to avoid a reckoning with the political bases for choices about who has power over what issues.

Sanctuary city policies are not well served by this kind of federalism. They are not simply matters of migration or local administration but are also part of the broader history of city-building, urban resistance to racial and economic inequalities, and the habitual political disenfranchisement of municipalities—these are issues that require confronting the political choices underlining distributions of authority and that will not be resolved under a facade of a pristine constitutional equilibrium. But federalism doctrine is a hard habit to beat. It is everywhere in academic, policy, and public discourse about sanctuary cities, which reduce it to questions of whether cities can deliver on their promise of providing safe space within which federal authority has no sway. The very use of the term “sanctuary” draws from the same motifs as federalism, which recommends that “the best way to protect minorities is to give them an exit option.”⁴

This chapter is concerned with the limitations of approaching sanctuary cities through the lens of federalism doctrine. One way of doing this would be to join with others in exploring how municipalities, local public institutions, and non-state actors have assumed jurisdiction over broad aspects of migration without challenging federal sovereignty over citizenship and borders. Rose Cuison Villazor and Pratheepan Gulasekaram have recently done this through a careful study of how trans-local sanctuary “networks” composed of churches, educational institutions, unions,

⁴ Gerken, “Forward: Federalism All the Way Down,” p. 7.

and other institutions scale locally generated resistance up to the federal scale, invoking federal statutory and administrative law to unravel immigration enforcement from within.⁵ I will approach this issue from the opposite angle, which is how federal immigration authorities scale down to the local level, indirectly using local laws and powers to amplify their own jurisdiction within and through the city without directly challenging local sovereignty. Somewhat like sanctuary networks, the result is the movement of locally generated data identifying non-status migrants to the federal scale and, through the subsequent management of migrant populations, the conscription of local authority in the service of immigration enforcement. Spatially mobile border regimes cross from national to local and back again in spaces of shared jurisdiction, without directly contesting the precept of dual sovereignty.

The chapter uses the example of urban securitization in Canadian sanctuary cities to explore how federal immigration authorities have extended their reach beyond their jurisdictional grasp by tapping into the well-spring of locally generated data on populations and individual persons. This occurs in many ways, but my focus will be on partnerships between federal immigration authorities and local police. On the one hand, Canadian immigration authorities lack the operational capacity to conduct robust inland enforcement or to independently acquire data on non-status migrants. On the other hand, local police have drawn from logics of risk management and predictive policing to expand their access to the personal information of migrants through arrests, detentions, streets checks, and their access to information “hubs” in such areas as health, education, and social work.⁶ Through interviews with local police agencies in Ontario, I outline the rationale for sharing these data with immigration authorities and the ways they use jurisdiction to avoid democratic accountability. The resulting picture is one of a sanctuary city where the punitive logics of surveillance, control, exclusion, and banishment operate with the greatest intensity.⁷ The realities of securitization establish quite clearly that federalism’s promise of exit from national sovereignty

⁵ Villazor and Gulasekaram, “Sanctuary Networks.”

⁶ See Ferguson, “Policing Predictive Policing,” and Munn, “Here’s Who Stands to Gain from a Radical Policing Approach in Canada” and Winston, “Palantir Has Secretly Been Using New Orleans to Test Its Predictive Policing Technology.”

⁷ See Spena, “The Good, The Bad and the Ugly: Images of the Foreigner in Contemporary Criminal Law” and Bosworth and Guild, “Governing through Migration Control: Security and Citizenship in Britain.”

(or, more accurately, sovereign power) is not to be had – not for migrants or sanctuary cities.

The chapter is organized as follows. In [Section 1](#), I survey the weaknesses of federalism as applied to sanctuary cities, using as examples two leading theoretical perspectives on sanctuary cities in federal states: urban political economy and urban citizenship. In [Section 2](#), I examine other ways of thinking about jurisdiction, focusing on the case of urban securitization. In [Sections 3–7](#), I use data sharing between local police and federal immigration authorities in Canada to examine how federalism both facilitates and obscures shared jurisdiction over the border. I conclude by reflecting on the implications this has for sanctuary cities.

2 Sanctuary Cities in Federal States

It would be useful to begin with a review of sanctuary city policies in the United States, which have generated the most concrete and detailed scholarly record. Although sanctuary practices and policies in this setting are clearly concerned with rights, scholars, policymakers, and jurists predominantly approach them by reference to immigration federalism.⁸ On this basis, sanctuary cities sit within subnational sovereign spheres, migration sits within the federal sphere, and jurisdictional conflicts emerge only when one level of government trespasses onto the space of the other. It should be noted that disputes are almost always connected with the question of data and who “controls” it: can local governments constitutionally withhold locally generated information about immigration status from immigration authorities and, phrased from the other angle, can federal governments compel disclosure of this information? Other questions emerge, to be sure, but control over data and whether to classify it as “local” or “national” is the starting point of any effective sanctuary policy or, for that matter, any border enforcement regime. Without it, governments cannot effectively implement, evaluate, refine, or account for policy.

The law of federalism provides a deceptively simple approach to the exceptionally complex problems posed by data politics. Cities may pass sanctuary laws if those laws are “truly” local in character and are only

⁸ See Somin, “Making Federalism Great Again: How the Trump Administration’s Attack on Sanctuary Cities Unintentionally Strengthened Judicial Protection for State Autonomy,” and Lasch et al., “Understanding Sanctuary Cities,” and Armacost, “Sanctuary Laws: The New Immigration Federalism.”

incidentally concerned with immigration. In turn, federal governments may not compel cities to conduct or facilitate immigration enforcement. These questions are settled by reference to precedent established in relation to the Tenth Amendment anti-commandeering clause, which protects local governments from being conscripted into administering federal policies, and the doctrine of preemption, which allows the federal government to override local laws under a range of conditions, including if a local law is an “obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁹ Federal courts have consistently ruled that the federal government cannot compel state and local cooperation in immigration enforcement, upholding sanctuary city and state laws that preclude, among other things, the sharing of locally generated data with federal authorities, even if that data pertains to immigration status.¹⁰ It should be noted, though, that anti-sanctuary laws have also passed constitutional muster. The authority of Charter cities to disobey California sanctuary laws was recently upheld, as was a Texan law forbidding cities from passing sanctuary policies.

Legal scholars have done an excellent job analyzing this jurisprudence,¹¹ but my interest is in how the concepts and categories of federalism doctrine have found their way into social science analyses of sanctuary. One example is what I will loosely term “urban political economy.” On this view, the fiscal and political capacities of cities are the primary variables explaining the nature and efficacy of sanctuary and other local access policies.¹² Els de Graauw’s rich empirical work documents an official consensus among municipal officials that sanctuary is at most concerned with providing precarious and non-status inhabitants of a city access to services and rights to which they are already entitled as a matter of local law. But the legal authority to provide access does not settle the question of whether municipalities will either actively remove barriers to access or defend their authority to withhold data from federal authorities. As De Graauw notes, these decisions are made on the basis

⁹ *Arizona v. United States*, 567 U.S. 387 (2012).

¹⁰ Somin, “Making Federalism Great Again: How the Trump Administration’s Attack on Sanctuary Cities Unintentionally Strengthened Judicial Protection for State Autonomy.”

¹¹ See *ibid.*, Gulasekaram, Su and Villazor, “Anti-Sanctuary and Immigration Localism,” Lasch et al., “Understanding Sanctuary Cities,” and Armacost, “Sanctuary Laws: The New Immigration Federalism.”

¹² De Graauw, “City Government Activists and the Rights of Undocumented Immigrants”; De Graauw, “Municipal ID Cards for Undocumented Immigrants: Local Bureaucratic Membership in a Federal System.”

of the political and economic consequences of rebuffing federal authorities. While big cities such as Chicago, New York, and San Francisco successfully fought against the Trump administration's attempt to withhold federal funds from sanctuary cities, this was an exceptional situation. In the long run, cities need to have workable relationships with federal governments in order to manage global policy issues, of which migration is one. As democratic institutions, municipalities must also be attentive to the will of the electorate, which can be decisive in how ambitious sanctuary policies will be.

Urban political economy has the merit of describing at least official consensus that cities are bound by federalism doctrine. Few municipalities see sanctuary as a step toward rescaling authority over citizenship from the national to the local sphere. But bundled within these descriptive claims are a series of political claims that have to be placed into the much larger history of the relationship between federalism and nation-building. It is true that cities lack the constitutional capacity to assume the degree of political and fiscal independence that would enable them to adopt more ambitious policies and practices, but it is also true that they have done precisely that in other areas, including health, the environment, and economic development.¹³ And equally important from this point of view is that federal governments facilitate and tolerate expansions of municipal jurisdiction in these fields, sharing jurisdiction without concentrating on the final question of who is ultimately sovereign in these spheres. While migration is among the most sacred of subject-matters from the standpoint of nation-building, even here, federal governments recognize and encourage expansive municipal roles in migration policy, including settlement and integration, which are understood to be inseparable from health, education, labor, and so on.¹⁴ We can recognize the reality of official consensus over the federal government's claims to a monopoly over migration while also recognizing that the actual governance of migration is far more fluid and complex than this.

Urban citizenship theory offers a second account of sanctuary that picks up on this point. Best represented by critical geographer Harald Bauder, this perspective constructs sanctuary cities as a "scale of formal

¹³ Hirschl, "City, State: Constitutionalism and the Megacity."

¹⁴ Çağlar and Schiller, "Migrants and City-Making: Dispossession, Displacement, and Urban Regeneration."

belonging,” which can “supersede regional and national scales.” They do so through a mix of social, political, and legal factors. The social and political factors include the bare fact of inhabitation and repeated social interactions organized around discourses of inclusion, which can produce postnational sociopolitical identities and alter the form and organization of political communities.¹⁵ The legal aspect is trickier. Bauder argues that local jurisdiction over migration and citizenship can be grounded in *lex domicilii*, an ancient body of (private) international law that grounds jurisdiction (including rights) in the physical location of a party to a dispute. This domicile principle can be contrasted with *lex patriae*, which in the Westphalian system establishes jurisdiction by virtue of national citizenship. Other principles may also be deployed, including that of territoriality, where the location of the subject matter of a dispute determines which political community possesses jurisdiction over a dispute.

Traditionally, it is courts that would use the foregoing principles to determine which laws apply when a typically private law issue contains a “foreign” element. While frequently used to coordinate international struggles over the regulation of transnational disputes (i.e., “private international law”), these jurisdictional devices have played a prominent role in the stabilization of domestic cultural and territorial conflicts in federal states. In the early years of confederation in Switzerland, for example, courts wavered between *lex domicilii* and *lex patriae* in identifying which canton had jurisdiction over a private (though not public) law dispute.¹⁶ Conflict of laws here played the role of softening the coerced inclusion of seven Catholic cantons into the federation in 1847, following their secession. Under this arrangement, subnational governments could regulate a range of subject matters (wills and estates, family law, torts, contracts, etc.) in the context of the internal movement of Swiss citizens across historically sovereign territories. Similarly, in the United States, courts in one state can sometimes apply their own laws to disputes that touch upon the jurisdiction of another state, but they can also apply the law of another state in its own courts based on the domicile principle. To make matters more complicated, states can also vary the scope or applicability of federal public law within their territory, including constitutional rights.

¹⁵ See Bauder, “Urban Sanctuary in Context” and “Possibilities of Urban Belonging.”

¹⁶ Schoch, “Conflict of Laws in Federal State: The Experience of Switzerland.”

Lex domicilii has therefore been an essential ingredient to maintaining federal systems, precisely by conditioning the possibility of shared rather than exclusive jurisdiction. For this reason, it actually contradicts the premise of dual sovereignty. It is interesting that this core myth of federalism doctrine would feature in critical conceptions of sanctuary. Connecting law to postnational citizenship theory, Bauder argues that there is a distinctive “legal strength to implement policies” and “domicile rules of belonging” in both American and Canadian cities by virtue of their autonomy from federal governments¹⁷ because the city is “a territorial legal entity at a different scale at which sovereignty is articulated.”¹⁸ But when applied within federal states, the domicile principle of belonging has never been about upholding dual sovereignty. To the contrary, it has always been used along with other conflict of laws principles to engender stability through the undulation of sovereignty, and the means for this have been layerings of shared jurisdiction that perforate the hard lines of sovereign enclaves. But to be clear, this process has also been central to the nation-building enterprise; through compromise, the national political community is stabilized and fortified. This being so, it isn’t clear how the domicile principle can lay the basis for postnational political communities within or without a federal state.

I could say more about this, but I will summarize this section by saying that the legal strength of cities is reduced to dual sovereignty in each of the accounts canvassed here. Urban political economy sees federalism as a source of legal weakness, where sanctuary cities lack the authority to govern the core moral subject matter at issue: migrant rights qua *migrant* rights. But this obscures the realities of shared jurisdiction that flow from city-building in a broad range of policy domains that can be brought to bear in sanctuary cities. Federalism doctrine also limits our imagination in urban citizenship theory, which starts well enough by rejecting the nation-building premise that citizenship and migration are inherently federal in character. But if not for the cover provided by sovereign sub-national governments, cities in federal states would not differ from those in unitary states in terms of their “legal strength” – and this cover is occasional and always conditional. Worse, the legal materials invoked to support the transfer of jurisdiction from federal to local scales have actually been instrumental in fortifying national political communities.

¹⁷ See Bauder, “Urban Sanctuary in Context,” p. 36.

¹⁸ *Ibid.*, p. 40.

3 Urban Securitization in Federal States

One way of responding to these problems would be to abandon federalism altogether. Rosa Cuison Villazor and Pratheepan Gulasekaram take this route, arguing that “discussion of the term ‘sanctuary’ remains obsessed with state and local rights,” reducing it to a “federalism contest” that pits federal jurisdiction over migration with “the right of states to control their own affairs as independent, constitutional actors.”¹⁹ This is a strong point: denied constitutional autonomy, municipalities and other local public institutions are so often seen merely as “creatures” of states or provinces. But Villazor and Gulasekaram wisely distinguish jurisdiction from sovereignty, noting that municipalities and other local public institutions wield considerable authority within key policy fields and are adept at protecting this authority against federal incursions. Institutions of note include universities, hospitals, schools, business organizations, religious organizations, and digital sanctuary networks. Like municipalities, these institutions draw on jurisdictional devices other than federalism, including constitutional rights, common law, administrative and regulatory law, and statutory regimes. Universities, for example, have common law rights to prevent access to campuses and are actually obligated to maintain the privacy of student information under the *Federal Education Rights and Privacy Act*.²⁰ This example is especially important because the local authority in question is sourced in federal law, drawing a direct line between local public institutions and federal legislative bodies. This reminds us of the importance of the separation of powers, whereby federal executive actions, such as border enforcement, can be contained by invoking the limits built into *federal* statutes.

What emerges is a picture of jurisdiction that associates municipalities with local (nonstate) institutions as much as or more than higher levels of government, and which eschews the precepts of dual sovereignty inherent to federalism doctrine. Two matters of interest bear noting. First, local authority can be defended by reference to separation of powers within the federal scale, rather than simply the spaces the division of powers affords within the local scale. The sites of contestation vary, but resistance to inland border enforcement occurs in local and subnational institutions (division of powers) as well as within federal courts, legislatures, and administrative agencies, all of which impose checks and balances on pure

¹⁹ Villazor and Gulasekaram, “Sanctuary Networks,” p. 5.

²⁰ *Souders v. Lucero*, 196 F3d 1040, 1046 (9th Circ. 1999).

executive power (separation of powers) at the federal scale. Second, we are reminded that nonstate actors possess legal authority and identities that shape the production, interpretation, and application of state law, with interesting implications for political conceptions of sovereignty and how we define “the city.” Local nonstate actors and nonmunicipal, local public institutions share in the production and interpretation of federal immigration law across multiple scales, often in tandem with municipal governments with whom they co-govern key policy fields.

But the legal pluralism we see in local spaces is content-neutral.²¹ The legal modalities of sanctuary networks are not unique, as their antagonists – security professionals – are equally nimble, if not more so. The securitization of migration in and through local laws is by now well advanced, producing new practices, agents, and spaces of border control.²² While on the surface concerned with the maintenance of borders, urban securitization actually represents the collapse of territorial divisions between “internal” and “external,” blurs jurisdictional lines, and betrays anxieties about the nature and future of the nation-state. It is worth lingering on this point before relating it back to sanctuary cities.

The so-called externalization of borders is a well-known process involving the “territorial and administrative expansion of a given state’s migration and border policy” to foreign states and jurisdictions.²³ Central to this process is a set of intentions or habits through which state power is fortified by means of the dispersal, pooling, or integration of sovereignty in the international field. Interdiction, digitization, the collection and sharing of information, and other global preventive and deterrent measures are part of the process, as are regional mechanisms of “opening” borders for desirable migrants and “closing” them for the undesirables. While this process presents opportunities to harden borders, it also threatens them and reveals the incapacity of nation-states to manage their borders alone. The rise of populism and the breaking apart of the United Kingdom from the EU reflect well how regional and international integration can be perceived as a loss of sovereignty.²⁴

²¹ Macdonald, “Legal Republicanism and Legal Pluralism: Two Takes on Identity and Diversity.”

²² Parmar, “Borders as Mirrors: Racial Hierarchies and Policing Migration,” Back and Sinha, “Migrant City,” and Weber, in *Policing Non-Citizens* and “Rethinking Border Control for a Globalizing World.”

²³ Casas-Cortes et al., “New Keywords: Migration and Borders,” p. 74.

²⁴ Brack, Conan and Crespy, “Understanding Conflicts of Sovereignty in the EU.”

Varying conceptions of bordering practices shed light on a similar process of border “internalization.” Critical border studies describe national borders, not as fixed territorial or juridical lines, but instead as a set of spatially mobile performances, practices and technologies of exclusion and inclusion, often operating in connection with racial, colonial, and economic hierarchies.²⁵ They too involve forms of interdiction, data-production and sharing, and the integration of functionally disparate agencies in the management of human mobility. Tellingly, state officials and xenophobic populists worry about the loss of sovereignty when management of borders is shared with external sovereigns, but when borders shift internally, the illusion of dual sovereignty remains: Local power to enforce the border is “delegated,” while legal control over citizenship and migration remains in the hands of the federal government alone.

Federalism doctrine plays the role of maintaining this illusion, obscuring how sovereign practices, understandings, relations, and institutions (what we might call assemblages) cut across territorial and jurisdictional divides.²⁶ It does so in part by drawing artificial distinctions between the fields of migration and security, when the two are coeval political constructs. In constitutional terms, the former is reserved for federal governments, while the latter is of concern to all governments and is not subject to the precepts of dual sovereignty. Shared jurisdiction over matters of crime and security is the key to maintaining the illusion. Associations between irregular migration (a federal matter) and criminality (a shared federal/local matter) create space for local police and federal immigration/border authorities to pool operations, funding, and jurisdiction over such matters as human trafficking and people smuggling, drug and arms trafficking, terrorism, and transnational organized crime. In this way, federal immigration authorities receive data collected by local police and security agents but, by virtue of the myths of federalism, they can insist on exclusive control over borders. In other words, the policing

²⁵ See Parmar, “Borders as Mirrors: Racial Hierarchies and Policing Migration,” Casas-Cortes et al., “New Keywords: Migration and Borders,” and Cote-Boucher et al., “Border Security as Practice: An Agenda for Research.”

²⁶ See Landolt and Goldring, “The Social Production of Non-Citizenship: The Consequences of Intersecting Trajectories of Precarious Legal Status and Precarious Work” and “Assembling Noncitizenship through the Work of Conditionality,” Valverde, “Jurisdiction and Scale: Legal ‘Technicalities’ as Resources for Theory,” and Isin, “City.State: Critique of Scalar Thought.”

of irregular migrants is primarily about criminal law enforcement and has only incidental effects on federal immigration law and policy. As I will proceed to show, the Canadian context reveals the dynamics of shared jurisdiction over crime/security and shows that, far more than federalism doctrine, it is urban securitization that determines the legal strengths and weaknesses of the sanctuary city.

4 High in Demand and Short in Supply: Data Collection at the Federal Scale

It is best to start at the federal scale, before drilling down to the local scale. As with many other nations, the securitization of migration in Canada was deeply affected by a suite of legislative, policy, and operational changes made post-9/11.²⁷ Just prior to 9/11, parliament amended the *Immigration and Refugee Protection Act*, introducing a range of preventive and deterrent measures and the partial dismantling of the refugee status determination system.²⁸ But the events of 9/11 permitted even greater operational changes, the most significant of which was the creation of the Canada Border Services Agency (CBSA) in 2003. The CBSA was an amalgamation of disparate customs and border authorities that were, until this time, strewn across several ministries, including what was then termed Citizenship and Immigration (now called Immigration, Refugees and Citizenship), Customs and Revenue, and the Canada Food Inspection Agency. Parliament enacted the *Canada Border Services Agency Act* in 2005, which rendered the CBSA fully operational.

The CBSA is housed within Public Safety Canada (PSC). This is the core security and criminal justice ministry in the country, which contains Canada's federal police agency, the Royal Canadian Mounted Police (RCMP), Corrections Canada, and Canada's primary security intelligence agency, the Canadian Security Intelligence Service (CSIS).²⁹ The CBSA is vested with broad authority to enforce both the *Immigration and Refugee Protection Act* and a wealth of criminal law statutes, including the

²⁷ Forcese and Roach, *False Security: The Radicalization of Canadian Anti-terrorism* and Rudner, "Challenge and Response: Canada's Intelligence Community in the War on Terrorism."

²⁸ Atak and Simeon, "The Criminalization of Migration in Canada and Abroad."

²⁹ There are other key agencies, such as the Communications Security Establishment, housed in the Department of National Defence.

Criminal Code. As a law-enforcement agency, the CBSA employs technologies and practices similar to those used by police services, through its Criminal Investigations Division. It also possesses limited security intelligence powers. The CBSA has authority to partner with international agencies, which it uses to gather information, facilitate deportations, and physically obstruct access to Canadian territory.³⁰ It works regularly with the United States in this respect.³¹

The CBSA is legally and functionally unique, being the only entity within PSC that is not subject to independent oversight and review. Unfortunately, it is the only federal agency empowered to conduct both policing and security intelligence operations. The one saving grace is that the CBSA does not have particularly strong security intelligence powers nor is it well positioned to conduct policing operations or, for that matter, border enforcement between ports of entry. This is evident in the pivotal role played by the RCMP in policing the Canada–US border between ports of entry to stem the inflow of asylum seekers between 2017 and 2020.³² Meanwhile, CSIS remains the premier security intelligence service in the country, handling the most serious security files in the immigration context. The CBSA's role is principally geared to staffing ports of entry and overseas liaison work, with only 6,500 uniformed officers; this leaves very little for inland enforcement.³³

Unsurprisingly, information is one of the pillars of Canadian security. When it passed its first-ever national security policy in 2004, the federal government stated that the “key to providing greater security for Canadians and to getting the most out of our security expenditures is to co-ordinate and better integrate our efforts.”³⁴ Ever since, it has tried to smooth the flow of information, both domestically and internationally. One especially important year was 2015, when parliament passed the *Security of Canada Information Sharing Act*. This law mandates the sharing of security-based information among at least seventeen federal institutions, with special focus on those operating out of PSC.³⁵

³⁰ *Canada Border Services Agency Act*, SC 2005, c 38.

³¹ Moens, *The Challenging Parameters of the Border Action Plan in Perimeter Security and the Beyond the Border Dialogue*.

³² Smith, *Report: Changing U.S. Policy and Safe-Third Country “Loophole” Drive Irregular Migration to Canada*.

³³ Atak, Hudson and Nakache, “Policing Canada’s Refugee System: A Critical Analysis of the Agency.”

³⁴ Canada, “Securing an Open Society: Canada’s National Security Policy,” p. 9.

³⁵ Forcese and Roach, *False Security: The Radicalization of Canadian Anti-terrorism*.

But as net importer of intelligence, Canadian policing, border, and intelligence agencies have a long history of competing with each other and jealously guarding data and sources.³⁶ This is evident in the absence of an official interoperable security database accessible by all federal agencies with security mandates; data are contained in institutional silos and shared only on request and following high-level authorization. There are a handful of field-specific interoperable databases, including some linking border control and policing, but very little is known about them. The largest one is the Global Case Management System, which is a database shared by the CBSA and Immigration, Refugees and Citizenship Canada. It contains personal information related to citizenship and immigration applications, including name, date of birth, country of birth, address, medical details, education, and criminal history. Another is the Canadian Police Information Centre (CPIC), which is a central database that contains information “about crimes and criminals.”³⁷ The CBSA has access to this database. Managed by the RCMP, it is “the only national information-sharing system that links criminal justice and law enforcement partners across Canada and internationally.”³⁸ The CPIC is interfaced with the US’s National Crime Information Centre, so that the American authorities have access to the CPIC (but not information regarding young offenders) and the CBSA (and Canadian police) have access to American criminal databases.

It is within this context one must approach both inland border enforcement and urban securitization. On the one hand, the CBSA is legally vested with immigration, criminal, and security intelligence powers and is located in the heart of Canadian security and criminal justice governance. On the other hand, it is set adrift in a sea of informational scarcity alongside much larger, more mature, better resourced, and politically adept security and policing agencies. As a result, it focuses its efforts on the physical border, various interdiction and externalization strategies, and smoothing deportation and inadmissibility processes. Full-scale inland border enforcement is limited by these incapacities, although it has found workarounds in the form of partnerships with local public institutions with access to data.

³⁶ *Ibid.*

³⁷ Correctional Services Canada, *Commissioner’s Directive 564-5 Access to the Canadian Police Information Centre*.

³⁸ *Ibid.*

5 Data Sharing between Local and Federal Institutions

It should be noted at the outset that there is no uniform body of law governing the sharing of data between federal border agencies and local partners in Canada. What we find is a patchwork of provincial privacy legislation, common law, and the occasional Memorandum of Understanding (MoU) between the CBSA and provincial or municipal bodies.³⁹ Provincial privacy legislation is the most comprehensive of these, providing discretionary power to local public institutions to disclose for the purposes of aiding investigations by “law enforcement” agencies. A typical wording is found in s. 42(1)(g) of Ontario’s *Freedom of Information and Protection of Privacy Act*, which states disclosure may be made:

to an institution or a law enforcement agency in Canada if,

- (i) the disclosure is to aid in an investigation undertaken by the institution or the agency with a view to a law enforcement proceeding, or
- (ii) there is a reasonable basis to believe that an offence may have been committed and the disclosure is to enable the institution or the agency to determine whether to conduct such an investigation;

The language is generally the same in other provinces, as is the express requirement or permission to comply with search warrants and other court orders.

Early efforts to secure data were rather brazen, producing powerful public backlash. In 2013, for example, the Vancouver Transit Police (VTP) detained Lucia Vega Jimenez for fare evasion, reporting her to the CBSA. Ms. Jimenez committed suicide in a CBSA holding cell in the Vancouver international airport. In 2015, the VTP terminated its MoU with the CBSA in response to public outrage and recognition that the VTP lacked a mandate to engage in immigration enforcement. Schools are another good example. In 2006, the Toronto Catholic District School Board allowed CBSA officers to enter school property to enforce immigration law. In one instance, they threatened to arrest two students unless their mother turned herself in, only to take all three into custody. In another instance, the CBSA apprehended two children and took them to a van carrying their mother and grandparents.⁴⁰ Public outrage led to the passage of a “Don’t Ask Don’t Tell” policy in the Toronto District School Board.

³⁹ Hannan and Bauder, “Scoping the Range of Initiatives for Protecting Employment and Labour Rights of Illegalized Migrants in Canada and Abroad.”

⁴⁰ See CBC, *School Official Blasts Deportation*.

Transportation authorities are a third example. In 2014, the Ministry of Transportation Ontario used powers of vehicle safety audits to stop trucks so that the CBSA could search them. One of the trucks carried twenty-one non-status passengers. The public reaction was swift and powerful, leading the ministry to terminate its partnership with the CBSA.⁴¹ The Ministry of Transportation Ontario cited as one reason the fact that it lacked the statutory mandate to participate in border enforcement. In none of these examples did the CBSA have a warrant, and in most, they did not know the identity or location of the migrant until local authorities informed them.

It is worth pausing to consider the place of jurisdiction in these examples. Animated by migrant rights, resistance to disclosure centered around the rule of law, inflected by federalism. Each public institution noted earlier terminated its MoU with the CBSA because it recognized that open-ended sharing of data was inconsistent with the principles and purposes of its enabling legislation; privacy legislation and rights were a secondary consideration at best. The rule of law argument is underlined by dual sovereignty and the lack of any constitutional, much legislative, link between border enforcement and schools, local transport, and municipal transit. More precisely, the lack of shared jurisdiction among these institutions and the CBSA undermined the legal and political justification for systematic cooperation.

But this is not so with police, where there is shared jurisdiction both vertically with the CBSA and, increasingly, horizontally with schools, shelters, NGOs, and other local institutions. One prominent example is the criminalization of human trafficking and the regulation of sex work. Following a series of constitutional challenges, aspects of sex work have been decriminalized, with provinces and localities filling the jurisdictional space with a bevy of regulations, including municipal zoning by-laws and labor laws.⁴² But the most relevant are sweeping antihuman trafficking laws that associate sex work with international and transnational criminality. Multimillion dollar provincial and federal antitrafficking strategies establish concrete partnerships between local police and the CBSA, which rest on the belief that human trafficking is predominantly international and associated with irregular

⁴¹ Hannan and Bauder, "Scoping the Range of Initiatives for Protecting Employment and Labour Rights of Illegalized Migrants in Canada and Abroad."

⁴² Liew, "The Invisible Women: Migrant and Immigrant Sex Workers and Law Reform in Canada."

migration. The federal government launched a five-year antitrafficking strategy in 2019, spending \$75 million over six years, principally in the shared area of criminal and immigration law.⁴³ Many provincial governments provide similar levels of funding to police as well as to NGOs, which help collect and share data for the purposes of aiding law enforcement investigations.⁴⁴ Migrant rights organizations note that these powers are “anti-sex work, anti-migrant, and racist,” co-opt grassroots organizations through fiscal incentives and language of care, and roll out “heightened surveillance capabilities” directed at racialized migrant sex workers.⁴⁵

Shared jurisdiction is key, cementing horizontal information-sharing partnerships between local NGOs, public institutions, and police, and vertical data sharing with the CBSA through linkages between crime, security, and the border. But it is the tip of the iceberg. According to an Access to Information request filed by No One is Illegal, the police in the Greater Toronto Area made 4,392 out of 10,700 calls to the CBSA’s “Warrant Response Centre” between November 4, 2014, and June 28, 2015, which local police officers (or any other law-enforcement officer) can use to provide the CBSA with information about a person who the officer believes or merely suspects lacks status.⁴⁶ The Toronto Police Service (TPS) made 75% (3,278) of those calls, which is more than the RCMP (1,197), and greater “than the police services of Montreal, Quebec City, Ottawa, Calgary, Edmonton, and Vancouver combined (2,729).”⁴⁷ What is more, “status checks” were the most common reasons for calls – 83.35% in the case of the TPS as against a national average of 72%.⁴⁸ The Service de Police de la Ville de Montréal has also been an active collaborator, making 2,632 in 2015, 2,872 in 2016, and 3,608 in 2017.⁴⁹ It should be underlined that more than 83% of these calls were status checks and not responsive to a federal arrest warrant.

⁴³ De Shalit, *Neoliberal-Paternalism and Displaced Culpability: Examining the Governing Relations of the Human Trafficking Problem*.

⁴⁴ *Ibid.*

⁴⁵ See Lam, “Behind the Rescue: How Anti-Trafficking Investigations and Policies Harm Migrant Sex Workers,” p. 3.

⁴⁶ Moffette and Gardner, *Often Asking, Always Telling: The Toronto Police Service and the Sanctuary City Policy, Union of Ontario and No One Is Illegal-Toronto*, p. 21.

⁴⁷ *Ibid.*, p. 21.

⁴⁸ *Ibid.*, p. 22.

⁴⁹ See Lee, *Montreal Police Calls to CBSA Suggest It Is Far from a Real Sanctuary City the Very Principle of the Sanctuary City Is Non-Collaboration*.

The policing of non-status migrants has escalated while most formal partnerships between local and federal institutions have been dismantled. Indeed, police involvement in border enforcement is the most rigorous in the two most high-profile and reputedly most robust sanctuary cities in the country: Toronto and Montréal. While the rule of law and federalism have had an impact in many areas, they have been completely ineffectual in the context of policing, based precisely on the appearance of shared jurisdiction over irregular migration, when seen as a matter of crime and security. In [Section 6](#), I will examine how local police understand the basis and scope of this jurisdiction.

6 Shared Jurisdiction over Crime, Security, and Migration

In 2017–2018, I participated in an empirical study of the local policing of non-status migrants in Ontario, led by Mia Hershkowitz, and joined by Harald Bauder.⁵⁰ We interviewed eleven high-ranking officers (chiefs, super-intendants, etc.) in eight municipalities in Ontario (including Toronto) and asked officers to speak to their role in sharing information with the CBSA, how they perceived their role in border control, their perceptions of sanctuary policies, and their interpretations of Ontario's *Police Services Act* (PSA) in these areas. While I cannot go into the details of study here, it is worth noting all officers we spoke with admitted to the routine sharing of information in the absence of a federal arrest warrant, and thought that this sharing was required by the PSA. For background, s. 5(1) of *Ontario Regulation 265/98* states:

A chief of police or his or her designate may disclose any personal information about an individual if the individual is under investigation of, is charged with or is convicted or found guilty of an offence under the *Criminal Code* (Canada), the *Controlled Drugs and Substances Act* (Canada) or any other federal or provincial Act.

Case law is clear that disclosure in the absence of a court order is discretionary and not mandatory, and the CBSA must request specific information in the context of a specific investigation; the law does not allow for discretionary disclosure in the context of “[m]ere suspicion, conjecture, hypothesis or ‘fishing expeditions.’”⁵¹

⁵⁰ Hershkowitz, Hudson and Bauder, “Rescaling the Sanctuary City: Police and Non-Status Migrants in Ontario, Canada.”

⁵¹ *R. v. Sanchez*, 1994 CanLII 5271 (ON SC).

The first theme that emerged from the interviews was that police do not consider disclosure a form of border enforcement.⁵² Officers insisted involvement is merely bureaucratic – a routine pushing of a file to the requisite agency. One officer stated that when non-status migrants:

walk in, they come to us, or we come upon them, and they ask us for help. So this directive indicates our responsibilities, and it is basically about us making a lot of phone calls to Canada Border Services⁵³

This attitude aligns with associations between irregular migration and criminality, where even victims are referred to the CBSA, especially if an officer thinks the underlying crime is one of a national or international character, such as human trafficking or people smuggling.

The local boundedness of the policing of migrants is also established by reference to provincial statutes. Another officer stated:

The biggest challenge is that we have taken an oath to uphold the laws and it's all about the *Police Services Act* and I don't think there is any policy or procedure that we could put in place that would allow us to turn a blind eye or not fulfill our oath.⁵⁴

Another officer stated:

enforcement of warrants or arrests, or requests, for example CBSA, working with them, we are expected of course through legislation to work with CBSA and execute immigration warrants⁵⁵

It bears repeating that the statistics of information sharing noted earlier indicate that police are almost never executing immigration warrants but instead are proactively calling the CBSA to conduct “status checks.” If a warrant is issued, it's only because of disclosure, not the other way around. Clearly, a warrant cannot retroactively justify the very disclosure the warrant is predicated upon.

The Toronto Police Service has provided a number of public statements that shed more light on the legal rationale for cooperation. In a 2017 hearing before the TPS civilian review body, the Toronto Police Services Board (TPSB), then Chief Mark Saunders stated the PSA and privacy legislation:

⁵² Hershkowitz, Hudson and Bauder, “Rescaling the Sanctuary City: Police and Non-Status Migrants in Ontario, Canada.”

⁵³ *Ibid.*, p. 45.

⁵⁴ *Ibid.*, p. 46.

⁵⁵ *Ibid.*, p. 46.

both provide authorization for police officers to *proactively* assist the C.B.S.A. with personal information about persons under investigation, charged and/or convicted of serious Criminal Code (C.C.) and Controlled Drugs and Substances Act (C.D.S.A.) violations. The (Immigration and Refugee protection Act) ... directs when police officers are legally obliged to act as peace officers under this Act.⁵⁶

This is a strained interpretation of the PSA, which nowhere states that disclosure of identifying information to the CBSA or any federal law enforcement agency is required. It is understood, of course, that police must comply with a court order. But like provincial privacy legislation, the PSA provides discretion to disclose in any other context. Legislation specifically outlines the interests in nondisclosure that police must weigh before deciding whether or not to disclose. Section 6 of the PSA states that the decision to disclose must be based on considerations of “what is consistent with the law and the public interest.” The “law and the public interest” is defined in part through s. 4(2) of the PSA, which defines “adequate and effective police services” as including: crime prevention and assisting victims and witnesses. The principles and purposes policing itemized under s. 1 of the PSA include the following:

1. The need to ensure the safety and security of all persons and property in Ontario.
2. The importance of safeguarding the fundamental rights guaranteed by the *Canadian Charter of Rights and Freedoms* and the *Human Rights Code*.
3. The need for cooperation between the providers of police services and the communities they serve.
4. The importance of respect for victims of crime and understanding of their needs.
5. The need for sensitivity to the pluralistic, multiracial, and multicultural character of Ontario society.

Disclosures to the CBSA contravenes many of these principles and, to this extent, violates the rule of law. Principles 3 and 5 are undermined by the documented fact that police cooperation with immigration authorities makes it far less likely migrant communities will report crime.⁵⁷ Principles

⁵⁶ See Toronto Police Services Board, 2017 *Minutes of the Toronto Police Services Board*, p. 236.

⁵⁷ See Saberi, “Toronto and the ‘Paris Problem’: Community Policing in ‘Immigrant Neighbourhoods’” and Ontario Human Rights Commission, *Under Suspicion: Research and Consultation Report on Racial Profiling in Ontario*.

2–5 are undermined by the fact that racial profiling is often a feature of the policing of non-status migrants in Canada.⁵⁸ In fact, the analogous practice of “carding” (i.e., random street checks of mostly racialized minorities) was recently prohibited through provincial changes to the PSA regulations in 2017. A 2018 review of carding legislation led by Ontario Court of Appeal Justice Michael Tulloch recommended even clearer restrictions on the powers of police to collect personal information, including the outright prohibition of asking for information for arbitrary reasons.⁵⁹ The Supreme Court of Canada recently referenced this report, among others, when it recognized systemic racism in policing.⁶⁰

What we are left with is the fact that the scale of disclosure cannot be justified by reference to law or, more precisely, shared jurisdiction over criminal law. Most of the time, disclosure is made in the absence of a legal obligation and, worse, contrary to the principles and purposes of enabling legislation – just as it is when schools, transportation ministries, and municipal transit corporations share data. How is it that police can get away with flagrant contraventions of the rule of law?

There are two answers relevant to this chapter. The first is that security trumps federalism in the field of jurisdiction. Defending cooperation with the CBSA, Chief Saunders claimed that the TPS, “as a member of the law enforcement and public security community, respects and supports the mandate of other law enforcement agencies, like the C.B.S.A.”⁶¹ We can glean much from this statement, when we disaggregate the terms “law enforcement” and “public security.” After all, the TPS does not partner with park wardens, by-law officers, or Canada Revenue Agency officers with the same enthusiasm as it partners with the CBSA, yet all are law enforcement agencies. The real community is not law-enforcement officers but, as Chief Saunders states, the “public security community.” This community is defined by a shared role in the management of threats to state and citizen, where legal distinctions between criminal law/immigration law and criminal/migrant break down and jurisdiction can be extended beyond what is permitted within the four corners of provincial legislation.

⁵⁸ Moffette and Gardner, *Often Asking, Always Telling: The Toronto Police Service and the Sanctuary City Policy, Union of Ontario and No One Is Illegal-Toronto*.

⁵⁹ Tulloch, “Report of the Independent Street Checks Review.”

⁶⁰ *R. v. Le*, 2019 SCC 34 (CanLII).

⁶¹ Toronto Police Services Board, 2017 *Minutes of the Toronto Police Services Board*, p. 238.

This has distinctive importance in federal states because local police can draw authority from federal law and, more to the point, they can use federal authority to transgress the provincial laws that confer them with most of their power. The federal law they draw from includes substantive criminal law, which now includes entire sections of the *Immigration and Refugee Protection Act* as well as the range of regulations designed to tamp down on aspects of irregular migration that are defined as international and transnational crimes. Through these laws, local police partner with federal agencies in the investigation of human trafficking, people smuggling, terrorism, drug trafficking, cybercrime, and so on. They are also part of broader circuits of security, defined by the insatiable hunger for information and, in the past several decades, a risk-based obsession with “pre-crime.”⁶² Proximity to data gives them purpose and power, an opportunity to aggrandize themselves – to secure more funding, influence, and prestige.

But in democracies, police are compelled to use legal arguments to justify themselves. Long on discretion and short on accountability, police easily dissemble their role in the extralegal facets of the carceral state, where inside/outside and local/national are blurred every bit as much, and for much the same reasons, as migrant/criminal. This raises the second point: We see the double sense in which sanctuary policies are “provincial” – not just because cities are creatures of provinces but also because the dynamics of political struggle unfold outside of jurisdictional remit of discrete bodies or levels of government. The police and other security professionals are now serious political actors in their own right and know they have “the ability to act as more or less autonomous agents.”⁶³ Police are not accountable to representative government, which can at best influence policing through civilian oversight and review commissions. In 2015, Toronto City Council tried to assert influence through an independent civilian oversight body, the TPSB, asking it to investigate and then report back on the following issues: (1) statistics on the number of non-status persons reported to the CBSA, (2) agreements that exists between the TPS and the CBSA, (3) practical implementation of sanctuary policies, and (4) and the possibility of amending the PSA to regulate that police officers only report immigration status to the CBSA when directed

⁶² Zedner, “Securing Liberty in the Face of Terror: Reflections from Criminal Justice” and McCulloch and Pickering, “Pre-Crime and Counter-Terrorism: Imagining Future Crime in the ‘War on Terror’.”

⁶³ Wortley, “Measuring Police Attitudes toward Discretion,” p. 538.

by the courts after a conviction has been registered.⁶⁴ These demands have been ignored, with the TPS steadfastly refusing to change its practices and reminding the TPSB and the City of Toronto that they lack jurisdiction to direct operational changes.⁶⁵ One participant in our study stated:

For policing the issue is that we are bound to respond to statute violations related to the criminal code, any other federal statute, along with any other statute at the provincial level, we don't have the luxury of being able to turn to a municipality and say, "okay we are going to adopt your philosophies and your principles," because our practices are not dictated by the municipality, it is exclusively the realm of the province. The province decides what we will and will not do. As a result, the province has decided that we will enforce federal and provincial statutes.⁶⁶

But provincial law actually constrains the local policing of migrants. The irony is unmistakable: police violate provincial law but use its shadow as a bulwark against subsequent democratic accountability, using one form of jurisdiction to prevent an accounting of the absence of another.

7 Conclusion

Reckoning with urban securitization offers an important inroad into the nature and limits of sanctuary cities in federal states. As the urban assumes a decisively *municipal* character in sanctuary scholarship, we become pre-occupied with a constitutional order historically geared toward nation-building and against city-building. Through federalism, the city appears as epiphenomenal, utterly dependent on national and subnational governments for political and legal authority. While this is partly true, sanctuary cities are not reducible to municipalities nor is municipal authority reducible to formal constitutional law or enabling statutes. Cities play greater roles in a range of policy fields that intersect with and include migration, through patterns of shared jurisdiction that reflect a transformation of the nation-state and the emergence of other global and trans-local political communities. As Saskia Sassen has shown, these parallel processes occur precisely through the concepts and institutions of the nation-state, so it is no surprise to see federal governments carrying this process forward, even

⁶⁴ City of Toronto, *Toronto Police Service: Service Governance Pertaining to the Access to Police Services for Undocumented Torontonians*.

⁶⁵ See Toronto Police Services Board, 2017 and 2018, *Minutes of the Toronto Police Services Board*.

⁶⁶ Hershkowitz, Hudson and Bauder, "Rescaling the Sanctuary City: Police and Non-Status Migrants in Ontario, Canada," p. 47.

if they don't fully appreciate what they're doing.⁶⁷ However, attempts to theorize the sanctuary city in this (possibly) emergent context of urban citizenship draw heavily on the cumbersome and ultimately unproductive language of dual sovereignty. While no doubt a reality that must be contended with, federalism doctrine produced by courts is so domineering as to obscure what critical federalism theory can offer with respect to the democratic potential of local communities in this transformative setting.

Shifting away from sovereignty toward (shared) jurisdiction reveals that local institutions can and do wield more authority than at first meets the eye. This chapter has been less concerned with exploring the empirical bases of this point in terms of sanctuary policies and networks, as with how the legal strength of the sanctuary city is affected by the parallel legal modalities of urban securitization. The Canadian experience shows that local police have also acquired considerable authority over the governance of migration through the shared jurisdiction produced by the criminalization of migration. The key commodity is data. Far from being inert, data "is generative of new forms of power relations and politics at different and interconnected scales."⁶⁸ By virtue of their access to data and the logics of risk management and predictive policing, local police are now key players in border enforcement. The spatial mobility of the border goes hand in hand with the legal mobility of police, who seem able to feely cross the boundaries set by federalism, rights, and the rule of law. It bears noting this process is also facilitated by the federal government, which remains confident it can share jurisdiction but retain sovereignty over the border.

This is all to say that federalism remains relevant, of course, but circling back to the legal strength of sanctuary cities, the question isn't whether cities do or do not govern migration, but whether they can protect against the disclosure of locally generated information. This is a jurisdictional question that engages not only federalism but also transversal normative framings related to security, rights, the rule of law, common law, administrative law, and so on. The fact is that, through security, migration is already governed at the level of the city while the illusions of dual sovereignty leave sanctuary cities ill-equipped to implement their policies.

⁶⁷ Sassen, "Territory, Authority, Rights: From Medieval to Global Assemblages."

⁶⁸ Bigo, Isin and Ruppert, "Data Politics: Worlds, Subjects, Rights," p. 4.

Sanctuary Values

CHRISTOPHER N. LASCH[†]

1 Introduction

“Sanctuary” policies – policies that seek to limit the participation of local law enforcement in the immigration enforcement project – have been enacted around the United States in four major waves: first, in the 1980s, responding to perceived injustice in the treatment of migrants from Central America. Second, in the late 1990s and more intensely after 9/11, bucking increased pressure on localities to participate in immigration enforcement. Third, from 2008 to 2014, in disapproving “Secure Communities” federal enforcement program. And, fourth, following the election of President Donald J. Trump, whose campaign explicitly targeted “sanctuary” jurisdictions and promised to dramatically increase immigration enforcement both at the border and in the interior of the United States.¹

Even this brief recounting of the recent history of “sanctuary” shows that sanctuary policies can be viewed on an abstract level as the state and local responses to an increase or fear of increase in federal immigration enforcement policy. However, in the legal arena, mainly with respect to federal litigation in courts, lawyers, and judges have framed the question of sanctuary as one regarding our federalist system, one in which state and federal governments struggle over the power to regulate or protect non-citizens. This formalistic “authority” framing obscures the motivating values and policy reasons why states and localities want to prevent increases in immigration enforcement in their communities. On a more pragmatic level, the rationales used to justify sanctuary by local policy makers and advocates have widely varied, with motivations that range from a concern over inclusion and racial equity concerns, to a desire to reduce the harm caused by increased enforcement that separates families and the harm

[†] The revision of this chapter was finalized by Linus Chan and Toshesh Banthia.

¹ For a more detailed account of what constitutes “sanctuary policies,” see Lasch, et al. “Understanding Sanctuary Cities.”

that comes from detention and deportation. The formalistic authority arguments brought in court ignores these important concerns and creates a stilted and artificial framework that invites misinterpretation and abuse, without ever allowing a vigorous and crucial discussion over questions of community.

Kevin Johnson and others have observed that in the United States, litigation over state involvement in immigration enforcement tends to submerge salient civil rights issues beneath dry, technical arguments about preemption and federal supremacy. One could add the Tenth Amendment anticommandeering doctrine, the state-law authority of county sheriffs, and the doctrine of separation of legislative and executive power (in particular when it comes to imposing conditions on federal funding streams) to the list of doctrinal arenas in which the importance of racial and civil justice is ignored in favor of formalistic authority doctrines.

Yet, the fourth wave of sanctuary – the movement following the election of Donald J. Trump to the Presidency, and continuing into the Biden presidency – brings a promise of a more relevant and coherent discussion of communal identity and values. This promise is further strengthened by the rhetoric of antidiscrimination and equality of advocates and politicians, which in turn is sharpened by the transparency of the Trump administration's nativist and racist agenda. This promise, however, fades as long as litigation on sanctuary continues to be centered on the rarified air of legal doctrines that exclusively discuss authority and sovereignty. The very values motivating and undergirding the sanctuary movement, such as identity, equity, and harm reduction, will continue to remain hidden and unexplored if lawyers and judges continue to frame questions around sanctuary policies as one of authority rather than of community. Moreover, not only would the core questions of sanctuary remain hidden, but the use of formalism and authority legal doctrines would create a false equivalency allowing those who oppose sanctuary an abundance of tools to create policies of exclusion and harm. One example is the claimed equivalency of Texas's SB4 (requiring local law enforcement to comply with immigration detainers) and California's SB54 (forbidding such compliance).² When questions center on which system of government – whether it be state, local, or federal can make immigration policies – the underlying and often motivating questions about sanctuary policies are lost.

² Ma, "California Divided: The Restrictions and Vulnerabilities in Implementing SB 54," pp. 141, 143–145.

This chapter sets out to explore how more normatively laden doctrines from constitutional law can be brought to bear on the legal issues pertaining to sanctuary. Even when structural legal doctrines are relevant, they nonetheless should be understood as situated in a larger framework permeated by the very values that sanctuary proponents seek to activate.

This chapter proceeds in four parts. **Part I** begins with a description of some of the recent “sanctuary” battles and the legal theories around which those battles have been framed, exposing the doctrinal framing as largely formalistic and devoid of the values that motivated the policies from the start. **Part II** lays out the difference between a structural or “authority and power” approach used in such litigation from a communal approach that centers on questions of identity, equity, and harm reduction. **Part III** provides possible reasons for the avoidance of discussing communal values that are the root of these policies and conflicts, and Part IV demonstrates why it is a problem. The chapter then concludes with a brief meditation on the broader implications of such an approach.

2 Power Struggles over “Sanctuary”

Many of the important legal contests over immigration policy generally in the United States have come, in the last decade or so, packaged as legal battles over authority. Many examples of this phenomenon have concerned interior, not border, enforcement. Mirroring this larger trend, litigation and debate over “sanctuary” or antisanctuary legislation or policies have arisen from varied sources. States and localities (most notoriously Arizona with its Senate Bill 1070) have claimed a role in the enforcement process, directing resources to apprehend suspected undocumented migrants, or hold suspected migrants for federal officials. Other localities who seek to create “sanctuary” have attempted to disentangle law enforcement from immigration enforcement and raised concerns over the practice of holding state and local prisoners beyond their release date pursuant to “detainers” issued by federal immigration officials.

In each of these instances, it will be seen, the axis of litigation was not policy itself or its goals or consequences but the authority to make policy. As a consequence, the legal doctrines deployed were focused entirely on structural or sovereignty concerns. The packaging of the litigation, to continue the metaphor begun in the preceding paragraph, obscured the contents of the package. This was in contrast to the political and public debate,

which focused much less on authority or power, but on questions of racial equity and community harm.³

2.1 Arizona's Senate Bill 1070: A Battle over Antisanctuary Measures Is Fought in Terms of Federal Supremacy and Preemption

The legal battle over Arizona's Senate Bill 1070 was a case in point, even as the proposed law was in fact an "anti-sanctuary" bill designed to involve local law enforcement into immigration enforcement. Senate Bill 1070 was one of several bills authored by immigration restrictionist groups in an attempt to force local and state involvement in immigration enforcement.⁴ The law required Arizona law enforcement, normally tasked with policing and enforcing states to inquire into the immigration status of people they encountered, and it also created criminal sanctions based on immigration status that mirrored the federal system.⁵ One focal point of attacks by the community and advocates on Arizona's law (and others like it) authorizing state-level immigration enforcement had been the risk of racial profiling. Asking local law enforcement to engage in immigration enforcement increases the risk that non-white community members would be subject to increased arrests and detention based solely on their race.

Racial profiling puts at risk several communal concerns. First, it risks alienating and separating members of a community and strikes at the heart of a community's identity. Second, the risk of racial profiling comes with it the attendant possibility of putting members of the community in harm's way, either through detentions and arrest by local authorities, or even deportations and family separation. Detention and deportations not only inflicted harm on those who were detained and deported, but often would result in harm to family members and the community as a whole.

Despite the risk associated with racial profiling, the Supreme Court's decision striking down the law followed the path predicted by Kevin Johnson and proposed by the US government attorneys and demonstrated

³ Kaur, "US Immigration Policies toward Haitians Have Long Been Racist, Advocates Say"; Kamasaki, "US immigration Policy: A Classic, Unappreciated Example of Structural Racism"; Trump, "Presidential Announcement."

⁴ Campbell, "The Road to 1070: How Arizona Became Ground Zero for the Immigrants' Rights Movement and the Continuing Struggle for Latino Civil Rights in America."

⁵ See generally, Eagly, "Local Immigration Prosecution: A Study of Arizona Before SB 1070," p. 1749.

“how the current legal analysis of the constitutionality of the spate of state and local immigration measures often focuses on federal preemption and the Supremacy Clause, a relatively dry, if not altogether juiceless, body of law.”⁶

Concerns over local law enforcement involvement with immigration enforcement was not limited to border states such as Arizona, or Texas, but ranged widely throughout the United States. The New Orleans police department, in response to a consent decree from the Department of Justice agreed not to use perceived or actual immigration status in taking law enforcement action and to not inquire into immigration status with victims of crime. Both of these provisions highlighted community concerns over equity – namely that immigrant community members should be able to access legal protections as any other member of the community, yet the police’s ability to protect the community erodes when members of the community do not trust the police or law enforcement.⁷

2.2 Defunding Sanctuary Jurisdictions: A Battle over Antisanctuary Measures Is Fought in Terms of Separation of Powers, Spending Clause Doctrines, and the Tenth Amendment

The Trump administration continued to use the “authority” framework to attack cities and localities that attempted to enact sanctuary policies by threatening federal funding accusing the localities as deviating from a national policy on immigration.⁸ The Trump administration “first with an executive order”⁹ and then with Department of Justice actions that directly linked federal grant funding with cooperation in immigration enforcement and compliance with Section 1373, put localities and even states into the crosshairs.¹⁰

⁶ Johnson, “Immigration and Civil Rights: State and Local Efforts to Regulate Immigration,” p. 612; see also Heeren, “Persons Who Are Not the People: The Changing Rights of Immigrants in the United States,” pp. 391, 400.

⁷ Just as litigation obscured these communal values, a Congressional hearing by House Judiciary Chairman Bob Goodlatte attempted to subvert these concerns into one of authority, accusing the attempt to create a bias free police policy as a way of violating federal supremacy over immigration law.

⁸ Lai and Lasch, “Crimmigration Resistance and the Case of Sanctuary City Defunding,” pp. 553–556.

⁹ Exec. Order No. 13,768, 82 Fed. Reg. 8799 at § 9(a) (January 25, 2017), www.gpo.gov/fdsys/pkg/FR-2017-01-30/pdf/2017-02102.pdf.

¹⁰ *Ibid.*, p. 557–563 (describing the administration’s actions, and the litigation response, through the end of 2017).

Although the attack on localities and states over funding was replete with civil rights implications, those concerns did not come to the fore in court.¹¹ The local governments resisting the administration's antisancuary efforts by and large eschewed substantive claims that would have, for example, surfaced the antidiscriminatory norms underlying their policies and the race-based nature of the administration's attack on them.¹² And the courts' holdings, nearly all of which rejected the administration's defunding measures, relied on legal doctrines that focused largely on the procedure for defunding and ignored the root of the controversy. The President's executive order was enjoined on the grounds that (1) the power to attach funding conditions belongs to Congress, not the executive branch, and the executive order therefore violated the separation of powers doctrine; (2) the executive order violated Spending Clause doctrine because it did not impose funding conditions unambiguously, attached conditions that were not "germane" to the funding at issue, and imposed conditions that attached to such a large amount of federal funding as to be coercive.¹³ Later decisions invalidated the Attorney General's efforts to attach funding conditions to the same federal grants for the same reasons,¹⁴ and the additional reason that compliance with Section 1373 could not be made a condition of federal funding because Section 1373 itself violated the anticommandeering doctrine rooted in the Tenth Amendment.¹⁵

2.3 Immigration Detainers: A Battle over Pro-sanctuary Measures Is Fought in Terms of the Tenth Amendment, Federal Supremacy and Preemption, and State-Law Authority

A final area demonstrating how sanctuary contests ignore communal concerns lies in the plethora of litigation spawned by the federal government's

¹¹ No less than the administration's Muslim ban and rescission of DACA, the sanctuary defunding measures could have been litigated as being fueled by unconstitutional animus. See, for example, Johnson, "Lessons about the Future of Immigration Law from the Rise and Fall of DACA," pp. 343–390.

¹² See Lai and Lasch, "Crimmigration Resistance and the Case of Sanctuary City Defunding," pp. 540–545 and n. 348.

¹³ Order granting the County of Santa Clara's and the City and County of San Francisco's Motions to Enjoin Section 9(a) of Exec. Order 13,768, *County of Santa Clara v. Trump*, No. 17-cv-00574 (N.D. Cal. April 25, 2017).

¹⁴ Cohen, "A Gun to Whose Head? Federalism, Localism, and the Spending Clause," pp. 430–435.

¹⁵ *City of Chicago v. Sessions*, 321 F. Supp. 3d 855, 2018 WL 3608564 at *5–*11 (N.D. Ill. 2018) (relying on *Murphy v. National Collegiate Athletic Ass'n*, — U.S. —, 138 S.Ct. 1461, 200 L.Ed.2d 854 (2018) to find Section 1373 unconstitutional); *City of Philadelphia v. Sessions*, 309 F. Supp. 3d 289, 329–331 (E.D. Pa. 2018) (same).

increased use of detainers as an interior enforcement mechanism. Through detainers, immigration officials ask local law enforcement to prolong the detention of prisoners otherwise entitled to their release, to allow time for them to be taken into immigration custody. Early resistance to this program featured strong civil-rights-based critiques rooted in the concern that entangling local policing with immigration enforcement would contribute to racial profiling.¹⁶ But litigation around the legality of detainer-based detention has largely been grounded in questions of authority: Does the federal government have the authority to require local officials to comply with detainers?¹⁷ Do federal immigration officials have the authority to request such detentions?¹⁸ Do state officials have authority to make what amount to civil immigration arrests?¹⁹

It is worth noting that these sanctuary controversies have involved conflicts between governments at the state, federal, and local levels and encompass all permutations of contested authority – not just generating conflicts between the federal and state governments²⁰ or between the federal and local governments (whether counties²¹ or cities)²² but also engendering conflicts between state and local governments.²³

Lost in the much of the discussion was not only the substance of the Fourth Amendment whose requirement all governmental entities would be required to follow but also the underlying harms of the detainer practice, both for its propensity of racial bias and its tendency to cause increased detention and all of its attendant harms. The overall question of whether the increased use of detention and separation of people from their families or community was never addressed. While traditional concerns

¹⁶ See generally, Lasch, “Rendition Resistance”, pp. 154–163.

¹⁷ *Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014).

¹⁸ *Moreno v. Napolitano*, 213 F. Supp. 3d 999 (N.D. Ill. 2016).

¹⁹ *Santos v. Frederick County Bd. of Com'rs*, 725 F.3d 451 (4th Cir. 2013); *Lunn v. Commonwealth*, 477 Mass. 517, 78 N.E.3d 1143 (2017); *Cisneros v. Elder*, 490 P.3d 985 (Colo. App. 2020), as modified on denial of reh'g (17 December 2020), cert. granted in part sub nom. *Saul Cisneros v. Bill Elder*, in his Official Capacity as Sheriff of El Paso County, Colorado., 21SC6, 2021 WL 2188930 (Colo. 24 May 2021). One exception has been the focus of the Fourth Amendment and whether and how these detentions can pass the warrant and reasonable suspicion requirements. See Kagan, “What We Talk about When We Talk about Sanctuary Cities,” p. 1140.

²⁰ *Arizona v. United States*, 567 U.S. 387, 132 S. Ct. 2492 (2012).

²¹ For example, *Galarza*.

²² For example, *City of Chicago*; *City of Philadelphia*.

²³ For example, *El Cenizo* (lawsuit brought by cities and counties to enjoin operation of Texas's Senate Bill 4, requiring localities to comply with federal immigration detainer requests).

over loss of liberty in litigation require the balancing of government interests against individual loss of liberty and its harms, none of that discussion surfaced in the litigation around detainees.

3 Differentiating between an Authority and Power Framing from a Communal Values Framing

Kevin Johnson has asked, “[A]t their most fundamental level, how can racial profiling in [immigration] enforcement, massive detentions of non-citizens, and record levels of deportations not implicate civil rights concerns?”²⁴ The answer to this rhetorical question, as we have seen, is that at every turn, civil rights concerns about *how* authority is exercised have been subordinated to formal doctrines pertaining to *who* may exercise authority.

The doctrines that have been deployed by litigants and courts in these sanctuary battles avoid discussion of the values motivating communities to put into place the sanctuary policies in the first place. The absence of discussion of communal values is made visible most dramatically when political actors shift in their allegiance to the formalistic power doctrine depending on the issue at stake. And nowhere has this been more obvious than in the shifting allegiances regarding whether authority should be centralized (and supported by doctrines like preemption) or localized (and supported by doctrines like anticommandeering under the Tenth Amendment).²⁵

Former Attorney General Sessions, for example (like many Republicans), often threw his allegiance behind local control. For example, he has written that “[l]ocal control and local accountability are necessary for effective local policing. It is not the responsibility of the federal government to manage nonfederal law enforcement agencies.”²⁶ Similarly, he has touted local authority when it comes to the subject of removing Confederate monuments.²⁷ These positions, of course, reflect

²⁴ Johnson, “Immigration and Civil Rights: State and Local Efforts to Regulate Immigration,” pp. 635–636.

²⁵ Bulman-Pozen, “Preemption and Commandeering without Congress,” pp. 2042–2043.

²⁶ Att’y General Jefferson B. Sessions III, Memorandum for Heads of Department Components and United States Attorneys, *Supporting Federal, State, Local and Tribal Law Enforcement* (March 31, 2017).

²⁷ Shabad, “Jeff Sessions Says Administration Won’t Allow Extremist Groups to ‘Obtain credibility’.”

the classic Republican antifederal-government viewpoint. But when it comes to “sanctuary” policies, Sessions favors centralized federal authority, and characterizes local policymaking as “contrary to the rule of law.”²⁸ As Richard Briffault has noted, a “particularly salient feature of the new preemption has been the reversal of the presumed association of liberals and Democrats with big government and conservatives and Republicans with local control.”²⁹

Such shifting visions of authority were observed by Democratic member of Congress Zoe Lofgren at the outset of the hearings concerning the transformation of New Orleans from “Crescent City” to “Sanctuary City.” “It’s ironic,” Lofgren said, “that my republican colleagues today argue against local policies in favor of a top-down mandate from Washington.”³⁰

The only obvious consistency was whether or not the form of government supported increased immigration enforcement – when the federal government was “failing” to increase immigration enforcement, then local and state powers would be elevated, but when the federal government increased its focus on immigration enforcement, such as during President Trump’s administration, local and state authorities must be diminished. The use of structural arguments merely as tools to forward a specific policy agenda only fuels cynicism and debases questions of sovereignty itself. When the question of sanctuary is reduced to a question of authority and power, there is little surprise that the debate then turns on whether a specific policy serves a political agenda, rather than on a doctrinal basis. For instance, during the Obama administration, those who favored more immigration enforcement viewed Arizona’s policies as necessary in the wake of a federal government that failed to enforce immigration law, while during the Trump administration, any attempts by localities to prevent such enforcement were viewed as interference of a federal policy on immigration enforcement.

Additionally, the formalistic nature of the authority doctrine can be seen by examining the rules around the federalist doctrines. With respect to Tenth Amendment anticommandeering doctrine, for example, the simple rules of the doctrine are: (1) the federal government cannot “command the States’ officers ... to administer or enforce a federal regulatory

²⁸ For example, U.S. Dep’t of Justice, “Attorney General Sessions Delivers Remarks to Federal Law Enforcement Authorities about Sanctuary Cities.”

²⁹ Briffault, “The Challenge of the New Preemption,” p. 2025.

³⁰ *New Orleans: How the Crescent City Became a Sanctuary City – Hearing Before the H. Subcomm. on Immigration and Border Security of the H. Comm. on the Judiciary*, p. 4.

program”³¹ and (2) the federal government cannot “dictate[] what a state legislature may and may not do.”³² These rules apply without regard to the content of the federal command or dictation. Similarly, the separation of powers principle upon which much of the sanctuary defunding litigation was decided states simply that the Spending Clause power resides in Congress and not the executive branch, and must be exercised by the former and not the latter.³³ Again, this rule applies regardless of content. This doctrinal arena allowed judges and lawyers to avoid discussing or making judgments over policies and questions about the impacts and harms attendant to these policies.

Another way of observing the quality of the formalistic power doctrine is that the goal or resolution of the controversy is difficult to measure. With respect to the sanctuary defunding issues, if Congress could be persuaded to pass legislation embodying the administration’s antisanctuary funding conditions, the separation of powers doctrine would no longer apply. With respect to immigration detainers, if the federal administration could persuade (rather than command) localities to comply, the Tenth Amendment doctrine would then fall away.³⁴ However, if the discussion centered on the communal goals, such as the harm inflicted on these communities by these policies, a measurable impact can be discerned – the promotion of sanctuary policies would lead to less racial bias in local law enforcement and less harm inflicted on communities. Alternatively, for those favoring increased immigration enforcement, the underlying harms such as generalized crime reduction or increase in wages could also be fairly measured.

Some of the formalistic power-based doctrines upon which sanctuary contests have been decided may and have discussed community values that animate the policies. For example, the question of state and local arrest authority that has been at issue in the most recent rounds of

³¹ *Galarza v. Szalczyk*, 745 F.3d 634, 644 (3d Cir. 2014) (quoting *Printz v. United States*, 521 U.S. 898, 935 (1997)).

³² *City of Chicago v. Sessions*, 321 F. Supp. 3d 855 (N.D. Ill. 2018) (quoting *Murphy*, 138 S.Ct. at 1478).

³³ *City of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 530 (N.D. Cal. 2017) (citing *South Dakota v. Dole*, 483 U.S. 203, 206 (1987)).

³⁴ Persuasion by the federal government was not necessary in Texas, where the state legislature commanded Texas localities to comply. *City of El Cenizo, Texas v. Texas*, 890 F.3d 164, 191 (5th Cir. 2018) (“For better or for worse, Texas can ‘commandeer’ its municipalities in this way.”).

immigration detainer litigation³⁵ may include a discussion of the harms imposed by such policies. State laws regulating arrest authority may in fact be brokered by vibrant substantive debate, which involve a discussion of communal concerns over safety and inclusion.³⁶ Nonetheless, while formalistic power and federalist concerns can involve values and concerns that motivate the community, the courts and legal decisions (rather than the political ones) rarely touch upon or invoke them as part of the discussion. They are framed as collateral justifications rather than centralized as legal doctrines. Concerns such as displacing family units or encouraging racial bias become the background rather than animating the legal arguments involved.

4 Why Have Formalistic Empty Doctrines Carried the Day?

There are several possible explanations for the phenomenon just observed, the ubiquitous use of structural and formalistic doctrine in legal contests over sanctuary, rather than engaging with the animating concerns of the community.

The debate over authority in the immigration arena may be caused by a conspicuous vacuum of authority at the federal level. Even when a single political body controls both the Senate and the House of Representatives, along with the White House, little to no legislative action has been passed to reform an immigration system that is universally seen as broken. When President Biden entered office, he quickly proposed several legislative reforms to the immigration system; then when Republican support never materialized, he and the legislative leaders folded into his larger budget bill. Unfortunately, when the Senate Parliamentarian opined that the Democrats proposals for immigration reform should not be included in a budget bill (that would be immune from a Senate filibuster) legislative fixes for the immigration system has again seemingly faded at the time of writing this chapter.³⁷ As with many major divisive policy issues

³⁵ See, for example, *Lunn and Cisneros*.

³⁶ See, for example, *Cisneros* at ___ (noting that in 2006, Colorado enacted Senate Bill 90, “which required local law enforcement to report individuals to ICE when there was probable cause to believe they were present in violation of federal immigration law,” but then in 2013 “repealed that statute entirely, declaring that ‘the requirement that public safety agencies play a role in enforcing federal immigration laws can undermine public trust’”) (citations omitted).

³⁷ See Sullivan et al., “Democrats Quietly Scramble to Include Immigration Provision in Social Spending Bill.” See also LeVine, “Dems’ Last-Ditch Immigration Gambit Loses Steam.”

of a national character, which includes gun control, and climate change, Congress has been stymied from acting. This has left little room for policymaking other than executive action by the President. Unfortunately, there is little room for open debate and public input into executive decisions.

The lack of legislative movement by Congress has invited states and localities to begin to try and fill in the gaps.³⁸ With executive policies that lack public inputs, coupled with an increasing politicization of immigration, a motivated and engaged public has no choice but to push questions of local and state control over immigration. As state and local politics fill the vacuum left by the paralysis of Congress, questions over authority and structural formalism abound. While an important component, this is an incomplete picture, as questions over local and state control of immigration have existed since the founding of the nation.

The debate over sanctuary policies has been dominated by a narrative framing thirty years in the making – the narrative of immigrant criminality.³⁹ This narrative is “sticky” – it continues to persuade even in the face of empirical evidence to the contrary.⁴⁰ The power of the narrative lies in its exploitation of cognitive biases.⁴¹ And perhaps, the existence of this powerful narrative shaped the strategies available to advocates.

As immigrants became associated more with criminality, so did the immigration system become more associated with law enforcement systems. While some of these battles had been fought since the beginning of the nineteenth century, their relative salience grew in the 1980s and 1990s as the Drug War and Tough on Crime policies took root and consequently viewed the border as a gateway for drugs and crime. Even as some immigration advocates attempted to divorce themselves from the label of criminality,⁴² a broad consensus by political actors and the public existed that immigration rule violators should be treated under a criminal justice paradigm.

³⁸ See Bulman-Pozen, “Preemption and Commandeering without Congress,” pp. 2041–2042 and Briffault, “The Challenge of the New Preemption,” p. 1997.

³⁹ Lai and Lasch, “Crimmigration Resistance and the Case of Sanctuary City Defunding,” pp. 565–567.

⁴⁰ Gulasekaram et al., “The Importance of the Political in Immigration Federalism,” pp. 1452–1453.

⁴¹ *Ibid.*, pp. 1451–1452.

⁴² Sharpless, “Immigrants Are Not Criminals’: Respectability, Immigration Reform, and Hyperincarceration,” pp. 711–725.

In the case of immigration detainees, for example, the narrative of immigrant criminality supported the notion that local law enforcement, whose daily business was controlling crime, should take an active role in immigration enforcement. This premise was so powerfully internalized that local sheriffs unquestioningly complied with immigration detainees for years before the *Galarza* litigation exposed the notion that sheriffs were not *required* to do so. This factor mirrors the difficulty and slow pace of criminal justice reform in the country. Just as substantive criminal enforcement questions have been avoided by courts, leading to substantial frustration by local communities,⁴³ it may be much easier to convince courts that there were structural issues of enforcement by localities rather than trying to fight against the paradigm of criminality overall. The Tenth Amendment provided advocates with a tool to avoid the paradigm of immigrant-as-criminal and litigate out of its long shadow.⁴⁴ While this approach avoided the sticky narratives of immigrant criminality, it sidelined the value-laden controversy over the racial and historical basis for the criminality premise.

While one possible explanation for the choice of formalistic doctrines suggests a conscious attempt to avoid the more potent content supplied by the dominant antisansctuary narrative, another explanation is that those responsible for litigating sanctuary contests have had mixed motivations. In the sanctuary defunding contests, for example, localities fought to retain federal funding historically associated with policing practices not necessarily inconsistent with the dominant narrative.⁴⁵ Government attorneys charged with litigating may have been unable, through their own positional bias, to advance some of the critiques available.⁴⁶

Related to the idea that some “advocates” engaged in the sanctuary contests may have mixed motivations is the notion that those representing a “side” in such a contest may in fact lack the consensus necessary to shift the battle from the terrain of formalistic power and authority doctrine to a discussion involving harm reduction and equity. Advocates had to broker

⁴³ One such example can be seen with qualified immunity and its effect on police misconduct. See Schwartz, “The Case against Qualified Immunity,” pp. 1805.

⁴⁴ The Tenth Amendment may have been a particularly favorable choice of doctrine given how restrictionists had successfully “exploit[ed] the discourse of state and local rights for their particular policy ends.” *Ibid.*, p. 1453.

⁴⁵ Lai and Lasch, “Crimmigration Resistance and the Case of Sanctuary City Defunding,” pp. 590–601.

⁴⁶ *Ibid.*, p. 584 (noting that the failure to advance the normative positions available to counter the immigrant-as-criminal narrative “had the consequence of signaling a potentially weak commitment to earlier expressed values underlying sanctuary policies”).

compromise and find allies, many of whom may have been more easily persuaded by structural and resource concerns than ones rooted in harm reduction and destigmatization. In Denver, for example, while advocates unveiled an ambitious “sanctuary” ordinance rooted in antidiscrimination and equality principles, the ordinance that ultimately passed reflected deep compromises brokered during the legislative process.⁴⁷ The final version of the ordinance eschewed language that would invoke doctrines like equal protection, instead adhering to the tepid doctrines of sanctuary battles that had already been fought on normatively blanched fields.

Litigators must of course choose from the tools available to them, and the selections made in the contests over sanctuary may reflect nothing more than choices based upon the suitability of available doctrines rather than the advancement of possible narratives that would have better reflected communal values. The evolution of legal doctrines may have contributed to litigation that battled over structure and power in at least two ways.

First, doctrinal evolution may have resisted efforts to imbue doctrine with normative heft. Deborah Jones Merritt describes how this may have occurred with the Tenth Amendment. For much of the nation’s history, the Tenth Amendment – which reserves to the States and to the people those powers not delegated to the federal government in the Constitution –⁴⁸ was regarded as a simple “truism” signifying nothing more than the notion of a limited central government of enumerated powers.⁴⁹ But in its “revolutionary” 1976 decision in *National League of Cities v. Usery*,⁵⁰ the Supreme Court “promised a dramatic reshaping of federal-state relations.”⁵¹ This reshaping would bar the federal government from regulating “the States as States,” interfering with “essential ‘attributes of state sovereignty,’” and “obstructi[ng] ‘the States’ freedom to structure integral operations in areas of traditional governmental functions.”⁵²

Within a decade, though, the Court overruled the decision, abandoning the balancing test and its promise of decision-making that addressed the

⁴⁷ Murray, “Denver’s New Stance on Immigration Could Draw Blowback from the Feds – But Other Cities Have Gone Further,” p. 1.

⁴⁸ U.S. Const. amend. X.

⁴⁹ Merritt, “Republican Governments and Autonomous States” p. 818.

⁵⁰ 426 U.S. 833 (1976).

⁵¹ Merritt, “The Guarantee Clause and State Autonomy” p. 11.

⁵² *Ibid.*, p. 12–13 (citations omitted).

consequences and harms arising from discrimination and unequal treatment and instead returned the doctrine to a neutered state only able to address obvious or blatant forms of discrimination.⁵³

Second, doctrinal evolution may have drained previously existing normative content. Areas of law, such as equal protection, that we might initially think of as directly involving questions of communal identity and harm have increasingly grown more ineffectual and drained of its ability to reflect communal concerns. The introduction of a requirement requiring proof of animus,⁵⁴ the refusal to examine more closely government actions,⁵⁵ and the emphasis on formal equality rather than antisubordination⁵⁶ all contributed to the neutering of equal protection as a constitutional protection. By 1996, Reva Siegel declared that “[t]his body of constitutional law once served to dismantle status-enforcing state action, but, ... the doctrines now serve to rationalize, rather than scrutinize, the new, facially neutral forms of status-enforcing state action they have helped bring into being.”⁵⁷ In 2009, Kenji Yoshino announced “the end of equality doctrine as we have known it,”⁵⁸ and in 2012, Ian Haney-López declared that “equal protection will not again advance racial justice until colorblindness and malicious intent are overthrown.”⁵⁹

This inability of the equal protection doctrine as a legal and judicial tool to address real concerns over racial discrimination and its effects can be seen in stark relief following the murder of George Floyd. The doctrinal evolution of a Constitutional amendment tasked with making real the sacrifices and values fought over during the Civil War had been unable to prevent the most overt and violent examples of racial bias in the killing of black men by police.

While all of the foregoing may help account for the absence of normatively charged litigation around sanctuary, mystery still remains. This is particularly so in light of the alacrity with which other aspects of the administration’s immigration platform have been challenged through content-rich doctrinal theories. The Muslim ban, for example, was immediately challenged as having been “motivated by animus and a desire to

⁵³ *Ibid.*, p. 14 (citing *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)).

⁵⁴ *Washington v. Davis*, 426 U.S. 229 (1976).

⁵⁵ Yoshino, “The New Equal Protection,” pp. 755–763.

⁵⁶ See Ehrenreich and Siebrase, “Breastfeeding on a Nickel and a Dime,” p. 76.

⁵⁷ Siegel, ““The Rule of Love”: Wife Beating as Prerogative and Privacy,” p. 2195.

⁵⁸ Yoshino, “The New Equal Protection,” p. 748.

⁵⁹ Haney-López, *Intentional Blindness*, p. 1876.

discriminate on the basis of religion and/or national origin, nationality, or alienage.”⁶⁰ More recently, advocates have successfully challenged the federal criminal statute on illegal re-entry as motivated by racial animus and disproportionately impacting communities of color.⁶¹ Likewise, the decision to end President Obama’s Deferred Action for Childhood Arrivals program was attacked as violative of equal protection,⁶² with advocates labeling the decision “a culmination of President’s Trump’s oft-stated commitments ... to punish and disparage people with Mexican roots.”⁶³ In light of such claims it is not clear that the foregoing represents a complete or convincing explanation for the terms on which sanctuary has been litigated.

5 The Problem with a Formalistic Power Doctrine

Why is the application of formalistic federalism a poor way to resolve sanctuary issues? The two most obviously concerning results of the subversion of doctrines that reflect communal concerns in favor of normatively blank ones are: First, that the legal debates in which we engage do not reflect community concerns, so in fact we never even discuss topics of great normative importance, and second, that the legal decisions these contests produce are also unmoored from the concerns of the communities that created the policies in the first place. There are less immediately obvious consequences that are nonetheless of great importance. Two that are discussed here are the contribution to a growing ahistoricism and the generation of false equivalencies.

5.1 *We Don’t Argue about What We Mean to Be Arguing About*

Effective legal arguments take the form of narratives, taking advantage of “humankind’s basic tool for giving meaning to experience or

⁶⁰ *State of Hawai’i, et al. v. Donald J. Trump, et al.*, No. 1:17-cv-00050, Document 64 (“Second Amended Complaint for Declaratory and Injunctive Relief”) at 32 (D. Haw. Mar. 8, 2017).

⁶¹ *United States v. Carrillo-Lopez*, 2021 WL 3667330 (D. Nev. Aug. 18, 2021).

⁶² *Nat’l Ass’n for the Advancement of Colored People v. Trump*, 298 F. Supp. 3d 209, 223 (D.D.C. 2018), *adhered to on denial of reconsideration*, 315 F. Supp. 3d 457 (D.D.C. 2018) (noting equal protection claim).

⁶³ *States of New York, Massachusetts, et al. v. Donald Trump et al.*, No. 1:17-cv- 05228, Document 1 (“Complaint for Declaratory and Injunctive Relief”) at 2–3, 52 (E.D.N.Y. Sep. 6, 2017).

observation.”⁶⁴ Through narrative, advocates frame events for legal decision makers, and the framing choices that advocates make define the “trouble” that must be addressed, cast actors in the story in the roles of champion and villain, and generate expectations as to how the trouble will be resolved.⁶⁵

But legal doctrine, of course, can constrain the narrative choices available to advocates and consequently the community.⁶⁶ The law serves as the setting for advocates’ narratives, describing the terrain on which narrative contests must take place.⁶⁷ Formalistic power doctrine narrow narrative possibilities and consequently deprive legal contests of normative arc.⁶⁸ In the battle that took place in the Supreme Court over Arizona’s SB1070, for example, the framing of the issue as one of preemption contributed to the complete absence of discussion of racial profiling.⁶⁹ Similarly, in the sanctuary defunding cases, the “perceived challenges of introducing a racial justice narrative in the litigation context” may have contributed to the absence of nondiscrimination narratives that might have been expected given the sanctuary jurisdictions’ explicit pronouncements along these lines.⁷⁰ The discussion of local or state power versus federal power obscured the harms that increased enforcement brought to the communities that were trying to avoid them.

These observations are consistent with Kevin Johnson’s prediction that the *Arizona* case would not be decided on civil rights grounds and thus implicate his warning as to the consequences of embracing legal doctrine that stifles civil rights narratives:

The nation needs to face up squarely to the fact that race and the civil rights of people are at the core of the modern debate over immigration. Until it does, we will not be able to fully understand and address what is at stake in

⁶⁴ Alper et al., “Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial,” p. 5; see also, generally, Delgado, “Storytelling for Oppositionists and Others: A Plea for Narrative” and Alfieri, “Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative.”

⁶⁵ cf. Stone, *Causal Stories and the Formation of Policy Agendas*.

⁶⁶ See, for example, Yoshino, “Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays,” pp. 1802–1811.

⁶⁷ Olivares “Narrative Reform Dilemmas.”

⁶⁸ See Sarat, “Narrative Strategy and Death Penalty Advocacy,” p. 356.

⁶⁹ See Lasch, “Immigration Detainers after Arizona,” pp. 648–654.

⁷⁰ Lai and Lasch, “Crimmigration Resistance and the Case of Sanctuary City Defunding,” pp. 602–603.

the continuing national discussion of immigration reform and U.S. immigration law and its enforcement.⁷¹

5.2 *We Don't Decide What Needs to Be Decided*

Closely related to the issue of narrative suppression and selection is its natural consequence – when legal doctrine stifles or diverts debate over “what is at stake,” the resulting legal decisions of course will not contribute to discussions that directly impact communities of concern.⁷² Just as the development of constitutional norms is stifled by doctrines imposing procedural prerequisites to the litigation of substantive constitutional law,⁷³ the substitution of authority-based doctrines for doctrines that reflect communal concerns prevents courts and other decision-making bodies from advancing our understanding of how the Constitution addresses “what is at stake.”

In the sanctuary battles, the principal sanitizing of a communal concern has been the removal of race from discussions as to the legality of sanctuary or antisanctuary policies. When a locality creates a sanctuary policy, it does so to protect the locality’s community, namely a city or county. When a state does so, it also is concerned with the residents of the state itself. Race as a communal concern goes to the heart of a community’s identity, and how a community defines itself. The Court’s decision in *Arizona*, for example, was noteworthy for its avoidance of race – the only mention of race in the Court’s opinion was to cite the “show me your papers” portion of SB 1070 (the only provision the Court upheld against challenge) as limiting Arizona officers from “consider[ing] race, color or national origin ... except to the extent permitted by the United States [and] Arizona Constitution[s]” and requiring the provision to be implemented so as to “protect[] the civil rights of all persons”⁷⁴ The central

⁷¹ Johnson, “Immigration and Civil Rights: State and Local Efforts to Regulate Immigration,” pp. 612.

⁷² *Ibid.*

⁷³ See, for example, Liebman, “More Than ‘Slightly Retro’: The Rehnquist Court’s Rout of Habeas Corpus Jurisdiction in *Teague v. Lane*,” p. 575; Shay and Lasch, “Initiating a New Constitutional Dialogue: The Increased Importance Under AEDPA of Seeking Certiorari from Judgments of State Courts,” p. 228; Lochner, “Qualified Immunity, Constitutional Stagnation, and the Global War on Terror,” p. 852.

⁷⁴ *Arizona*, 567 U.S. at 411. Justice Alito, in his separate opinion, adverted to “civil-liberty concerns” but only in the context of a discussion of Fourth Amendment concerns that did not explicitly address race. *Arizona*, 567 U.S. at 449 (Alito, J., concurring in part and dissenting in part).

concern about empowering police to demand proof of lawful presence in the United States was the potential for racial profiling. By relegating race to this spare summary, and moving immediately to the Constitution's structural framework, not only did the Court's decision proceed on grounds inhospitable to the litigation of race discrimination, but it also swept such concerns aside.

The Third Circuit decision in *Galarza v. Szalczyk*,⁷⁵ which was groundbreaking in the litigation over immigration detainers, is another demonstration of how race disappears in the cold light of authority-based doctrines. *Galarza* involved a United States citizen, Ernesto Galarza, who was detained by Lehigh County (Pennsylvania) on the basis of a detainer.⁷⁶ Because the issue before the Third Circuit concerned whether the federal government could command the county to detain Galarza, the relevant doctrine applied by the court included the constitutional-avoidance canon of statutory construction, and the Tenth Amendment's anticommandeering doctrine.⁷⁷ Nowhere mentioned was the racial profiling claim brought by Galarza – a claim that the Lehigh County officers involved in his detention, because of his Hispanic ethnicity, had either reported him to federal immigration officials despite knowing of his citizenship or failed to consult available identity documents that would have demonstrated his citizenship.⁷⁸ The district court had upheld this claim against a motion to dismiss based on qualified immunity,⁷⁹ but these claims and facts were deemed irrelevant to the authority-based doctrines on which the Third Circuit's decision rested. And yet, there is no debate that concerns over racial equity and community inclusion were animating the fears of the community and motivating attempts to disentangle local law enforcement from immigration enforcement.

5.3 Formalistic Power Doctrines Contribute to Ahistoricism

Sanctuary debates that rely on arguments sanitized of racial content have contributed to divorcing the legal context from its racially inflected history. Reva Siegel has described as “status regime modernization”⁸⁰ a

⁷⁵ 745 F.3d 634 (3d Cir. 2014).

⁷⁶ *Ibid.*, pp. 636–638.

⁷⁷ *Ibid.*, p. 639–645.

⁷⁸ *Galarza v. Szalczyk*, 10-CV-06815, 2012 WL 1080020, at *15–17 (E.D. Pa. Mar. 30, 2012), vacated and remanded, 745 F.3d 634 (3d Cir. 2014).

⁷⁹ *Ibid.*

⁸⁰ Siegel, “The Rule of Love”: “Wife Beating as Prerogative and Privacy,” pp. 2178–2179.

phenomenon whereby “status relationships [are] translated from an older, socially contested idiom into a newer, more socially acceptable idiom.”⁸¹ Siegel’s description of race relations in the Reconstruction period shows that status regime modernization can be effectuated by a transition from content-rich to contentless doctrine:

In this era, the legal system continued to draw distinctions on the basis of race and gender, but it now began to emphasize formal equality of entitlements in relationships once explicitly organized as relationships of mastery and subordination, and to repudiate openly caste-based justifications for such group-based distinctions as the law continued to enforce. While the American legal system continued to distribute social goods and privileges in ways that favored whites and males, it now began self-consciously to disavow its role in doing so. The new interest in rule-equality and the energy devoted to explaining law without recourse to overtly caste-based justifications mark an important shift in the mode of regulating race and gender relations, a deformalization and concomitant modernization of status law.⁸²

This transition from antisubordination to formal equality has been seen more recently in the adoption of a “colorblind” approach to equal protection doctrine, which scholars have criticized for its ahistoricism.⁸³

Sanctuary debates are deeply connected to this phenomenon and susceptible to a similar ahistoricism. Just as the “Southern strategy” that swept Nixon into power in the aftermath of the Civil Rights Movement depended on a “racially sanitized” law-and-order rhetoric,⁸⁴ accompanied by an emphasis on states’ rights,⁸⁵ even so have these same moves been replicated in the sanctuary debates. The immigrant-as-criminal narrative provided the ability for a legal shift from explicit subordination to facially neutral crime-control strategies.⁸⁶ With an acceptance of immigration control as merely a form of crime control, the racial

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ For example, Powell, *Rhetorical Neutrality: Colorblindness, Frederick Douglass, and Inverted Critical Race Theory*; Obasogie and Newman, “Black Lives Matter and Respectability Politics in Local News Accounts of Officer-Involved Civilian Deaths: An Early Empirical Assessment,” pp. 550–551; Barnes, “The More Things Change: New Moves for Legitimizing Racial Discrimination in a ‘Post-Race’ World,” p. 2102.

⁸⁴ Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, p. 42.

⁸⁵ Haney-López, *Dog Whistle Politics: How Coded Racial Appeals Have Reinvented Racism and Wrecked the Middle Class*, pp. 56–57.

⁸⁶ See, generally, Lasch, “Sanctuary Cities and Dog-Whistle Politics”; Lai and Lasch, “Crimmigration Resistance and the Case of Sanctuary City Defunding,” pp. 565–567.

implications of the former can be ignored by legal actors in deciding the legality and constitutionality of sanctuary policies. And the emphasis on states' rights has characterized both pro-sanctuary and antisantuary positions.

A particular corner of the debate, in which sanctuary is compared to antebellum "nullification" of federal authority, demonstrates how power doctrines rooted in the allocation of state and federal authority obliterate and reshapes the connection between law and history. In a February 2017 opinion piece in *the Wall Street Journal*, Karl Rove suggested that cities and counties that seek to disentangle themselves from federal immigration enforcement are morally and politically equivalent to the antebellum South.⁸⁷ Sanctuary cities are just like 1832 South Carolina, Rove argued, because they "believe they can declare a federal law null and void within their jurisdictions."⁸⁸ In April 2017, the White House renewed this rhetoric. After a federal court enjoined the President's executive order attempting to defund sanctuary cities,⁸⁹ the White House issued a statement claiming that sanctuary cities "are engaged in the dangerous and unlawful nullification of Federal law in an attempt to erase our borders."⁹⁰ A year later, Attorney General Sessions made the same argument while castigating sanctuary jurisdictions during remarks to California law enforcement officers. Sessions declaimed: "There is no nullification. There is no secession. Federal law is 'the supreme law of the land.' I would invite any doubters to Gettysburg, and to the graves of John C. Calhoun and Abraham Lincoln."⁹¹

Putting aside the question of whether sanctuary policies are accurately characterized as violating federal law, raising the specter of southern nullification to attack sanctuary was wrong as a matter of history. Scholars responded to Rove's piece and to Sessions's claimed connection to the tradition of Abraham Lincoln, by pointing out that "those driving sanctuary-city policies are the heirs to an entirely different states' rights

⁸⁷ Rove, "Trump and the 21st-Century Nullifiers – What 'Sanctuary Cities' Have in Common with 1832 South Carolina."

⁸⁸ *Ibid.*

⁸⁹ *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497 (N.D. Cal. 2017), *reconsideration denied*, 267 F. Supp. 3d 1201 (N.D. Cal. 2017), *appeal dismissed as moot sub nom. City & Cty. of San Francisco v. Trump*, 17-16886, 2018 WL 1401847 (9th Cir. Jan. 4, 2018).

⁹⁰ The White House, Statement on Sanctuary Cities Ruling (Apr. 25, 2017).

⁹¹ U.S. Dep't of Justice, "Attorney General Sessions Delivers Remarks at the 26th Annual Law Enforcement Legislative Day Hosted by the California Peace Officers' Association."

tradition – one based in the North that helped to topple slavery, thanks to its resistance to immoral laws.”⁹²

It was the formalism of legal doctrine that facilitated the historical misdirection deployed by Rove, the White House, and Attorney General Sessions, whose pronouncements betrayed an understanding of history that mirrored the legal doctrine pertaining to federalism – admitting no normative dimension in defiance of both history and common sense.

5.4 *Formalistic Power Doctrines Flatten the Normative Universe, Creating Dangerous False Equivalencies*

Just as the absence of communal values in authority-based doctrines encourages false historical analogies, it also encourages false equivalencies in our understanding of the present. For example, while state-level sanctuary and pro-immigration enforcement state and local actions are based on a similar view of authority, they nonetheless have clearly divergent normative aims.⁹³ Sanctuary legislation frequently cites antismigration and racial equality rationales as the basis for sanctuary policies. Antisanctuary legislation tends to cite the need to reduce criminality and other law and order goals, which themselves are racially contested. Yet, these normative justifications tend to disappear once relocated in litigation. The absence of this normative direction in the legal doctrine facilitates the equalizing of differently motivated sanctuary and antisanctuary legislation. The Fifth Circuit’s decision upholding Texas’s SB4 – antisanctuary⁹⁴ legislation prohibiting Texas localities from adopting policies to disentangle local law enforcement from federal immigration enforcement – provides an example.

The court addressed the claim that Texas was precluded from enacting such state-level legislation by the doctrine of field preemption. Its discussion applying this contentless doctrine was predictably devoid of normative substance.⁹⁵ But furthermore, the court also engaged in false

⁹² See Giesberg, “Jeff Sessions Is Wrong. Sanctuary-City Advocates Aren’t Like Secessionists. They’re Like Abolitionists.” Baker, “A Brief History of Sanctuary Cities”; Trainor, “What the Fugitive Slave Act Can Teach Us about Sanctuary Cities”; Lasch, “Resistance to the Fugitive Slave Act Gives Sanctuary Cities a Model for Resistance”; Lasch, “Rendition Resistance”, *supra* note 16.

⁹³ Rodriguez, “Enforcement, Integration, and the Future of Immigration Federalism,” pp. 514–521.

⁹⁴ City of El Cenizo, *Texas v. Texas*, 890 F.3d 164, 178 (5th Cir. 2018).

⁹⁵ *Ibid.*, p. 177 (analyzing whether “SB4 and the federal statutes involve different fields”).

equivalencies because of the normatively empty terrain on which it proceeded. Describing the local ordinances that SB4 intended to displace as “regulat[ing] whether and to what extent the local entities will participate in federal-local immigration enforcement cooperation,” the court said these ordinances had precisely “the same goal” as SB4 had on a state level.⁹⁶ Both sets of legislation – local and state – attempted to “regulate ‘federal-local cooperation in immigration enforcement.’”⁹⁷ Because they legislated in the same field, if SB4 were field preempted, “so too [would be] the local ordinances”⁹⁸

A recent decision demonstrates how precisely the same contentless doctrine yields an opposite result. While Texas cities were forced to yield to state authority per SB4, in California, a court held that localities could not be subordinated to California state legislation the court deemed “an unconstitutional invasion into the rights of the city” to run its own police force and jail in accordance with its own ordinances and charter.⁹⁹ Though the ruling was from the bench, the court’s acquiescence to Huntington Beach’s argument that the California Values Act is “commandeering”¹⁰⁰ of municipal authority smacks of a false equivalency rooted in normatively empty authority-based doctrines. (By contrast, the decision upholding Texas’s SB4 had concluded that “[f]or better or for worse, Texas can ‘commandeer’ its municipalities in this way”).¹⁰¹

6 Conclusion

Using the term “sanctuary” to describe local policies designed to impact immigration enforcement has been critiqued and rejected by a spectrum of commentators. For example, in creating a policy to stop honoring ICE detainers, political leaders seeking distance from the immigrant-as-criminal narrative, have labeled these policies as “Fourth Amendment” policies. Those who seek more immigration enforcement continue to wield the label of “sanctuary” as a pejorative, attempting to associate the term with lawlessness.¹⁰² The evolution of a term that by definition

⁹⁶ *Ibid.*, p. 178.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ DeBenedictis, “California Can’t Enforce Sanctuary Law against Charter Cities”.

¹⁰⁰ *Ibid.*

¹⁰¹ *El Cenizo*, 890 F.3d at 191.

¹⁰² Lind, “Sanctuary Cities, Explained.”

involves safety, peace, and freedom from persecution to one that invokes lawlessness and increased crime is partly made possible by narratives and legal doctrines used in court when examining immigration law generally. Litigation over immigration policy generally is dominated by authority and structural questions. As demonstrated in this chapter, this tendency holds true when questions over sanctuary policies arise.

Modern litigation over sanctuary has devolved into questions of authority and power. This devolution has resulted in sidelining why communities have adopted sanctuary policies in the first place. Questions of authority and power manifest in legal arguments over whether and how federal supremacy over immigration clash with state sovereignty issues embodied in the Tenth Amendment or other structural concerns in the Constitution, such as separation of powers. These structural framings again avoid the term “sanctuary” in favor of questions of authority and the clash of governments. But sanctuary, or the desire to keep people safe from harm has always been a consistent and unavoidable reason that these policies exist in the first place. Advocates for sanctuary may have a myriad of motivations, but principally they want to avoid racial bias and discriminatory treatment of their community members and they want to protect their community members from the harms that are inflicted by immigration detention and deportation. By contrast, as this chapter sets forth, litigants and courts have largely set aside such concerns and instead focused on legal doctrines that are largely out-of-reach of the public, perpetuating the myth that immigration policy generally need not be held accountable to constitutional mandates on racial equity or balancing government interests against the civil liberties of individuals.¹⁰³

By framing the issues around the question of authority and not over the underlying question over whether such policies are either necessary to protect the community from racialized policing or whether the harms of enforcement policies themselves can be justified by government interests, there is an inherent acceptance that those concerns are not subject to litigation at all. The absence of legal discourse over whether these policies are in fact racialized furthers the notion that the racial impact of those policies are irrelevant to their constitutionality. Similarly, if there is no discussion over the harms of increased enforcement, which includes family separation, public health concerns, and detention and deportation, then

¹⁰³ This belief usually arises out of an expanded notion of what the “plenary power” doctrine established by the Chinese Exclusion Cases actually means. See Rosenbaum, “(Un)equal Immigration Protection,” pp. 243–253.

it creates an assumption that such government actions are immune from constitutional scrutiny.

Not every litigation challenge or defense to sanctuary needs to reflect concerns over community values. But immigration policy itself is an offshoot of community concerns, it helps shape the United States as a community, and its implementations are almost always justified as a means to either preserve the identity of the nation as a whole or as a way to protect it from harm. The lack of discussion and debate over these concerns involving sanctuary policies, whether by cities, counties, or states, creates a vacuum of public understanding. If the Government need not justify or establish what harms that an immigration policy is purported to address, then immigration policy becomes increasingly more undemocratic.

This is not to say that litigation should be viewed as a means to *make* policy. Most sanctuary policies and its corollary antisanctuary or “local immigration enforcement” policies have gone through a political process prior to litigation. At times the political process may involve a local or state-wide legislative process, or it may also involve political leaders issuing changes in policies or programs. Litigation however does play an important role in making sure such policies conform to constitutional and legal requirements. Modern litigation around sanctuary has focused only on the mandates relating to structure and sovereignty. What has been missing in sanctuary litigation has been the constitutional and legal mandates intended to protect against bias and undue harm imposed by the government. Legal principles of equitable treatment and the balancing of harms by government policies are especially needed given how sanctuary and immigration policies can involve important counter-majoritarian principles. Sanctuary policies seek to protect residents, especially those who are not able to fully participate politically. Moreover, the communities that are seeking to create these policies are often smaller political entities subsumed under larger ones – cities versus counties, counties versus states, and of course states versus the federal government. Litigation narratives that reflect the desire to provide safety and equitable treatment are important, not just for those who face immigration enforcement but also the larger public to understand how immigration enforcement policies impact our local communities.

Nationality, Citizenship Law, and Questions of Scale

Colonial and Postcolonial Considerations*

RADHIKA MONGIA

In his important work *The Production of Space*, Henri Lefebvre articulates a wide-ranging and persuasive argument for the social production of space. Space, for Lefebvre, is both a constitutive dimension of social relations, even as it is constituted through such relations that are embodied in an array of institutions, practices, and ideologies. The modern world is composed of multiple social spaces and multiple scales that are inherently historical and processual. Diverging from notions that think of space in terms of nested, concentric circles, where “local” space is contained within and subsumed by “higher” level space, such as regional, national, and global, for Lefebvre “[s]ocial spaces interpenetrate one another and/or superimpose themselves upon one another.”¹ Any given spatial scale is, in important ways, produced through the relations that characterize such interpenetrations and superimpositions and no spatial scale has an identity independent of such relations. While each scale and spatial arrangement has unique, historically variant qualities, each is, in a sense, simultaneously also multiscalar, intertwined with other spatial scales. Moreover, any given spatial scale is not a smooth and homogeneous formation, but “hypercomplex” and contradictory, shot through with unevenness.² Thus, Lefebvre’s approach, as Manu Goswami writes, works “[a]gainst conceptions of space as a pre-given container, a physical-geographical location, a neutral backdrop of social relations,

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¹ Lefebvre, *Production of Space*, p. 86, emphasis in original.

² Ibid., p. 88.

an ontological horizon, and a discursive effect.”³ Instead, his work urges us to attend to the multiform modalities – including the institutions, practices, representations, and ideologies – through which social space is produced. However, spatial analysis, Mariana Valverde warns, can often adopt a static perspective, lacking, or certainly muting, a temporal dimension.⁴ Unlike such static conceptions, Lefebvre’s approach is resolutely historical, concerned not only with multiple social spaces but also with the coexistence and coimbrication of multiple temporalities. In other words, Lefebvre’s insights invite us to temporalize social space and historicize scale-making projects.

Questions of scale and of social space are of increasing interest to scholars of migration, ranging from calls for multiscale analysis to the “local turn” in understanding migration governance leading to greater attention to the urban as an important site of political activity and scale of analysis.⁵ One trajectory of this work shows how certain scales – such as the local and the urban – while always important, have been neglected in migration studies; another trajectory shows how these scales are currently emerging as significant to migration governance and to understanding the everyday reality of migrant lives. Contributing to this conversation on scale in migration studies, in this chapter I attend to space–time formations by focusing on the scale-making capacity of law, both historically and in the present, by pursuing two interrelated explorations. First, I seek to historicize the very production *and* disappearance of certain scales. In particular, through an analysis of the legal regulation of colonial Indian migration in the nineteenth and early twentieth centuries, I show how, in the early twentieth century, an imperial sociolegal scale was gradually rendered unintelligible, even as a national sociolegal scale gained ascendance. Addressing legal debates that circulated between India, England, Canada, and South Africa – all part of the unwieldy, legally differentiated, and racially stratified British empire – I show how migration law and regulation in the early twentieth century were an important aspect of the wider, uneven, and fraught historical transformation from

³ Goswami, *Producing India*, p. 34.

⁴ Valverde, “Jurisdiction and Scale.”

⁵ On multiscale analysis, see Çağlar and Glick Schiller, *Migrants and City-Making*; on the “local turn” in migration governance, see Zapata-Barrero et al., “Theorizing the ‘Local Turn’ in a Multi-level Governance Framework of Analysis”; on the shift toward the urban as a scale of analysis and political activity, see Darling and Bauder, *Sanctuary Cities and Urban Struggles*.

an imperial scale to a national scale, from empire-states to nation-states. To be sure, the varied national liberation movements were the primary agents of this transformation. However, these movements did not, by themselves, dictate the precise contours and “contents” of national space and national scale. To gain an appreciation for the specificities of any scale – for instance, the imperial, the national, or the urban – we must attend to the processes, practices, and institutional forms through which it is produced and constituted. I show how contingent historical events positioned migration law and governance as significant for the production of national scale and of national identity by analyzing two distinct processes of nationalization with respect to Indian migration to South Africa and to Canada.

The domain of migration law and governance, as well as the proximate and overlapping issue of citizenship, are increasingly vital aspects of simultaneously reproducing and redefining national space. Thus, whereas the first set of explorations I pursue outline how the national scale becomes significant with respect to migration in the early twentieth century, I next turn to an analysis of the reworking of national scale in our current moment. I share Neil Brenner’s view that no scale preexists the practices and institutional forms through which it is constituted. As such, Brenner suggests that explorations of scale and rescaling are best approached as explorations of processes, where scales are in constant in flux and are constantly being remade.⁶ As one instance of such a reconstitution of the national scale, I examine the complex dynamics of the changing migration and citizenship regime in postcolonial India. Since the mid-1980s, the documentation and acquisition of citizenship in India have undergone several radical shifts, steadily moving away from a broad *jus soli* definition to a narrow *jus sanguinis* conception. While the central government maintains sole jurisdiction over the legal definition of citizenship – and thus the definitions of the “foreigner,” the “migrant,” and the “illegal migrant” – these changes have been markedly shaped by demands emanating from the northeastern state of Assam that has seen a large number of Bangladeshi migrants. I provide a sketch of these demands to analyze how subnational or regional forces are embedded in the processes through which national space and national scale are reproduced and transformed. Though the empirical situations I study here are separated by a century and more, both focus

⁶ See Brenner, “The Urban Question and the Scale Question” and “A Thousand Leaves.”

on the centrality of migration and citizenship law to the making and recalibration of (national) scale.

Such issues might seem some distance from theorizing local migration law and governance, the concern of this volume; however, they participate in the conversation assembled here in two ways: First, and most obviously, like other contributions to the volume, this chapter is concerned with describing and analyzing the interpenetration and transformation of scales. However, where several other chapters foreground the local scale – where “local authority,” “local government,” and “local administration” are “used synonymously to designate the lowest tier of government in any national legal setting”⁷ – to consider the forms of local migration law and governance, including how they are shaped by and reshape national and supranational scales, the “local” in my examination is not the “lowest tier of government,” but either a sub-imperial polity within empire or the state/province within a national setting. Put otherwise, I mobilize a different understanding of the “local.” Second, in charting how the regulation of colonial migrations was articulated to the emergence of national space, national scale, and, indeed, national identity, I seek to complicate and enrich the usual critiques of methodological nationalism. In general, the critique, particularly with reference to scholarship on migration, outlines how the adoption of an unreflexive national framework obstructs our ability to apprehend practices and processes that transcend and exceed the boundaries of the nation-state.⁸ Interrogating the national frame has led to an important body of scholarship described as transnationalism. However, the transnational approach does not adequately address the historical *emergence* of the national and the place of migration – especially colonial migration – in constituting national space and scale.⁹ Likewise, a robust historical dimension is sometimes lacking in the more recent literature on the “local turn,” which also often forgoes its necessary imbrication with other scales. Thus, the kind of historicizing effort I undertake enables us to concretely grasp the social production of space, to clarify the scale-making capacity of the law, and to reflect on the perils and possibilities of emergent legal forms (such as changes in citizenship regimes).

⁷ See Baumgärtel and Miellet, introduction to this volume.

⁸ For an influential early statement, see Glick Schiller et al., “From Immigrant to Transmigrant.”

⁹ For a further development of these arguments, see Mongia, “Interrogating Critiques of Methodological Nationalism.”

1 Colonial Considerations of Rescaling: From Imperial Space to National Space

1.1 Migration Governance and/in Imperial Scale: The Nineteenth-Century Genesis

Systematic state regulation of colonial Indian migration saw its genesis with the 1834 British abolition of slavery in slave plantation colonies. Abolition caused plantation owners in Mauritius and the Caribbean to recruit labor from India, which was then becoming more extensively and more tightly incorporated into the British empire. In its early stages, the migration was not subject to any state oversight; this, however, was short-lived. Stringent criticism of the practice was soon voiced by the British and Foreign Anti-Slavery Society and other parties, who saw the movement of Indian labor as “a new system of slavery.”¹⁰ To enable the continuation of Indian migration, the Court of Directors of the East India Company (in charge, at the time, of British administration in India)¹¹ sought to institute a system of state oversight to address these criticisms. However, as such intervention “had no foundation in any existing law,”¹² it led to an extended debate, beginning in 1835 and not resolved till 1842, between state, quasi-state, and nonstate participants that moved between England, India, Mauritius, and the Caribbean.¹³ The orienting frame, spatial scale, and economic imperatives of these debates were imperial and not (proto)national. The final resolution, that required potential emigrants to consent to a state-authored and state-authorized labor contract, produced a lasting paradox: The state regulated “free” migration precisely in order to ensure that it was “free.”

Significantly, state oversight largely covered only the migration of Indian labor to former slave colonies of the British, French, and Dutch empires, what historians refer to as “indentured migration.” The law did not encompass other migration flows, including the far larger movement of people operating under the *kangani* and *maistry* systems – informal,

¹⁰ For details on the objections of the British and Foreign Anti-Slavery Society, see Tinker, *A New System of Slavery* and Kale, *Fragments of Empire*.

¹¹ For an account of the sovereign and other powers vested in (and divested from) the East India Company, see Stern, *The Company-State*.

¹² Secretary of State for the Colonies to Law Commissioners, India, May 25, 1836, quoted in Edward Lawford, Solicitor to the East India Company, to David Hill, June 12, 1838, *Papers Respecting the East India Labourers' Bill*, p. 2, India Office Library and Records.

¹³ For an extended analysis of the debates and the cessation of Indian migration before it was resumed under state authorization, see Mongia, *Indian Migration and Empire*, chap. 1.

self-organized local recruitment networks – that oversaw migration streams to Ceylon (Sri Lanka) and to various locales in South-East Asia.¹⁴ Thus, the imperial scale that the regulations worked within and helped produce was not a smooth, homogeneous, and frictionless legal space. Rather, to use Lauren Benton's term, it was "lumpy,"¹⁵ allowing for a multiplicity of legal forms, ranging from practices governed by state law to those that came under the purview of what we can call forms of customary law. Despite its lumpy formation, however, for close to a century, the indenture system generated an ever-expanding and minute set of laws and rules, that took shape through dense and complex webs of intracountry and transcontinental correspondence and debate between a host of metropolises, colonies, dominions, territories, and villages that were part of the British, Dutch, and French empires.¹⁶ This was emblematic of what Tony Ballantyne has called the "web-like" character of imperial space, which took shape through connections, circulations, and interdependencies between the metropole and a given colony and *also* placed various colonies in relation to each other.¹⁷ It was not only legal forms – on migration and other aspects of life – that helped produce imperial space. The subjective experience of migration and of quotidian life were also, in time, variously shaped by and embedded in notions of an imperial subjectivity, concretely embodied in the formal, legal category of the "British subject."

In other words, the regulation of Indian indentured migration took shape within and helped produce imperial space and scale. Lumpy and fractured, the jurisdiction of imperial *emigration* regulation to destinations outside India related only to a certain form of labor, namely, indentured laborers who agreed to contracts prior to departing, and who, initially, moved only to former slave plantation economies.¹⁸ In fact, Act

¹⁴ For details on the quantitative scale of these movements and an important corrective to the conventional wisdom that grossly underestimates Asian migration in the nineteenth and early twentieth centuries, see McKeown, "Global Migration, 1846–1940" and McKeown, *Melancholy Order*, pp. 43–65. For a more recent overview, see Lucassen and Lucassen, eds., *Globalising Migration History*. For details on the distinction between the indenture system, which organized migration to the plantation economies, and the *kangani* and *maistry* systems of migration from India to a variety of locales in South-East Asia, Burma (Myanmar), and Ceylon (Sri Lanka), see Sandhu, *Indians in Malaya*; Jain, *Racial Discrimination against Overseas Indians*; Amrith, *Crossing the Bay of Bengal*.

¹⁵ Benton, *Search for Sovereignty*.

¹⁶ For an analysis of the morphology of this expansive universe of laws and rules and the mammoth bureaucracy it engendered, see Mongia, *Indian Migration and Empire*, chap. 2.

¹⁷ Ballantyne, "Rereading the Archive."

¹⁸ In the later nineteenth century, the system of indentured Indian labor was extended to sites, such as Fiji and Uganda, that had not seen chattel slavery. In addition, after about

XXI of 1883, the definitive Indian emigration legislation till 1917, offered thoroughly circumscribed definitions of “emigrant,” “emigrate,” and “emigration.” According to the Act, “‘Emigrate’ and ‘Emigration’ denote the departure by sea out of British India of a native of India under an agreement to labour for hire in some country beyond the limits of India other than the island of Ceylon [Sri Lanka] or the Straits Settlements [that included present-day Malaysia and Singapore].”¹⁹ By thus legislatively excluding those who moved to Ceylon, the Straits Settlements, or a host of other destinations from the very definitions of “emigrate” and “emigration,” the bulk of Indian labor migrations, as also the migration of merchant communities and others, occurred *outside* the purview of state authority.²⁰ (As we will see later, this Act would pose considerable constraints on regulating “free” migration in the twentieth century.) Likewise, at the destination sites or the locales of *immigration* – be they of indentured labor or of merchants – there were minimal governmental regulations. Moreover, those that existed did not privilege notions of national origin and national identity that, at the time, were barely operative categories in the way we apprehend them today. Though race and colonial/civilizational thinking structured the regulations, these were not “nationalized.”²¹

Indeed, viewed from the vantage point of our contemporary moment, a striking feature of the regulation of Indian migration is the near absence of notions of nationhood, nationalism, nationness, and, consequently, of national citizenship framing discussion and action till the late nineteenth

1860, the “internal” migration to tea estates in the northeastern Indian region of Assam was also regulated, often using the indenture contracts and regulations as a template.

¹⁹ Question whether the term *emigrant* applies to soldiers recruited in India under agreement with the Colonial Secretary for service in Africa, Home Department (Sanitary/Plague), February 1899, Proceedings No. 114–117, National Archives of India (henceforth, NAI). This definition, in fact, had been adopted in Act XIII of 1864, under the guidance of Henry Maine, then a member of the Law Commission in India. See *Report by Mr. Geoghegan on Coolie Emigration from India*, Parliamentary Papers (House of Commons) 47, no. 314 (1874), p. 39.

²⁰ On the migration of Indian merchant communities, see Markovits, *The Global World of Indian Merchants, 1750–1947*.

²¹ Étienne Balibar’s discussion of processes of “nationalization” is useful here: Arguing against teleological histories of the nation-state, in which a range of “qualitatively distinct events spread out over time, none of which implies any subsequent event” are interpellated and arranged as specifically prenatal, Balibar suggests that we attend to how “*non-national* state apparatuses aiming at quite other (for example, dynastic) objectives have progressively produced the elements of the nation-state or ... have been involuntarily ‘nationalized’ and have begun to nationalize society.” See Balibar, “The Nation Form,” p. 88.

and, more especially, the early twentieth centuries. This absence is striking for two reasons: First, because concerns coalescing around gender, sexuality, and sexual morality, articulated precisely to anticolonial Indian *nationalism*, became a crucial lever in accomplishing the end of indentured migration in the twentieth century.²² Second, because, in the late nineteenth and early twentieth centuries, a new and novel idiom that produced a tight confluence between nation, race, state, and territory would come to decisively shape migration law and policy across a range of locales. Race-based thinking, legislation, and policies, as I noted earlier, were not new; what was new was the specific articulation and institutional forms generated by the convergence of race, nationness, and territory. This raises several questions that demand analysis: for example, through what processes was migration nationalized in diverse locales? How and with what consequences was it federalized? How has control over migration become a *sine qua non* of national space? Many scholars have detailed the race-based logic of migration control across several jurisdictions in the late nineteenth and early twentieth centuries, though typically they have not foregrounded how migration law and regulations were, simultaneously, produced by and implicated in a profound restructuring of space.²³ I briefly analyze here some elements of this restructuring and the scale-making capacity of the law with reference to colonial Indian migration to South Africa and to Canada. To emphasize the contingency of the national scale (indeed, any and every scale is a contingent formation), I recount below the very different trajectories the process of nationalization took in South Africa and in Canada. These disparate trajectories, however, had the common consequence of rendering the pan-imperial category of “British subject” available for division and differentiation by recourse to nationality that, I argue, served as an alibi for race.

While the processes leading to the nationalization of migration law in South Africa and in Canada followed different trajectories, they also shared important similarities: First, motivating the efforts to prohibit Indian migration at both sites was a renovated and muscular racial

²² For elaborations of this argument, see Tinker, *A New System of Slavery*, especially, chap. 9; Reddock, *Women, Labor and Politics in Trinidad and Tobago*; Reddock, “Freedom Denied”; Kelly, *A Politics of Virtue*, especially, chap. 2; Niranjana, *Mobilizing India*, especially, chap. 2; Nijhawan, “Fallen Through the Nationalist and Feminist Grids of Analysis”; Gupta, “‘Innocent’ Victims/‘Guilty’ Migrants.”

²³ See, for instance, Lake and Reynolds, *Drawing the Global Color Line*; McKeown, *Melancholy Order*; Young, *Alien Nation*.

thinking. Second, thwarting the efforts at each site were the legal limitations posed by common membership in empire that, in theory, posited the legal equality of British subjects across the world. Given this liberal premise of the British empire-state, the conundrum that needed resolution was how, in law, to distinguish between and discriminate against (certain) British subjects, without calling the entire edifice of empire into question. Though, in both South Africa and in Canada, racial thinking impelled changes in migration regulation and, in both, racial thinking was recoded as national thinking, the precise trajectory of events indicates the *contingency* of the nationalization of migration regimes. In other words, resolving the race-based issue of migration regulation via recourse to nationality was not an obvious avenue that readily presented itself to lawmakers, bureaucrats, lay people, or budding nationalists at the time.

1.2 Migration Governance and the Making of National Scale: South African Trajectories

Let us turn first to the processes of nationalization in southern Africa. The Union of South Africa came into existence in 1910, following British victory in the South African (or Anglo-Boer) war of 1899–1902. The Union brought together four colonies in southern Africa – Natal, Transvaal, the Cape, and the Orange Free State – that comprised the provinces of the new state. Indian traders and merchant communities were resident in all the four colonies/provinces and, between 1860 and 1911, the British colony of Natal had arranged for indentured Indian labor. Over the years, descendants of indentured laborers had moved to the other colonies, especially the Transvaal (an Afrikaner republic, but under the ultimate suzerainty of Britain). Toward the end of the nineteenth century, prior to the formation of the Union, each colony – particularly the Transvaal and the Orange Free State – had deployed a variety of techniques to curtail, if not prohibit, “Asiatic” (thus including Indian) migration and settlement. These techniques ranged from limitations on trader licenses, to rules regarding hygiene and sanitation, to literacy tests for immigrants seeking entry.²⁴ Each technique bespoke the imperative of disguising race-based discrimination in terms that could be construed in nonracialized terms. The British had cited remedying the

²⁴ On this last, see Marilyn Lake’s illuminating essay, “From Mississippi to Melbourne via Natal.”

condition of Indians in the Afrikaner colonies as one of the reasons for the South African war; however, after the war and the formation of the Union, such discriminatory legislation was exacerbated, rather than ameliorated.

In 1910, the newly formed Union of South Africa maintained strict provincial boundaries between the four erstwhile colonies as it sought to federalize migration law and formulate Union-wide immigration legislation and policy. These changes were of a piece with the wider trajectory, in the twentieth century, of shifting the regulation of migration from the domain of local authorities to the domain to centralized, federal authority.²⁵ The so-called “Indian Question” would constitute one of the most persistent, troublesome, and significant issues in framing such legislation in South Africa. For, within the framework of “indirect rule,”²⁶ that organized legal regimes in Africa, people were distinguished as belonging to either a “tribe,” if they were “natives,” or a “race,” if they were deemed “non-natives.”²⁷ Those deemed to belong to a tribe, in keeping with the logic of indirect rule, were governed via their so-called customary law. Mahmood Mamdani elaborates how those deemed to belong to a race, on the other hand, were governed by a common, yet hierarchically organized, civil law.²⁸ Indians, as members of a “race” and conceived of as “non-native,” were thus governed by ordinary civil law. Due to this two-pronged legal regime, Indians “could not, like Africans, be relegated to a different legal regime, but had to be discriminated against within and by the ordinary law.”²⁹ According to Martin Chanock, they thus “posed

²⁵ For an analysis of how the regulation of migration moved from the domain of local authorities into the domain of centralized, federal authority in the twentieth century, see McKeown, *Melancholy Order*. Recent scholarship on the “local turn” in migration governance would benefit from tracing the similarities and distinctions of current formations with such historical precedents.

²⁶ Rather than introduce or impose new legal regimes, that characterized “direct rule” colonialism, “indirect rule” colonialism purportedly sought to maintain so-called cultural traditions and to utilize prevailing legal regimes, often called “customary law,” to achieve its ends. For a discussion of indirect rule, see Mantena, *Alibis of Empire*.

²⁷ For a discussion of distinguishing “tribes” from “races” within the framework of indirect rule, see Mamdani, *Define and Rule*, especially chap. 2.

²⁸ Ibid.

²⁹ Chanock, *The Making of South African Legal Culture*, p. 19. “Indians” in “Africa” posed a specific and difficult legal conundrum. The issues are complex, and strain accepted ways of thinking about legal jurisdiction, particularly since the different laws did not follow any logical consistency. For a fine analysis of issues of jurisdiction and the portability of personal law, in general, and with regard to how such issues framed debates over Muslim personal law in relation to Indian migrants in Fiji, more specifically, see Koya, “The Campaign for Islamic Law in Fiji.”

many of the most difficult problems to South Africa's lawyers" and discussion on the immigration legislation opened acute questions regarding the legal definitions of residence, domicile, citizenship, and marriage.³⁰

Marriage would emerge as the locus of regulation pursued in South Africa in the early twentieth century. With respect to Indian indentured migration to Natal, marriage was seen as an index of good health and sound morality and, for these reasons, largely served as a mechanism facilitating migration. However, with respect to nonindentured migration to the southern African colonies – for instance, of traders and merchants – marriage was activated as a central institution demarcating the difference between various religiously defined communities and came to function as a mechanism constraining mobility.³¹ Ignoring the indubitable presence of a majority Black population, the newly formed South African state positioned itself as the representative of a coherent, racially and religiously defined white Christian community, and migration regulations with regard to Indians would increasingly demand that the kinship relations of migrants, as also of Indians long-resident in South Africa, replicate the Christian nuclear family. Beginning with legal events in the Transvaal, a series of court cases denied the wives of Indian male residents entry into South Africa by declaring *all* Hindu and Muslim marriages invalid – *even when monogamous in practice* – since, in a doctrinal understanding, the religions *permitted* multiple unions, or polygamy. (While polygamy was practiced by several African “tribes,” it was cordoned off into the domain of “customary law,” via the logic of indirect rule.)

This provoked a massive controversy, not only because wives were denied entry into South Africa but also because the decisions implied that *all* married Hindu and Muslim women in South Africa were “concubines.”³² By 1913, the Indian “marriage question” became tied to the celebrated *satyagraha* (passive resistance) movement spearheaded by Gandhi, who then lived in South Africa.³³ The specific nature of the

³⁰ Chanock, *The Making of South African Legal Culture*, p. 19.

³¹ Unfortunately, due to the constraints of space, I cannot address how successful Indian traders and merchants thoroughly scrambled the racial understandings of class, that is critical here.

³² See Gandhi, “New Bill” and “The Marriage Question.”

³³ Gandhi arrived in South Africa in 1893 and lived there for more than two decades, till 1914, when he returned to India, following the dénouement of the events crudely summarized here. For a more in-depth analysis of these events and the linkage between the “marriage question” and *satyagraha*, see Mongia, “Gender and the Historiography” and Mongia, *Indian Migration and Empire*, chap. 3.

articulation between the “marriage question” and satyagraha introduced into the calculus a densely gendered dynamic of Indian *nationalism* with enormous consequences for the terms of the resolution achieved. In essence, the South African state adopted the discourse of nationalism, with religious and racial difference recoded as *national* difference. Acute and complex questions about the fundamental liberal principles of tolerance and a respect for difference, the separation of church and state, and the demarcation of private and public spheres were resolved by recourse to new definitions of state sovereignty articulated to novel understandings of national security.³⁴ This linkage enabled vastly expanded notions of security that posited varied kinship relations as a threat to the social fabric of settler societies, thus requiring concerted defenses in the form of migration regulations. With officials in both England and India also embroiled in the debate, it was not only the South African state that adopted this position. Asked to weigh in on the matter, Sir Syed Ali Imam, a Muslim member in the Viceroy’s Council in India, voiced a similar position, that also disregarded the native Black population as well as other negatively racialized communities and conceived South Africa as a (white) Christian country. His contribution is worth quoting at length:

[While different] incidents of minor importance attach to the contract of marriage in different centres of Christendom ... [there is] no manner of doubt that any marriage that has not monogamy as its basic principle can ever be held to be valid ... in any part of Christendom. The law has its origin in the Christian faith and Ecclesiastical authority, but it affects ... [the] validity [of] marriages contracted by non-Christians if such validity is sought in a Court in Christendom ... It follows, therefore, that the South African Government has considerable justification for standing by a principle that it must bow to as a Christian administration. It will be a feeble argument to advance to say that South Africa is not a Christian country ... To all intents and purposes it is a Christian country ... It is obvious then, that to ask the South African Government to give up this principle is to ask it to dissociate itself from the rest of Christendom on a point affecting in the highest degree the moral and social conception of Christian nations. This must be regarded as wholly impracticable and outside the range of a reasonable solution of a difficult problem.³⁵

³⁴ My position is not to defend either polygamous or monogamous heterosexual marriage. It is to show how one form of patriarchal relations is normalized and then often defended as less or nonpatriarchal.

³⁵ “Note” from Sir Syed Ali Imam to Lord Hardinge, Viceroy of India, February 3, 1914, Validation of Indian Marriages in South Africa, Department of Commerce and Industry (Emigration Proceedings–A), April 1914, Proceedings No. 4–8 (confidential), NAI.

By way of this contribution to the discussion, Sir Syed Ali Imam would help cede South Africa to Christian and white supremacy.

Indentured Indian migration to Natal was summarily suspended in 1911. This opened a path, in 1914, as these debates were underway, to devise new mechanisms to not only restrict nonindentured migration from India but to also work as a mechanism to pressure resident Indians to leave South Africa. The 1914 Indian Relief Bill, offered as the resolution to the “Indian Question,” would explicitly code the state as Christian. Men were free to have multiple marriages; the state, however, would recognize only one marriage and only the children of this marriage would be deemed legitimate. Moreover, to be recognized, the marriage would have to be officially registered with the state. This resolution expressed a novel understanding of the liberal principle of tolerance and the relationship between “ordinary civil law” and “customary law,” simultaneously recognizing *and* delegitimizing the latter.³⁶ In this way, the regulation of marriage, certainly insofar as it related to Indian migrants and residents in South Africa, was wrested out of the control of religious authority and moved into the control of state authority. Now, for the purposes of participating in legal migration on the basis of marital alliances, it became mandatory for Indian migrants to corroborate a marriage as documented and verified by the state through a series of stringent regulations.³⁷ This was in stark contrast to the approach that had governed the marriage and sexual arrangements of the more than 150,000 indentured migrants who had arrived in Natal in the half-century preceding the formation of the Union and prior to the cessation of indentured migration.³⁸ It is important to note here that while some Indians had polygamous marriages, it was not widely practiced within the Indian community. Indeed, in 1914, with a total “free” Indian population of over 80,000, there were *forty* cases of polygamous marriages.³⁹

Feminist scholarship has shown that familial narratives, tropes of kinship, and dense articulations of gender are central, perhaps indispensable,

³⁶ For a related analysis of marriage arrangements in Fiji, see Kelly, “Fear of Culture.”

³⁷ The complex and contentious debates over the precise form of such documentation and verification are properly the subject of a separate account. While, beginning in the 1860s, the colonial state in India had attempted to institute a system for the voluntary registration of births, deaths, and marriages, this met with limited success. See Singha, “Colonial Law and Infrastructural Power.”

³⁸ On these regulations, see Sheik, “Colonial Rites” and Havaladar, “‘Civilizing’ Marriage.”

³⁹ Examination of Sir Benjamin Robertson, January 29, 1914, Nos. 712A, 723A, 726A, Indian Enquiry Commission, Department of Commerce and Industry (Emigration

to nationalist discourse; that national identity seems unable to express itself without resorting to idioms of gender and sexuality.⁴⁰ Simultaneously, particularly since the nineteenth century, state regulation of marriage, kinship, and filiations has become an increasingly important realm with regard to producing and policing the limits of modern notions of nationality through procedures of *identification*.⁴¹ The twin forces, of sociocultural formations of identity and politicolegal procedures of identification, that subtend the notion of nationality and operate on distinct, yet inter-related, scales are premised upon and call forth a demand for endogamy. Moreover, the mingling of family genealogy with the definition of national community, as Étienne Balibar notes, “is a crucial structural mode of production of historical racism ... [which] is also true when the national becomes a multinational community.”⁴² Thus, immanent to all invocations of nationality are relations of gender, sexuality, and kinship.⁴³ In South Africa, over time, the implementation of antimiscegenation laws would demand endogamy within the internally differentiated tribes and the racially classified population. However, the endogamy principle also animates the notion of nationality in general – a point to which I will return.

The 1914 South African Indian Relief Bill explicitly identified “Indians” as a *national* category in migration regulations. Earlier, the category used had been “Asiatic” (including, among others, Indians and Chinese). In fact, as Karen Harris notes, legislation that specifically targeted and isolated Indians as a *national* group emerged only after the formation of the Union of South Africa.⁴⁴ Such transformations in the classification of people, from “Asiatic” to “Indian,” from a regional category to a

Proceedings–A), April 1914, File No. 24, NAI. It is difficult to ascertain if Robertson refers to forty women or forty men who were in polygamous marriages. But, by his account, there were about forty “such cases.”

⁴⁰ See, for instance, the important early essays in Yuval Davis and Anthias, eds., *Woman/Nation/State*; Yuval-Davis, *Gender and Nation*; Kaplan, Alarcon, and Moellem, eds., *Between Woman and Nation*.

⁴¹ See Noriel, *The French Melting Pot*; Balibar, “The Nation Form”; Balibar, *We, the People of Europe?*.

⁴² Balibar, *We, the People of Europe?*, p. 123.

⁴³ For an analysis of recent debates and legal responses to “forced marriages” of Muslim immigrants and their place within the production of “white Europe,” focused particularly on Norway, see Razack, *Casting Out*, chap. 4. There are several resonances between these issues and recent debates and contestations, at numerous sites, regarding same-sex marriage and concerns about their validity across state jurisdictions.

⁴⁴ Harris, “Gandhi, the Chinese and Passive Resistance.”

category understood precisely as a nationality, speak to the microscopic, almost surreptitious, global transformations of the empire-state into the nation-state. In other words, the identification (in affective and legal registers) of Indians as a *national* group by *both* the Indian community and the state fed into processes of nationalization that enabled a recoding of a logic of racialization into a logic of nationality. While Indians, and aspects of migration law, were “nationalized” before the emergence and consolidation of a specifically “South African” national/racial identity, these events nonetheless invested the state with a national character by generating nationality as a viable state (and social) category.⁴⁵ Thus, with respect to migration, “nationality,” was an unforeseen and contingent outcome of these events.

1.3 *Migration Governance and the Making of National Scale: Canadian Trajectories*

Another way we can discern the contingency of the nationalization of migration is to assess the very different route it took in Canada. For, as “Asiatics” were being transformed into new kinds of nationality-bearing “Indians” and “Chinese” in South Africa, the category of “British subject” was also undergoing a thorough redefinition. If the salience of this category and its redefinition were tacit in the events that unfolded in South Africa, they were at the heart of the controversy, occurring almost contemporaneously, half a world away, in Canada. Unlike South Africa, Canada was not a destination site for Indian migrants under the state-regulated indenture system. Indians who arrived in Canada in the first decade of the twentieth century journeyed there of their own accord from myriad locations, including India, Hong Kong, and the Straits Settlements. By 1906,

⁴⁵ Many studies of nationalism in South Africa have focused, with good reason, on the development of a white Afrikaner nationalism following the formation of the Union and its confrontation, over the course of the twentieth century, with a pan-South African Black nationalism, both of which were directed toward “capturing” the state. We can understand the activities of the Indian population engaged in the satyagraha struggles as a “subordinate” nationalism that, while unable to “fill” or “capture” the state, nonetheless did not leave it “empty.” For discussions of important aspects of South African nationalism, see Marks and Trapido, eds., *The Politics of Race, Class and Nationalism in Twentieth-Century South Africa*; Hofmeyr, “Building a Nation from Words”; McClintok, *Imperial Leather*. For the entanglements between Indians and Africans and the trajectories of mid-twentieth-century nationalism in Natal, see Soske, *Wash Me Black Again*.

when there were about 6,000 Indians in Canada, their presence caused widespread anxiety, premised on racial fear.

Hence, in 1907, in an effort to curtail the migration, Canadian Prime Minister Wilfred Laurier suggested that the Government of (British) India require that Indians emigrating to Canada should have passports and that only a limited number be issued for travel to Canada.⁴⁶ While sympathetic to the racist concerns animating Laurier's request, the Government of India found it had no legislative authority to implement his proposal and restrict nonindentured migration from India. For they were constrained by Act XXI of 1883 that, as I detailed earlier, had exceedingly narrow definitions of the terms "emigrant" and "emigration" and applied *only* to indentured migration. Other forms of migration, such as Indians migrating to Canada, did not come under the purview of state authority and state regulation. As the viceroy of India would write in a telegram:

we recognize peculiar difficulties of Canadian Government and appreciate the conciliatory attitude with which it has approached this difficult question, but after very careful consideration, regret we are unable to agree to any proposal [such as a system of passports] for placing in India restrictions such as are suggested on emigration of free Indians or to suggest any further action on our part to check it. Any such measure would be opposed to our accepted policy: and it is not permissible under Indian Emigration Act XXI of 1883 ... In present state of public feeling in India [i.e., the rising anticolonial sentiment] we consider legislation of this kind to be particularly inadvisable.⁴⁷

While rejecting the passport proposal, the viceroy suggested that Canada instead pursue suitably disguised methods of racial discrimination to curtail the migration. For instance, it could "require certain qualifications such as physical fitness ... and the possession of a certain amount of money."⁴⁸

⁴⁶ Telegram from Governor General of Canada to Secretary of State for the Colonies, received in the Colonial Office, November 11, 1907, Department of Commerce and Industry (Emigration Proceedings-A), February 1908, Proceedings No. 18-33, NAI. In terms of current understandings, the system Laurier proposed is more of a quota system for visas and less of a passport system. The eligibility of (almost) all for access to a passport is a separate history that would take us to the latter part of the twentieth century.

⁴⁷ Telegram from Viceroy of India, Calcutta, to Secretary of State for India, London, January 22, 1908, Department of Commerce and Industry (Emigration Proceedings-A), February 1908, Proceedings No. 18-23, Serial No. 16 (confidential), NAI.

⁴⁸ Telegram from Viceroy of India, Calcutta, to Secretary of State for India, London, January 22, 1908, Department of Commerce and Industry (Emigration Proceedings-A), February 1908, Proceedings No. 28, Serial No. 16 (confidential), NAI.

Thus, Laurier's attempt to conduct Canadian *immigration* policy by "remote control," by outsourcing and externalizing it as *emigration* policy in India through a restrictive passport system, was unsuccessful.⁴⁹ Like South Africa, the Canadian government thus resorted to diverse methods to disguise its race-based immigration exclusions, even as it continued to press for the adoption of a restrictive passport system. I have analyzed elsewhere the multiple dimensions of these methods and detailed the sequence of events and protracted debates that ensued over the next decade.⁵⁰ Here, I briefly recount one such technique that would provoke a radical transformation in the organization of migration regimes, *globally*. In 1908, Canada instituted the Continuous Journey Regulation that stipulated that "immigrants *shall* be prohibited landing [in Canada], unless they come from [their] country of birth or citizenship by continuous journey, and on through tickets purchased before starting."⁵¹ Though the regulation made no mention of race or of nationality (and was quickly reworded to state "immigrants *may* be prohibited landing" to enable bureaucratic discretion in its implementation),⁵² it effectively prevented both re-immigrant Indians and immigrants coming directly from India to enter Canada: the former, since they did not come from what was deemed their "country of birth or citizenship"; the latter, due to the successful pressure exerted by the Canadian and imperial governments on shipping companies to cease selling "through tickets" to Indians. (In time, companies terminated direct voyages due to government pressure and financial unviability.) The Regulation was hotly contested, with Indians mounting a challenge premised on the legal equality of "British subjects." For instance, in one petition, Indians demanded their "rights as British subjects with all the emphasis it can command"; protested their differential treatment vis-a-vis other British subjects; and argued that "as long as we are British subjects any British territory is the land of our citizenship."⁵³

⁴⁹ I borrow the term "remote control" from Aristide Zolberg, *Nation by Design*. There is now a sizable scholarship on the "externalization" of immigration control.

⁵⁰ Mongia, *Indian Migration and Empire*; Mongia, "The Komagata Maru as Event."

⁵¹ Telegram from Governor General of Canada to Secretary of State for the Colonies, London, January 15, 1908, Department of Commerce and Industry (Emigration Proceedings-A), May 1908, Proceedings No. 6, Serial No. 22, Enclosure No. 3, Annex 1, NAI (emphasis added).

⁵² For the circumstances leading to this change, see Mongia, "Race, Nationality, Mobility: A History of the Passport."

⁵³ British Indian Subjects in Canada to Colonial Office, London, April 24, 1910, Department of Commerce and Industry (Emigration Proceedings-A), October 1910, Proceedings No. 47, Serial No. 8, Enclosure No. 1, Annex 1, NAI.

This last was not an idiosyncratic or tendentious claim. Rather, the notion of imperial citizenship, that foregrounded an imperial world and posited the equality of British subjects, was at the heart of the difficulties with devising restrictive migration policies.

In this charged context, where the legality – and thus the efficacy – of the Continuous Journey Regulation was under immense pressure, the Canadian government continued to press for a passport system and worried about the reintroduction of direct voyages, particularly by private parties. Concurrently, the Indian government dismissed Canadian worries of direct voyages as purely “hypothetical”; declined to cooperate on the passport proposal; and firmly held to the principle of the “complete freedom for all British subjects to transfer themselves from one part of His Majesty’s dominions to another.”⁵⁴ In a world where empire constituted the horizon of legal and subjective experience (even if these were hierarchically organized), the governments of both Canada and India were unable to conceive of other ideas for how to restrict the migration. It is important that we note this limitation on the imagination and on practical politics. For, as we will see, necessity is, indeed, the mother of invention.

This situation would change in 1914, when Gurdit Singh, an Indian merchant, hired the *Komagata Maru* to make a voyage from Hong Kong (then a British colony) to Vancouver and explicitly challenge the Continuous Journey Regulation. The *Komagata Maru* arrived on the shores of British Columbia on May 23, 1914, with 376 Indian passengers and was refused permission to dock in the Vancouver Harbor.⁵⁵ The Indian passengers (except a few who could demonstrate Canadian domicile) were prohibited from reaching shore, as an extraordinary series of legal and extralegal machinations unfolded that would have an enduring impact on migration regimes. Before I turn to these transformations, here is a crude summation of the fate of the passengers: The legal challenge they mounted was unsuccessful and, on July 23, 1914, some two months after the ship had arrived in Canadian waters, it was escorted out of the Vancouver Harbor and sailed to India. On their return to India, the colonial police confronted the

⁵⁴ Comments of S.H. Slater, September 19, 1913, Department of Commerce and Industry (Emigration Proceedings–A), October 1913, Proceedings No. 29–30 (confidential, original consultation), NAI.

⁵⁵ There is now a substantial body of scholarship on the *Komagata Maru*. See Johnston, *The Voyage of the Komagata Maru*; Kazimi, *Undesirables*; Mawani, *Across Oceans of Law*; Dhamoon et al., eds., *Unmooring the Komagata Maru*; Chattopadhyay, *Voices of Komagata Maru*.

passengers as seditionists; nineteen were killed and twenty-three wounded in the fracas that followed. Most were imprisoned, and the police closely watched those released. Twenty-nine, including Gurdit Singh, escaped and were fugitives. In 1921, Gurdit Singh turned himself in to the police and spent five years in prison on charges of sedition.⁵⁶

The *Komagata Maru* event is often only understood as an exemplary instance of racist Canadian immigration policy. While this is certainly true, to my mind the event is more significant for the radical and rapid transformations it provoked in the rationales and the institutional scale of migration regimes.⁵⁷ First, the event catalyzed a profound transformation in the very premise of migration regulation. We will recall that for almost a decade, the overarching principle of free movement had served as the basis for the Government of India's refusal to acquiesce to Canadian demands. In the wake of the *Komagata Maru* event, there emerged new rationales, that decisively broke with a century of law on free migration and embraced the principle of restrictive and prohibitive measures. In so doing – and this is the second transformation precipitated by the *Komagata Maru* – the new framework fissured the category of the “British subject,” thus exposing the myth of the legal equality of imperial citizenship. To contain the dangers this exposure posed to sustaining empire, the justification offered was a conception of the world as composed not of a *hierarchy* of races, but of different, *formally equivalent* “nationalities.” Officials recognized the dangers of instituting race-based restrictions on migration in a world where anticolonial nationalisms were ascendent. What was required was a mechanism that would “secure some kind of reciprocity”⁵⁸ and “which [would] above all things ... have the *appearance* of giving equal treatment to British subjects residing in all parts of the Empire.”⁵⁹ Nationality, operating as an alibi for race, would prove to be this mechanism. Though it had essentially evaded all parties up to this point, in the wake of the *Komagata Maru*, we see the introduction of “nationality” as a crucial conduit and category in migration law. The

⁵⁶ For details on these events, see Johnston, *The Voyage of the Komagata Maru*; Mongia, “The *Komagata Maru* as Event.”

⁵⁷ For a fuller discussion of this argument, see Mongia, “The *Komagata Maru* as Event.”

⁵⁸ Comments of R.W. Gillian, June 23, 1914, Department of Commerce and Industry (Emigration Proceedings–A), September 1914, Proceedings No. 18–20 (confidential, original consultation), NAI.

⁵⁹ *Ibid.* (Emphasis added.)

category of nationality, as an alibi for race, could serve, simultaneously, as a mechanism of discrimination and could, in law, be construed as non-discriminatory. This new thinking, part of what Mrinalini Sinha has called the “imperial-nationalizing” conjuncture, sought to reconfigure and remake empire as composed of different nationalities.⁶⁰ (The incorporation of seemingly nonracial “national quotas” in the migration regimes of diverse states is a direct legacy of this racial thinking). A third and important related outcome of the *Komagata Maru* event, combined with the context of the onset of World War I, was a new and novel understanding of state sovereignty and security also made on *national* grounds. To avoid seeing the emergence of the national as a foregone teleology and to grasp its contingency in terms of migration regulation, it is important that we keep these conjunctural elements in view.

The legal splitting of the category of the “British subject” into a host of nationalities came to embodied (in this case, as in others) in the passport as expressing a *national identity*. The passport is one of the institutionalized forms that produces and constitutes the national scale as, specifically, an element in an international order with regard to migration, since this particular document is addressed not to the issuing state but to other states. Moreover, though other kinds of identity documents are often issued by local or state/provincial authorities, the passport now carries the imprimatur of federal authority, *everywhere*, and helps constitute the federal or national scale as the normative scale of migration control. Given a technology such as the passport – the emblematic artifact of modern migration law – the very act and regulation of modern migration *produces* national identity, in legal and affective registers.

The different trajectories that unfolded in South Africa and Canada (and, indeed, elsewhere), emphasize the contingency and fitful historical emergence of the national scale and national identity with regard to migration regulation in the early twentieth century. While some sites, such as the United States, had a more nationalized regime, this was an anomaly at the time. (Moreover, rather than being content as a nation, the United States was also an aspiring imperial power, as is amply evident in its annexations of sites such as the Philippines, Hawaii, and Puerto Rico after the Spanish-American War of 1898.) To further apprehend the novelty of the national, it is useful to note that in the early twentieth century, both Canada and South Africa lacked the robust dimensions of what one

⁶⁰ Sinha, “Premonitions of the Past,” p. 825.

could call a “national identity.” In Canada, while British imperial identity was strong, white racial identity was stronger, leading to a fracturing of, but not a severance from, the category of “British subject.” (Ironically, the legal category of the “Canadian citizen” would only emerge in 1947 the same year as Indian independence that, also shedding the nomenclature of “British subject,” inaugurated the “Indian citizen.”) In South Africa, on the other hand, British imperial identity was unsteady and imperiled, under attack from a white Afrikaner identity. But, here too, white racial identity would triumph over imperial identity, finding its institutionalized apotheosis in apartheid by 1948. Moreover, in both Canada and South Africa – as in several other sites, particularly other white-settler colonies like Australia or the United States – white racial identity would form the basis for producing national identity, marginalizing both the indigenous populations and minoritized migrants of color. Simultaneously, in sites such as India, the situation of Indian emigrants fed into a burgeoning anticolonial nationalism and played a part in a shift of nationalist aims from seeking *swaraj*, or self-rule within empire, with Dominion status akin to that of Canada and South Africa, to demands for *purna swaraj*, or complete independence. Over time, the processes put in motion by events such as the ones I have related here would not only situate national identity, largely working as a proxy for race, as a crucial conduit for *international* migration control; the “national” would also become the normative site and scale of such control. While it would take a several decades longer for an imperial scale and an imperial space to dissipate and disappear, the framing of migration law *in terms of* nationality was certainly one factor that helped introduce and consolidate in the world a national scale and a national space.

However, the national scale or, indeed, any scale, is not a fixed formation. Scales, as Brenner reminds us, “are no more than the temporarily stabilized effects of diverse sociospatial processes, which must be theorized and investigated on their own terms.”⁶¹ Thus, it is “*processes of scaling and rescaling*, rather than scales themselves, that must be the main analytical focus for approaches to the scale question.”⁶² In exploring the contours of local migration law and governance, many chapters in this collection are concerned, explicitly or implicitly, with how transformations at diverse sites might be indicative of and interwoven with rescaling

⁶¹ Brenner, “The Urban Question and the Scale Question,” p. 31.

⁶² *Ibid.* (Emphasis added).

projects. Focusing particularly on the local and urban scale, these essays demonstrate the necessity for multiscale approaches to migration analysis. Keeping in mind Lefebvre's insight that different scales interpenetrate each other and are produced in and through their relations with other scales, it becomes important to ask if, how, when, why, and where the national scale is recalibrated. Addressing such questions, among others, will ensure that we do not operate with congealed, invariant understandings of scales, in general, and of the national scale, in particular. To demonstrate the recalibration of the national scale, I now turn to a profound rescaling project currently underway in India. Within a context shaped by a majoritarian Hindu nationalism, this rescaling project is remaking the contours of national space, scale, and identity through the dual processes of changes in the citizenship law, on the one hand, and new practices of identification, on the other. In what follows, I consider these dual processes to provide the rough lineaments of how modalities of detention and expulsion are becoming key characteristics of national scale in India.

2 The Postcolonial Nationalizing Project in India: Producing Statelessness

The basic principles that structure Indian citizenship, outlined in Articles 5–11 of the Indian constitution, include a union-wide, pan-Indian notion of citizenship with Parliament as the body responsible for enacting laws on citizenship. Niraja Gopal Jayal notes that after independence in 1947, there were impassioned debates in the Constituent Assembly, tasked with drafting the Indian constitution, on how to define and delimit the category of citizenship.⁶³ Ultimately, the Assembly decided to premise citizenship on a broad-based *jus soli* principle, to address the extraordinary circumstances of Partition that attended Indian independence and to explicitly reject the “racial” principle animating *jus sanguinis* conceptions that, in the Assembly's view, had shaped citizenship in South Africa.⁶⁴ Later, the Citizenship Act of 1955 incorporated a combination of *jus soli* and *jus sanguinis* conceptions of citizenship, as is the case in many jurisdictions around the world. The Citizenship Act of 1955 would remain largely unaltered till the mid-1980s. At that time, changes to it were forced due to vigorous contestations and agitations concerning

⁶³ Jayal, *Citizenship and Its Discontents* and “Citizenship.” See also, Roy, *Mapping Citizenship in India*.

⁶⁴ Jayal, “Citizenship,” p. 165.

migrants in the northeastern state of Assam, that borders Bangladesh (formerly, East Pakistan).

What is known as the “Assam Movement” emerged in full force in the late 1970s, when it became evident that recent migrants from neighboring Bangladesh were on the voter rolls in the state. Led by the All Assam Students’ Union (AASU) and the All Assam Gana Sangram Parishad (AAGSP), the Assam Movement was an anti-immigrant agitation with two main concerns: The first regarding the political implications of purported and real noncitizens on the voter rolls; the second regarding the cultural implications of the threat Bengali-speaking migrants were seen to pose to the vitality of Assamese language and culture. Religion was complexly interwoven into the culture- and language-based agitation that had a complicated support base, drawing from, among others, Assamese Hindus and Muslims and Indigenous tribal groups.⁶⁵ In 1983, as state assembly elections were underway – ignoring a boycott issued by AASU and AAGSP on the grounds that the voter rolls were inaccurate and the election illegitimate – the state witnessed a brutal massacre of 4,000 (purported) Bengali/Bangladeshi immigrants and their descendants in several villages. The central government had believed that the anti-immigrant sentiment was restricted to urban centers; the horrific massacre showed that it also had strong support in rural areas, among the Indigenous peoples as well as the Assamese. In other words, the anti-immigrant sentiment was alive across communities and across both urban and rural scales.

Anupama Roy and Ujjwal Singh show that the Assam Movement relied on “the figure of the ‘migrant alien’ as disruptive of both the Assamese ethno-space and the national political space.”⁶⁶ They argue that it triggered a process that sought to construct a subnational identity and a notion of nationality/citizenship that was both “distinct from and consistent, coexistent, and concurrent with an Indian nationality.”⁶⁷ In this wider context, where the Movement sought both distinction and similarity, the central government made two legislative changes to address its demands: First, in 1983, to address the claim of the distinctiveness of the situation in Assam, it enacted the Illegal Migrants Determination by Tribunals Act that outlined a complex set of procedures to identify “illegal” migrants in the state

⁶⁵ For an overview of the complex alliances that characterized the movement, see Weiner, “The Political Demography.”

⁶⁶ Roy and Singh, “The Ambivalence of Citizenship,” p. 39.

⁶⁷ *Ibid.*

of Assam. (As the Act was restricted to Assam, and as it was largely symbolic, not yielding a mass identification of “illegal” migrants as those in the Assam Movement had hoped, it was legally challenged and struck down as unconstitutional by the Supreme Court in 2005.)⁶⁸ Second, the central government reached a settlement with the Assam Movement and, in 1986, it passed an amendment to the Indian Citizenship Act. The amendment stipulated that to qualify as a citizen by birth in India at least one parent of a child had to be an Indian citizen at the time of the birth. Though the motivation for this sea-change – from a *jus soli* to a *jus sanguinis* conception of citizenship – came from the specific conditions and the agitation in Assam, the act was effective nationally and spoke to the dimension of similarity and co-extensiveness of Indian citizenship. We see here, with exceptional clarity, the interweaving and reciprocal determination of scales, where agitations animated by subnational, relatively “local” concerns have wider, national reverberations and consequences.

These reverberations and consequences were – and are – not contained within a politicolegal sphere; rather, as with earlier events in South Africa and Canada, politicolegal and sociocultural spheres are mutually conditioned. Indeed, in the intervening years since the 1986 amendment, the figure of the “illegal migrant” has become an increasingly potent weapon for the Hindu nationalist agenda of the Bharatiya Janata Party (BJP) and allied right-wing organizations, that have sought to mobilize anti-immigrant sentiment more broadly – for instance, in seeking electoral gains in West Bengal (another state that shares a border with Bangladesh). The figure of the internal migrant and the (international) “illegal migrant” also found resonance in the west of the country, where it fed into the anti-immigrant project of the Shiv Sena (another right-wing party) in the western state of Maharashtra, particularly Mumbai.⁶⁹ With the BJP and its allies often using the term “infiltrators” to refer to “illegal migrants,” especially if they are Muslim, the issue of migrant interlopers now has national resonance in a sociocultural register. Simultaneously, in legal terms, since 1986, the trend toward a *jus sanguinis* conception of Indian citizenship has intensified.⁷⁰ Thus, in 2003, another amendment to the Citizenship Act further restricted eligibility by birth to only those with at least one parent who was

⁶⁸ For an extended analysis of the Act, see *ibid.*

⁶⁹ For a discussion of the anti-immigrant and anti-Muslim project of the BJP, particularly in West Bengal, see Gillan, “Refugees or Infiltrators?”.

⁷⁰ For instance, Jayal, “Citizenship”; Jayal, “Reconfiguring Citizenship in Contemporary India”; Roy and Singh, “The Ambivalence of Citizenship.”

an Indian citizen and the other not an “illegal migrant” at the time of the birth. In addition, the 2003 amendment stipulated that the government compile a National Register of Citizens (NRC), verifying the citizenship – or lack thereof – of every person in India. In Assam, to count as a citizen of India, people must provide documentation that they, or their ancestors, have been resident in India prior to March 25, 1971 (when, after a civil war, East Pakistan seceded from Pakistan and became Bangladesh).

For a good decade, the government took no steps to implement the NRC. It was finally initiated in Assam in 2014 (under the supervision of the Supreme Court), with plans to expand it pan-nationally soon thereafter. The results of the NRC exercise in Assam have produced disastrous consequences: The final NRC, released in August 2019, excludes 1.9 million people who have been deemed “illegal migrants” due to insufficient documentation.⁷¹ However, insufficient documentation might not be an indication of a lack of legal status but, more so, an indication of socio-economic marginalization, disproportionally affecting certain groups, such as those who are poor or illiterate, particularly Muslims and Dalits; or members of transgender communities, who have fled natal homes; or women who might have married young and have no access to the relevant documents. In addition, the converse is also true: Possessing documents is not the verification of a preexisting legal status but might be the result of what Kamal Sadiq calls “documentary citizenship,” whereby people are able, through various means, to assemble a dossier of documents that qualify them as citizens.⁷²

The results of the NRC exercise have been met with disappointment and alarm by different factions for different reasons. Some, such as the AASU and its allies, object to the NRC on the grounds that it did not identify sufficient numbers of noncitizens;⁷³ others, such as the right-wing, fascist, Hindu nationalist BJP, that currently holds an absolute majority in Parliament, are disappointed that a large number of those identified as noncitizens are (Bengali) Hindus;⁷⁴ yet others, such as liberal and left forces and international organizations, like the UN Human Rights Council, are deeply concerned about the implications of rendering

⁷¹ Joint Forum Against NRC, “Exclusion of 19 Lakh [1.9 million] People.”

⁷² Sadiq, *Paper Citizens*. Sadiq’s work asks us to rethink what we might mean by the category of “undocumented migrants” and suggests that, in sites such as India, noncitizens are more likely to have documents of citizenship.

⁷³ “Assam NRC Final List.”

⁷⁴ Dutta, “Assam NRC”; Indo-Asian News Service, “Unhappy BJP to Move Supreme Court.”

people as noncitizens/illegal migrants.⁷⁵ For, while the NRC deems people noncitizens or “illegal migrants,” presumably from Bangladesh, such a determination is not equivalent to their being legally acknowledged as Bangladeshi citizens. As Talha Rahman observes, the finding – accurate or otherwise – that a person is not a citizen of India does not imply that India can accord the person a different citizenship.⁷⁶ India has repeatedly assured Bangladesh that the NRC is an “internal” exercise; Bangladesh, for its part, has maintained that those deemed noncitizens in India are not Bangladeshi nationals. Those excluded from the NRC are thus rendered stateless and potentially confront lives in “perpetual detention,” with deportation not an option.⁷⁷ (The term, “stateless” is, of course, a misnomer, since “statelessness” is willfully produced, precisely, by states and is a status oversaturated by the gaze of the state.) Meanwhile, detention centers are under construction in Assam and in other states.⁷⁸

The already dire situation produced by identification procedures has been exacerbated further by yet another amendment, via the Citizenship Amendment Act (CAA), passed in December 2019. The Act outlines the criteria by which people of six non-Muslim faiths (Hindu, Sikh, Buddhist, Jain, Parsi/Zoroastrian, and Christian) from three neighboring countries of Pakistan, Bangladesh, and Afghanistan can be eligible for Indian citizenship. Specifically, those resident in India prior to December 31, 2014 can apply for citizenship on the grounds of religious persecution in these three neighboring, Muslim-majority countries. The Act is silent on other countries that neighbor India, such as Myanmar, Sri Lanka, or China. The CAA has been critiqued and opposed on several grounds – most vigorously by citizens’ protests, often led by women.⁷⁹ However, different sets of protestors had very different rationales for their opposition to the Act. Some, particularly in the northeastern border states such as Assam, Mizoram, or Tripura, protested on the grounds that the Act opens the

⁷⁵ *Deccan Herald*, “Harsh Mander’s Full Report”; Office of the High Commissioner, United Nations Human Rights Council, “UN Experts: Risk of Statelessness and Instability in Assam, India”; Bhat and Yadav, “The NRC in Assam Doesn’t Just Violate Human Rights of Millions.”

⁷⁶ Rahman, “Identifying the ‘Outsider.’”

⁷⁷ *Ibid.*, p. 118.

⁷⁸ There are currently six detention centers, often appended to jails, in use in Assam; the construction of several more detention centers is planned for Assam and other states. See Gettleman and Kumar, “India Plans Big Detention Camps for Migrants.”

⁷⁹ For an excellent analysis of some these protests, see Rao, “Nationalisms By, Against and Beyond the Indian State.” One of the protestors, an 80-year-old woman named Bilkis, was named one of *Time Magazine*’s “Most Influential People of 2020.” See Ayyub, “Bilkis.”

floodgates to refugees and threatens the cultural and linguistic balance in these states.⁸⁰ Others, in sites such as Delhi, most famously Shaheen Bagh, protested on the grounds that by introducing religion as a basis for citizenship, the Act undermines the secular underpinnings of the Indian constitution and is, in fact, unconstitutional. Such objectors identify several flaws with the legislation.⁸¹ For instance, that some religious minorities (e.g., the Muslim Ahmadiyya in Pakistan or the Hazara in Afghanistan) are also persecuted minorities in the three neighboring countries specified but are not offered protection in the Act; that religious persecution is alive and well in other neighboring countries (e.g., the Rohingya in Myanmar or Hindu Tamils in Sri Lanka) that are not included in the Act; that the 2014 “cut-off” date is arbitrary, mysteriously assuming no persecution beyond that date; that rather than advancing a piecemeal refugee policy, India might be better served with acceding to the Refugee Convention (to which it is not a signatory, often making refugees – ranging from Tibetans to Sri Lankan Tamils – vulnerable to the whims of the ruling dispensation).⁸² But all manner of protests came to a halt with the “lockdown” imposed in March 2020, due to the COVID-19 pandemic. Under cover of the pandemic, when widespread public protest became impossible and momentum was lost, we have seen draconian criminal charges brought against protestors, particularly those voicing critiques on constitutional grounds.⁸³

The Act has profound potential consequences for the everyday life of the Muslim population, including Muslim citizens, in India, since executing such legislation is, of course, dependent on bureaucratic measures. As such, the CAA must be understood in conjunction with the deeply flawed NRC exercise conducted in Assam that, as I noted earlier, potentially renders almost two million people stateless. When we place the CAA alongside this bureaucratic exercise, new causes for concern come to the fore. Bureaucratic discretion, harassment, and corruption have been

⁸⁰ Ratnadip Choudhury, “‘Want Peace, Not Migrants’: Thousands of Women Protest Citizenship Act Across Assam.”

⁸¹ Though some 140 petitions on the Act have been filed with the Supreme Court, it has not addressed them. See Mandhani, “CAA Case.”

⁸² As a small sampling of these different critiques, see Mander, “If Parliament Passes the Citizenship Amendment Bill”; Kesavan, “Border of Unreason”; Kapila, “These Are Some of the Refugees”; Angshuman Choudhury, “No, the Shameful Attack on Sikhs in Kabul Still Doesn’t Justify the CAA.”

⁸³ The Polis Project, “Manufacturing Evidence.”

widely documented in the NRC exercise.⁸⁴ The perils for those identifying as – or bureaucratically identified as – Muslim are grave, since the CAA does not offer a path to citizenship for Muslim refugees.⁸⁵ Though the CAA is one instance of what Nicholas de Genova calls “the legal production of illegality,”⁸⁶ its implementation will largely depend on the bureaucratic production of il/legality. Thus, even those Muslims long-resident in and citizens of India, could be rendered stateless and “illegal” by bureaucratic fiat, working in conjunction with a religiously defined, majoritarian nationalism.

For, it is not only legal transformations that have narrowed the scope of citizenship and expanded the category of “illegal migrant” in India, as it has elsewhere. Equally, a discourse of “illegal migrants” has proliferated well beyond Assam and has become a part of the national political conversation in India in a sociocultural register at the spatio-temporal scale of the everyday. The figure of the “illegal migrant” – or “infiltrators,” to use the language of the Hindu Right – now serves multiple functions: It is raised as a bogey to instill fear; it helps to shore up Hindu majoritarianism; it can be deployed as a handy scapegoat to explain away all manner of depredations that people confront; and, lastly, the terminology of “infiltrators” does critical work in yoking migration to national security, positioning Muslims as terrorists, and thus “deserving” of expulsion. This discourse, that simultaneously draws on and contributes to a more global language and hysteria of “illegal migrants,” has perniciously seeped into the social fabric of the polity, well beyond legal definitions, to become a part of the new (or renewed) common sense.

In India, at the hands of what Arjun Appadurai describes as “predatory majoritarianism”⁸⁷ the issue of a minority population within the nation is in the process of being converted into a problem of “illegal migrants,” the “imposter within,”⁸⁸ who should be expelled, or at least detained. However, the rise of predatory majoritarianisms, generated by what Appadurai calls a “fear of small numbers” (i.e., of minorities), is not unique to the Indian context. While Appadurai identifies the Nazi expulsion and extermination of Jews and others and the more recent genocide

⁸⁴ Mathur, “The NRC is a Bureaucratic Paper-Monster”; Field et al., “Bureaucratic Failings in the National Register of Citizens.”

⁸⁵ Kesavan, “An Evil Hour.”

⁸⁶ De Genova, “Migrant ‘Illegality’ and Deportability in Everyday Life.” See also, de Genova and Roy, “Practices of Illegalisation.”

⁸⁷ Appadurai, *Fear of Small Numbers*.

⁸⁸ Ghosh, “Everything Must Match.”

in Rwanda as paradigmatic instances of predatory majoritarianism, the tendency toward deportation, expulsion, and detention as the appropriate response to the notion of “illegal migrants” is now more widespread and is daily gaining ground. With the criteria that define national membership/citizenship made more stringent, statelessness is exacerbated, globally, as are deportations, expulsions, and detentions. This new formation of the national scale is not content with merely policing and producing the putative border, as was the largely the case in the early twentieth century; forms of violent expulsion are now part and parcel of an acceptable, even necessary, response.

3 Conclusion

The overarching argument of this chapter is that scales shift, change, and can appear and disappear. Keeping in view Valverde’s caution that discussions of space and scale can often elide a temporal dimension, this chapter has sought to historicize scale- and space-making projects over the *longue durée* focusing on migration governance as a constituent part of scale-making processes. I have shown how, in the nineteenth century, state control of Indian indentured migration was driven by the anxieties of freedom, generated by British slavery abolition, and led to the regulation of certain migration streams in and across imperial space. In the early twentieth century, wider control of migration was driven by a hierarchical racialized logic and, while taking shape across an imperial scale, led to the harnessing of migration control at the national scale, on a par with such other, temporally scattered, national scale- and space-making projects such as national currencies or national armies (the latter effectively only emerging after World War II).⁸⁹ By my account, racial thinking subtended the emergence of the national as a critical node in the regulation of migration in the early twentieth century. The aim of such practices of bordering was to prohibit the entry of negatively racialized migrants (while facilitating the entry of those positively racialized) and helped to delineate and constitute the geopolitical “external” contours, the “territorial outside” of the national, with decisions on the admission of people into state space often made at literal sea and ocean ports.

A century later, we are witnessing very different kinds of scale-making techniques where new procedures of identification join with new

⁸⁹ See, for instance, Barkawi, *Soldiers of Empire*.

understandings of citizenship – including those that vitiate *jus soli* principles and strengthen *jus sanguinis* principles – to not only proliferate the border into everyday life but also to generate national states that are engaged in the forcible expulsion and detention of people. Scholars have shown how the border and practices of bordering can be discerned and have proliferated well beyond the twin imperatives of geopolitical/territorial and demographic closure.⁹⁰ In fact, practices of bordering have now become especially intense *within* national-state space with new forms of governmentality, that resort to detentions, deportations, and expulsions – alongside the production of statelessness – increasingly common. A part of what Matthew Gibney calls the “deportation turn,”⁹¹ such endeavors can be identified in various state spaces.

The recent legal and sociopolitical events in India that I have detailed above are, simultaneously, part of and help to consolidate this wider tendency. Embodied in such changes is an alarming rise of new forms of ethnonationalism. These new forms of ethnonationalism have largely forsaken the reservations evinced by the Indian Constituent Assembly in 1950, when it rejected the “racial principle” that animated a *jus sanguinis* basis for citizenship and opted, instead, to articulate a *jus soli* premise for Indian citizenship. Now, in India, as elsewhere, we see a reconfigured and renewed “racial principle” that, like South Africa in the early twentieth century, mobilizes a highly restrictive endogamy, or *jus sanguinis* principle, as the basis for membership in the sociopolitical community. While the numerical scale of the operation of ethnonationalism in sites such as India – with almost two million people potentially stateless – is daunting and cause for grave concern, the overarching tendencies toward ethnonationalism are more widely evident in our historical present. Two legal processes characterize these tendencies: First, the twentieth-century logic of exclusion (that subtends prohibiting migration) is now supplemented by a logic of expulsion and detention. Second, in order to expel and detain people, they must first be rendered “migrants” and, preferably, “illegal migrants.” This can require complex legal and bureaucratic strategies, like those presently taking shape in India. Such transformations in India are indicative of a recalibration of scales. Formed through a multitude of processes, ranging from law to sociocultural reconfigurations, we

⁹⁰ For two especially provocative meditations on the border and practices of bordering, see Balibar, “What is a Border?” and Mezzadra and Neilson, *Border as Method, or, The Multiplication of Labor*.

⁹¹ Gibney, “Asylum and the Expansion of Deportation in the United Kingdom.”

see an interpenetration and superimposition of subnational and national scales wherein each is reworked. Thus, as scholarship in migration studies engages with questions of scale, it will be important to keep in view the more general tendencies; the complex lineaments (e.g., colonial and post-colonial; legal and sociocultural) that constitute their specific iterations; and the reciprocal traffic between the two.

PART III

Normative Perspectives on Local Migration Law and Governance

Sanctuary City, Solidarity City, and Inclusive City (Yet to Come)

Living Invisibly in Toronto in Times
of the COVID-19 Pandemic

LUISA SOTOMAYOR AND LIETTE GILBERT

1 Introduction

Living in limbo, existing under the radar, working under the table, watching over your shoulder, fearing encounters, avoiding arrest, not having access, circumventing services, wrestling precarity, deferring dreams, not being able to stay nor return, having no home ... nobody chooses to live without status. Yet, each of these uncertainties become an act of resisting and disrupting the pain of personal experiences and the violence of global geopolitical and economic forces rendering people without status. Since 2020, uncertainties have been exacerbated by the global COVID-19 pandemic. Beyond fears of detention and deportation by the state, the upsurge of white supremacy movements, right-wing nationalisms, and state violence against Black and other racialized people further threatens the life and integrity of illegalized migrants.¹ Illegalized migrants experience and negotiate these uncertainties and risks ‘in place,’ in cities and suburbs, setting the conditions by which migrants are afforded a chance to live, work, play, and move in their everyday – in short, the conditions by which their lives are made livable.²

As discussed throughout this book, in the past two decades, local jurisdictions have become central to migration law and politics, with urban policies incorporating a range of perspectives on the policing and

¹ De Genova, “The ‘Migrant Crisis’ as Racial Crisis: Do *Black Lives Matter* in Europe?”; De Genova and Roy, “Practices of Illegalization.”

² Carpio, Irazábal and Pulido, “Right to the Suburb? Rethinking Lefebvre and Immigrant Activism.”

settlement of illegalized migrants. The ‘local turn’ in migration research has shed light on the often disparate and contradictory ways in which localized migration governance approaches have unfolded, with both vertical and horizontal dimensions and progressive and regressive element.³ On the reformist side, some cities have responded to solidarity demands to disentangle themselves from federal immigration law enforcement mechanisms by declaring themselves ‘sanctuary’ or ‘safe cities,’ vertically decoupling from national policy to offer migrants a first line of protection against detention.⁴ In turn, the horizontal dimension of sanctuary city governance, which is the focus of this chapter, refers to the integration of illegalized migrants to city life and how the local challenges of livability, service accessibility, and inclusivity for everyone regardless of status may be addressed on the ground. Taken seriously, horizontality would go beyond common ‘soft policies’ in the educational and cultural realms and call for the inclusion of migrants’ interests in planning and other instances where the ‘public interest’ is collectively defined.⁵ At a practical level, planning is one of the few areas of control for municipalities and thus offers openings for migrant justice in the sanctuary city. Thus, an equity planning approach coupled with access to the city spaces ‘without fear’ would also help cultivating a sense belonging, becoming, and urban citizenship.

Despite the opening of some spaces in various services, municipal governments and urban planners have yet to fully address the ‘local turn’ of migration politics at a time when they are increasingly confronted with anti-austerity, anti-racism, and anti-colonial movements. Urban planners have long been complicit in ignoring particular populations and invisibilizing tactics through the production of uneven urban environments where those ‘out of sight’ are also excluded from adequate urban, social, and material services and infrastructures.⁶ In response, nonstatus migrants and precarious status citizens have joined many racialized and marginalized groups affected by everyday violence of state/planning practices of

³ See Baumgärtel and Miellet in this volume. See also Zapata-Barrero, Caponio and Scholten, “Theorizing the ‘Local Turn’ in a Multi-Level Governance Framework of Analysis: A Case Study in Immigrant Policies”; Lasch et al. “Understanding ‘Sanctuary Cities.’”

⁴ Paik, “Abolitionist Futures and the US Sanctuary Movement”; Darling and Bauder, *Sanctuary Cities and Urban Struggles: Rescaling Migration, Citizenship, and Rights*.

⁵ Bernt, “Migration and Strategic Urban Planning: The Case of Leipzig.”

⁶ Thomas, “Planning History and the Black Urban Experience: Linkages and Contemporary Implications”; Yiftachel, “Planning and Social Control: Exploring the Dark Side,”; Stein, *Capital City: Gentrification and the Real Estate State*.

dispossession and neoliberal capitalism.⁷ In Canada, this solidarity sought to denounce the cumulative effects of urban practices where vulnerable people have often been rendered invisible to legal authorities, but city officials did very little in challenging national immigration regimes that are rendering many people ‘illegal’ in the first place. Acts of solidarity in resisting the exclusionary logic of citizenship by imposing everyday contingencies on undocumented noncitizens have instead come more predictably from churches, nonprofit organizations, and pro-immigration advocacy groups. Defending these claims and rights of nonjudicial status to alleviate the barriers of access and equity is slowly extending to various institutions and sectors, such as healthcare and education, but the challenges persist particularly amidst a growing global inequality gap.

Our normative inquiry aims to recenter the limits and possibilities of creating an urban fabric where different sectors and service providers within and beyond the state may resist “irregularity” to “circumvent non-judicial status” and where illegalized migrants are increasingly included and afforded housing, labor, and mobility justice, in short, substantive urban citizenship.⁸ As a social practice with redistributive capacity, we see equity planning⁹ and decolonial planning practices¹⁰ at the crux of such efforts. Reclaiming the collective project of planning for migrant solidarity may activate new openings to disrupt exclusionary discontinuities in access to services and infrastructure. Furthermore, planning processes that make space for noncitizens through collaborative and democratic spaces have the potential to yield more just outcomes for all groups while giving noncitizens more control over their destiny.¹¹ In its more radical stance as a form of collective action, planning may afford noncitizens and other marginalized groups opportunities to enact a politics of possibility beyond the bureaucracy of the state and the logics of the market.¹²

⁷ Marcuse, “From Critical Urban Theory to the Right to the City”; Harvey, *Rebel Cities: From the Right to the City to the Urban Revolution*; Sandoval, “Shadow Transnationalism: Cross-Border Networks and Planning Challenges of Transnational Unauthorized Immigrant Communities.”

⁸ Connoy, “(Re)Constructing and Resisting Irregularity: (Non)Citizenship, Canada’s Interim Federal Health Program, and Access to Healthcare.”

⁹ Sotomayor and Daniere, “The Dilemmas of Equity Planning in the Global South.”

¹⁰ Ugarte, “Ethics, Discourse, or Rights? A Discussion about a Decolonizing Project in Planning”; Dorries, and Harjo, “Beyond Safety: Refusing Colonial Violence through Indigenous Feminist Planning.”

¹¹ Carpio, Irazábal and Pulido, “Right to the Suburb? Rethinking Lefebvre and Immigrant Activism.”

¹² Friedmann, “Planning in the Public Domain: From Knowledge to Action.”

Although much has been said about the City of Toronto's sanctuary policy,¹³ in this chapter, we revisit it in the juncture of COVID-19 and the prolonged protests that since May 26 of 2020 took place in North America following the police killing of George Floyd in Minneapolis, and the death of Regis Korchinski-Paquet in Toronto – among other victims of structural anti-Black racism. Since the 1990s, organizing for 'undocumented' migrants in Toronto has been primarily located with anti-Black racism, Indigenous struggles for sovereignty, and other noninstitutionalized solidarity movements, which makes this moment of particular significance for solidarity activists also claiming that 'no one is illegal' and less so, 'on stolen land'. In most large Canadian cities, such solidarity movements mobilized sanctuary or solidarity policies enabling access to some municipal services for a growing undocumented population.

Toronto's sanctuary city declaration Access TO (motion CD 18.5 passed on February 20, 2013) has been frequently cited by city officials to demonstrate how Toronto welcomes and accommodates difference. Often presented as a 'model city' of diversity and progressive politics,¹⁴ the case of Toronto invites scrutiny on the gaps between aspirational discourse and the governance and implementation of sanctuary policy. The case also invites reflection on the role and complexity of solidarity claims underpinning institutional pledges to 'sanctuary' and the extent to which equity planning practice could support a more serious commitment to livability, solidarity, inclusivity, and recognition for illegalized residents so that illegalization could be consistently resisted.¹⁵

In this chapter, we propose an inquiry of how solidarity – in the current moment of COVID-19 pandemic and anti-racism mobilizations – has been manifested and hindered in the processes of municipal governance and planning in Toronto. For nonstatus migrants and precarious status citizens, everyday violence has intensified through state/planning practices of dispossession and racial capitalism, offering an opportunity to

¹³ Hudson, "City of Hope, City of Fear: Sanctuary and Security in Toronto, Canada"; Humphris, "A History of the Memories of the 'Sanctuary City' in Toronto"; Hershkowitz, Hudson and Bauder, "Rescaling the Sanctuary City: Police and Non-Status Migrants in Ontario, Canada"; Landolt, "Assembling the Local Politics of Noncitizenship: Contesting Access to Healthcare in Toronto-Sanctuary City."

¹⁴ This rhetoric is criticized by Kipfer and Keil, "Toronto Inc? Planning the Competitive City in the New Toronto"; Goonewardena, "The Urban Sensorium: Space, Ideology and the Aestheticization of Politics"; Valverde, *Everyday Law on the Street: City Governance in an Age of Diversity*.

¹⁵ Sandercock, "Towards a Planning Imagination for the 21st Century."

expand solidarity in the face of neoliberal competition or devolution of resources. While Access TO is timidly opening a space for undocumented people to regularize some aspects of everyday lives in Toronto, such spaces need to be extended far more broadly to many other sectors in order to break the discontinuities of exclusion.

We first propose a review of sanctuary/solidarity city policy, followed by the tensions on immigration policy and local livability in the context of COVID-19. Despite its best intentions, such policy has so far been insufficient to address the needs and vulnerabilities of illegalized migrants. After considering how the 'local turn' in migration politics plays out in Toronto's urban governance context, we examine the limits of solidarity discourses particularly when attempts are made to institutionalize solidarity and translate it to municipal orders of government. We then discuss how municipalities and planners may engage more productively with the claims of current solidarity movements by redressing socio-economic vulnerabilities, arguing that sanctuary principles and practice need to go beyond social service agencies and municipal access to services and extend across new institutional and physical spaces in the city. If a city can better achieve inclusion in practice through the expansion of "free spaces"¹⁶ and freedom of mobility, what are the opportunities for urban planning to support the realization of such effort? How to move from planning *for*, to planning *with* those rendered invisible? How can we reimagine planning's normative commitments to transform through a praxis of solidarity? We conclude the chapter by stressing that a wider institutional commitment from municipal authorities would better strategize and advocate to effectuate changes at upper levels of government and a potential reform to immigration regime. In the failure of the state to provide such commitment to people excluded from immigration law, however, practices of solidarity might still be the most inclusive albeit vulnerable form of belonging.

2 Sanctuary Does Not Exist without Solidarity

In February 2013, Toronto City Council became the first 'sanctuary city' in Canada by adopting an Access TO policy presented by a solidarity

¹⁶ Nicholls, "The Uneven Geographies of Politicisation: The Case of the Undocumented Immigrant Youth Movement in the United States."

coalition of organizations.¹⁷ The policy sought to ensure access to municipal and public services for all residents, regardless of the immigration status. Based on a “Don’t Ask, Don’t Tell” principle, city officials were expected to not inquire about nor share immigration status with federal authorities (notably the Canada Border Services Agency) when providing particular services. Access TO has been described as “symbolically ambitious but practically cautious.”¹⁸ Yet, for pro-immigration organizations, community organizations, and advocacy groups, the sanctuary city policy demonstrably affirms pro-immigration politics and gesture toward social justice.

Sanctuary policy and solidarity claims point however to the tension between the legal and political recognition of migrants and national citizenship regimes – as well as to welfare state deficits and distribution of services across governmental levels. It is therefore not surprising that despite its narratives of inclusion, the main shortcomings of Toronto’s sanctuary city policy are caught between the discordance of political traditions and economic imperatives in national immigration policy, which at the local level complicates institutional commitment and service delivery. We expand on the challenges of Access TO later but for now, suffice to say that these limitations are exacerbated by the lack of appropriate municipal human and administrative resources, uneven institutional awareness and discretionary power, jurisdictional and constitutional constraints, pejorative discourses of migrants as threats to national boundaries and identity, and at the very core of the sanctuary policy, people’s invisibility and absence of demographic data on nonstatus migrants inhibiting services.¹⁹

Sanctuary city policies are generally considered oppositional practice to nation state authority by providing partial and limited suspension of

¹⁷ The Solidarity City Network behind Access TO policy included Toronto residents as well as a number of community organizations and advocacy groups, particularly the Alliance for South Asian Aids Prevention, Health for All, Immigration Legal Committee, Justice for Migrant Workers, Law Union of Ontario, No One is Illegal Toronto, Ontario Coalition Against Poverty, Parkdale Community Legal Services, Roma Community Centre, Social Planning Toronto, South Asian Legal Clinic of Ontario and the Workers’ Action Centre.

¹⁸ Hudson et al., “(No) Access T.O.: A Pilot Study on Sanctuary City Policy in Toronto, Canada,” p. 2.

¹⁹ Humphris, “A History of the Memories of the ‘Sanctuary City’ in Toronto, Canada”; Hudson, “City of Hope, City of Fear: Sanctuary and Security in Toronto, Canada”; Atak, “Toronto’s Sanctuary City Policy: Rationale and barriers.” Hudson et al., “(No) Access T.O.: A Pilot Study on Sanctuary City Policy in Toronto, Canada,” and No One is Illegal Toronto, “Often Asking, Always Telling: The Toronto Police Service and the Sanctuary City Policy.”

immigration law and enacting a temporary ‘relief’ space or solution to exclusionary politics, but such policy does not change immigration law and regime, does not provide regularization, nor does it repeal the vulnerability of undocumented people. Expanding the practice of temporary granting sanctuary into a particular circumscribed site (historically a church) outside the bounds of authority, detention, and deportation, to the more complex urban scale certainly brings far more unpredictability but nevertheless rests on similar traditions of charity and their asymmetrical power emphasizing a host-guest relation.²⁰ As Derrida reminds us, “[i]t must be remembered that the stakes of ‘immigration’ do not in all rigour coincide with those of hospitality which reach beyond the civic or properly political space.”²¹ Nevertheless, such unpredictability and asymmetrical power relations have become highly visible with the emergence of the global COVID-19 pandemic, as nonstatus migrants and other socially vulnerable groups have been left out of mainstream programs and planning responses, while the immigration system resorts to exceptionalities and temporal accommodations without suspending deportations and other practices of illegalization altogether.

3 ‘We’re (Not) All in This Together’: COVID-19 in the Sanctuary City

On August 14, 2020, as part of Canada’s response to the COVID-19 pandemic, the federal government announced that some “asylum claimants working in the healthcare sector during the COVID-19 pandemic would be offered a new pathway to permanent residency.”²² Called the ‘Guardian Angels’ pathway, the conditions for refugee claimants to access this route to permanent status involved “providing direct patient care as part of their job,” among other eligibility requirements.²³ While the UN Refugee Agency²⁴ and other organizations celebrated this action as a commendable step, migrants rights activists demanded that such pathway be extended to all migrants in recognition of the inordinate burden they have carried during the pandemic.

²⁰ Bagelman, “Sanctuary: A Politics of Ease?”

²¹ Derrida, “The Principle of Hospitality,” p. 6.

²² Government of Canada, “Health-Care Workers Permanent Residence Pathway: About the Public Policies.”

²³ *Ibid.*

²⁴ UN Refugee Agency, “UNHCR Applauds Canada’s Commitment to Grant Permanent Residency to Asylum-Seekers Working on COVID-19 Frontlines.”

The use of the ‘Guardian Angels’ tag to differentiate ‘deserving’ refugee claimants from others during the pandemic is exemplary of the Government of Canada’s practice of illegalization of those with precarious status, whereas the explicit requirement to access the pathway is for refugee claimants to literally risk their lives once more. Similar to narratives of the ‘good’ or ‘deserving’ immigrant that set some before the rest, the ‘Guardian Angels’ pathway stratifies a large majority of vulnerable migrants. The sorting of lives through temporal exceptionalities in legal migration regimes has been criticized for reproducing the criminalizing nature of the system through “the disavowal, disenfranchisement, and effective de-naturalisation or de-nationalisation of distinct categories of minoritised citizens.”²⁵ The governmental response also neglects the excessive impacts of the pandemic in the general migrant population. On August 23, 2020, under the coordination of the Migrants Rights Network,²⁶ migrants and activists took their demands for full and permanent immigration status for all to the streets in Toronto as a response to the excruciating circumstances caused by the pandemic.

The current context of the COVID-19 pandemic has clearly exposed how problems of access and resources for particular people affect life chances. Neighborhoods in the inner suburbs where the large majority of low-income, racialized, and new immigrants reside had infection and morbidity rates three times higher than the rates in the least ethnically diverse neighborhoods of the city.²⁷ Similarly, the rate of hospitalization in the poorest and racialized neighborhoods was four times as high than the city’s average, with 83 percent of reported cases in the city affecting Black and other people of color and 71 percent of those hospitalized were also racialized persons.²⁸ Like racialized communities disproportionately impacted by COVID-19, immigrants, refugees, and other newcomers accounted for 43.5 percent of total COVID-19 infections in Ontario while representing only 25 percent of the province’s population.²⁹ Unsurprisingly, rates of testing were lower with immigrant groups as many of them face communication barriers, have no healthcare access,

²⁵ De Genova and Roy, “Practices of Illegalization,” p. 352.

²⁶ Migrants Rights Network, “August 23 Day of Action for Status for All in 11 Cities.”

²⁷ Wherry, “One Country, Two Pandemics: What COVID-19 Reveals about Inequality in Canada.”

²⁸ Cheung, “Black People and Other People of Color Make Up 83% of Reported COVID-19 Cases in Toronto.”

²⁹ Guttman et al., “COVID-19 Immigrants, Refugees and Other Newcomers in Ontario: Characteristics of Those Tested and Those Confirmed Positive, as of June 13, 2020.”

and live with the fear detention or deportation. For example, about 2,000 undocumented workers in Ontario farms that had experienced ongoing outbreaks showed reluctance to go for testing assuming ineligibility for testing and treatment and fear of both losing income and being deported as a result.³⁰ Limited access to testing is further exacerbated by the fear of being deported if indeed tested positive as COVID data are reported to public health authorities. People without status have long been excluded from any safety net and fear interactions with institutions. Poor health outcomes and vulnerability to COVID-19 are exacerbated by poor housing conditions and lower incomes, and a series of no access to health benefits, to regular or emergency pandemic-related governmental programs, to childcare benefits, or any other assistance.³¹ Lockdown measures to halt the spread of the coronavirus have generally increased the control of residents and the need to constantly produce identification or risk arrest.

Undocumented people are evidently ineligible to relief assistance like the Canada Emergency Response Benefit (CERB) program, which provided financial support (\$2,000 CAD for a 4-week period) to employed and self-employed Canadians directly affected by COVID-19.³² While no data exist on income losses for illegalized migrants, it can be assumed that many of them were already working in low-paid, unaccounted for, exploitative or precarious conditions. With reduced opportunities for saving or moving outside the so-called sanctuary city, many illegalized migrants were left with few options to cope with the hardships. Migrants who faced employment termination or whose jobs involve risk of infection may have had no option but to maintain or take any available jobs despite health risks.³³ According to the International Organization for Migration,³⁴ many migrants around the globe are overrepresented in occupations where the risk of infection is high (domestic work, food services, nonessential retail) and excluded from opportunities to work remotely. They may face few transportation options and be forced to work in physical proximity with co-workers and customers without protective equipment or proper hygiene measures. These working conditions make

³⁰ Gatehouse, "How Undocumented Migrant Workers are Slipping through Ontario's COVID-19 Net."

³¹ Mowat and Rafi, "COVID-19: Impacts and Opportunities."

³² Government of Canada, "Canada Emergency Response Benefits (CERB)."

³³ No One is Illegal, "Often Asking, Always Telling: The Toronto Police Service and the Sanctuary City Policy."

³⁴ Guadagno, "Migrants and the COVID-19 Pandemic: An Initial Analysis."

them especially vulnerable to COVID-19. Due to their vulnerabilities and constraints, they may even be forced to work despite showing symptoms.

Similar to other low-income racialized groups, migrants with precarious status often share multigenerational households where the exposure of seniors and others with fragile health conditions may be heightened.³⁵ Migrants' invisibility to local government has also meant that their access to private space for proper isolation, such as hotel space during quarantine has not been made equally available or affordable to them. Undocumented migrants find themselves relegated to shelter services such as Toronto's Exhibition Place 'Better Living' center, which during the COVID-19 emergency of the congregated shelter model offered undignified individual rooms made of clear plexiglass divisions with no privacy, which advocates referred to as "glass cages for people."³⁶

Reporting on the impacts of the pandemic on the delivery of settlement services, the Ontario Council of Agencies Serving Immigrants (OCASI)³⁷ noted that services that could have been otherwise accessed by nonstatus migrants under conditions of confidentiality were significantly affected by the pandemic and ensuing lockdowns, with digital exclusion being a critical barrier to access services for nonstatus migrants. Virtual service delivery for settlement services was deemed inadequate to address the needs of all clients and to protect confidentiality. Service agencies brought attention to the growing isolation of service clients – many of them already isolated pre-COVID – and most critically, to heightened experiences of poverty, food insecurity, and risk of eviction due to unemployment and lost income in typical sectors such as domestic services and construction work due to the pandemic. OCASI advocates called for the federal and provincial governments to adopt a series of measures including a universal basic income program to be implemented regardless of status, a rent relief fund for tenants, and legislation that protect undocumented migrants from eviction, among others. Arguing that COVID-19 "policy responses by different orders of government have failed to redress structural and systemic disadvantages along racial lines," the racial justice education and advocacy network of Ontario, Colour of Poverty Colour of Change has urged for a regularization program to "provide a pathway

³⁵ *Ibid.*

³⁶ Cited in Lavoie, "Toronto Opens Four Warming Centres for People Experiencing Homelessness."

³⁷ Ontario Council of Agencies Serving Immigrants (OCASI), "OCASI Recommendation to TORR."

to permanent residence status for all people with precarious immigration status, including all migrant workers.”³⁸

COVID-19 thus exposed more bluntly Toronto’s existing socio-spatial inequalities and the extent to which borders of ‘life and death’ recreate themselves in the neoliberal city. While shutdowns and activity restrictions were implemented in the name of safety for a large better-off population who were able to retreat to their bubbles, not everyone was afforded the same level of protection.

4 Toronto’s ‘Local Turn’ in Migration Governance and Politics

Toronto’s sanctuary city policy as a claim to the city remains timid, discursive, performative, and perhaps at time a misleading reification of the idea of urban belonging or urban citizenship though access and hope.³⁹ Although the urban emerges as “a terrain through which political claims to rights are being articulated”⁴⁰ and as the privileged scale of “direct interactions” and service delivery, often perceived as inherently progressive,⁴¹ sanctuary policy is limited by jurisdictional mismatch between governments and neoliberal competition for services. The violence of exploitative labor conditions for illegalized migrants, coupled with ongoing gentrification, dispossession, evictions, and displacement from well-served and centrally accessible locations further complicates everyday survival in the sanctuary city.

One of the key challenges of the Canadian ‘local turn’ in migration governance and politics is the fact that municipalities have a minor status in law and politics. With reduced delegated power and authority, cities lack administrative capacity and adequate resources, which leave them with few legal tools to formulate and implement policies. Municipalities must then rely substantially on local planning, which is one of their few legal capacities to address emerging problems. As a result, “matters that might be better suited to other types of legal solutions, if brought before municipalities, end up funnelled into zoning and planning mechanisms.”⁴²

³⁸ Colour of Poverty Colour of Change, “COP-COC Reconstruction and Reset Plan for Canada.”

³⁹ Bagelman, *Sanctuary City: A Suspended State*.

⁴⁰ Darling and Bauder, *Sanctuary Cities and Urban Struggles: Rescaling Migration, Citizenship, and Rights*, p. 4.

⁴¹ See Mongia in this volume.

⁴² Ranasinghe and Valverde, “Governing Homelessness through Land-Use: A Sociolegal Study of the Toronto Shelter Zoning By-Law,” p. 327.

This is particularly the case with urban problems concerning social justice claims and affecting the interests of migrants with precarious status, such as poverty, food insecurity, or homelessness, among others. Due to this limitation, services covered by Access TO were already hardly inclusive of undocumented immigrants before the pandemic. Immigration regularization, (un)employment, childcare benefits, or healthcare, all under federal jurisdictions, stand unaffected by urban-level sanctuary policy. Housing as a provincial responsibility, although much needed by ‘undocumented’ people who have no access to social housing waiting lists, remains outside city-level capacity to provide.⁴³

The local turn of migration has long found itself at unease with upper level of governments. While the implementation of sanctuary policy has been based on a ‘Don’t Ask, Don’t Tell’ approach (adopted in 2004), the ‘Don’t Tell’ position has not always been fully observed as local authorities have often communicated information to immigration officials.⁴⁴ In 2017, an independent and comprehensive analysis of Toronto’s sanctuary policy revealed concerns over the lack of consistency in the implementation, lack of trust on police services, and the unintended impacts of the policy’s variability on vulnerable populations.⁴⁵ This is due mostly to the expansion of enforcement measures of border control to local institutions and the expansion of border policing.⁴⁶ ‘Don’t Ask, Don’t Tell’ has limited institutional commitment and its negative formulation normalizes inaction, passivity, or status quo (such as reporting) rather than progressive action defending immigration rights and claims.

Given Canadian municipalities’ lack of autonomy in the governance structure, local jurisdictions have little to no power or competence to respond to activists’ poignant demands or to even alleviate temporarily the economic burden on illegalized migrants, many of them now experiencing housing insecurity or homelessness. Despite the Access TO policy, being invisible to the system barely guarantees the protection of life under dire economic circumstances. For Bagelman, a ‘gentler face’ of sanctuary policy seemingly provides a temporary relief from exclusionary

⁴³ Lebow, *Access Denied in a “Sanctuary City.”*

⁴⁴ Notably related to policing as examined by Hudson in this volume.

⁴⁵ Ryerson Centre on Immigration and Settlement, “(No) Access T.O.: A Pilot Study on Sanctuary City Policy in Toronto, Canada.”

⁴⁶ Hudson, “City of Hope, City of Fear: Sanctuary and Security in Toronto, Canada”; Coleman and Kocher, “Detention, Deportation, Devolution and Immigrant Incapacitation in the US, post 9/11”; Gilbert, “Immigration as Local Politics: Re-Bordering Immigration and Multiculturalism through Deterrence and Incapacitation.”

policies and the threat of detention and deportation, but such policy “in fact contribute(s) to a hostile asylum regime by indefinitely deferring and even extending a temporariness of waiting” as vulnerability is never fully alleviated.⁴⁷

Neoliberal economic violence is thus another factor limiting livability for migrants and other vulnerable groups in Toronto and other aspiring global cities. If our main argument is that under current circumstances Toronto can hardly offer undocumented migrants genuine sanctuary conditions, it also holds true that the city’s violent urban development processes and entrepreneurial urbanism have constrained access to the city for an ever-larger number of low-income and racialized households.⁴⁸ Adding to the legal and practical complexities of implementing sanctuary policy is the fact that over the past two decades, Toronto has experienced a profound housing affordability crisis and a crisis of tenant rights resulting on ongoing displacement and evictions. Rapid processes of gentrification and financialization of housing markets, including multi-family rentals and other previously de commodified niche markets, have accelerated the displacement of socio-economically vulnerable residents from downtown and other residential neighborhoods to the inner or outer suburbs of the Greater Toronto Area.⁴⁹

Such urban transformations have been accompanied by a growing income inequality gap that over the past three decades has also deepened globally.⁵⁰ A city once characterized by a relatively homogenous middle-income public, Toronto has been reconfigured through rising global investments in real estate, ongoing projects of gentrification and downtown renewal altering dramatically its socio-economic and racial landscape. Such urban divide has been the focus of a number of studies that document rising poverty rates in neighborhoods where racialized

⁴⁷ Bagelman, “Sanctuary: A Politics of Ease?” p. 58.

⁴⁸ Kipfer and Keil, “Toronto Inc? Planning the Competitive City in the New Toronto”; Goonewardena, “The Urban Sensorium: Space, Ideology and the Aestheticization of Politics”; Slater, “Municipally Managed Gentrification in South Parkdale, Toronto”; Valverde, *Everyday Law on the Street: City Governance in an Age of Diversity*; Fincher et al., “Planning in the Multicultural City: Celebrating Diversity or Reinforcing Difference?”

⁴⁹ August and Walks, “Gentrification, Suburban Decline, and the Financialization of Multi-Family Rental Housing: The Case of Toronto”; August, “The Financialization of Canadian Multi-Family Rental Housing: From Trailer to Tower.”

⁵⁰ Soederberg and Walks, “Producing and Governing Inequalities under Planetary Urbanization: From Urban Age to Urban Revolution?”

immigrants reside.⁵¹ Studies showed that racialized income gaps persist in Canada between racialized and nonracialized workers, with earning gaps for new immigrants who identify as Black, Filipino, or Latin American had also being particular steep.⁵² In 2019, 87 percent of 122,250 low-income households in the rental market were paying over 30 percent of their income on rent, with at least half of these households facing severe unaffordability and allocating over 50 percent of their income to rent.⁵³ Such households were highly vulnerable of failing to meet rental agreements even before the pandemic, but when COVID-19 hit, vulnerabilities to tenant evictions amplified due to their limited ability to buffer income losses.

Neoliberal violence and socio-spatial relegation thus negate the right to the city for larger groups at the intersections of urban disadvantage, regardless of legal status. Such exclusions problematize the assumption that sanctuary can effectively extend protections for noncitizens in the neoliberal city. It also brings into question right to the city claims as a unified call by solidarity groups for access and inclusion. As Mayer argues, perhaps what social movements need to reclaim is not the right to the existent city, but the right to a *different* city, one that is more open and democratic.⁵⁴ An open city, foregrounded on solidarity, would recognize the right to the city as the right to participation and the right to appropriation based on inhabitation.⁵⁵ Such interpretation of the right to the city, which also involves a contributor right, is based on the recognition that “those who make the city have a claim to it.”⁵⁶

The next section provides the context of Toronto’s sanctuary policy from the perspective of solidarity movements and the limitations of translating solidarity into sanctuary policy to fulfill the promise of ‘access without fear’ and protection from detention and deportation.

5 The Limits of Solidarity in the Local State

In times of crisis when governments and institutions of power show their limits, people have come together to demand and to forge alternatives

⁵¹ Hulchanski, “The Three Cities within Toronto: Income Polarization among Toronto’s Neighbourhoods, 1970–2000.”

⁵² Block, Galabuzi and Tranjan, “Canada’s Colour Coded Income Inequality.”

⁵³ Leon and Iveniuk, “Forced Out: Evictions, Race, and Poverty in Toronto.”

⁵⁴ Mayer, “The ‘Right to the City’ in Urban Social Movements.”

⁵⁵ Holston, *Insurgent Citizenship: Democracy and Modernity in Brazil*.

⁵⁶ Holston, “Metropolitan Rebellions and the Politics of Commoning the City,” p. 127.

grounded in daily life and collective action. Wilde defines solidarity as “the feeling of reciprocal sympathy and responsibility among members of a group which promotes mutual support.”⁵⁷ Solidarity is generally understood as the foundation of political relations, and it is often invoked antagonistically when justice or institutional structure fails.⁵⁸ Solidarity is a highly malleable concept: Solidarity can be emancipatory or redemptive in the face of deficits of freedom, equality, and justice, but it can just as easily fall into intolerance on a less progressive side of the political spectrum. Both the strength and limits of solidarity rest on its “relational constitution” and the fact that it is not bounded by a particular scale.⁵⁹ Solidarity is expressed just as well through a call for universal human rights⁶⁰ or the democratization of everyday life – as in the case of local claims for sanctuary. In such case, solidarity acts as a normative framework for securing local rights for migrants and refugees excluded by the ‘legalities’ of national immigration regimes and global capitalism. Yet, the realization of solidarity also depends on its level of support – a reality complicated in times of pandemic and isolation.

The success of solidarity network securing nonstatus migrants rights show limitations. Its complete success would demand not only a greater capacity for migrants to disrupt their structural positions of vulnerability⁶¹ but also a broader solidarity of organizations and residents, but also solidarity amongst municipal politicians and departments personnel as well as solidarity between multi-level governmental instances that would ultimately politically grant recognition to nonstatus migrants. This ideal remains unattainable despite the best efforts of solidarity networks and progressive municipal politics and politicians. This is in part due, as DeGraauw explains, to the fact that immigrant policies at the municipal level are often framed “as developmental rather than redistributive policies.”⁶²

Migrant rights solidarity is argued in the form of demands to grant some municipal services to non-status migrants by instantiating a space of refuge from national state power. Solidarity as a common normative framework of inclusion and access for non-status migrants stand however

⁵⁷ Wilde, “The Concept of Solidarity: Emerging from the Theoretical Shadows?” p. 171.

⁵⁸ Melissaris, “On Solidarity.”

⁵⁹ Oosterlynck et al., “Putting Flesh to the Bone: Looking for Solidarity in Diversity, Here and Now.”

⁶⁰ See Oomen, this volume.

⁶¹ Swerts and Nicholls, “Undocumented Immigrant Activism and the Political: Disrupting the Order or Reproducing the Status Quo?”

⁶² DeGraauw, “City Government Activists and the Rights of Undocumented Immigrants: Fostering Urban Citizenship within the Confines of US Federalism,” p. 4.

in opposition to the state's policies of detention and deportation – which reassert the exclusive membership of a political community. According to UNHRC, 79.5 million people were forcibly displaced worldwide from their home in 2019 and many of them find themselves without status or rendered illegal by national political regimes and global economic bordering forces.⁶³ As stated by Swerts and Nicholls, “this illegalisation of migrants by national governments has created shadow populations ... [that] lack the *de jure* recognition needed to guarantee their right to stay.”⁶⁴ Derrida decries the different statuses created by the conflated political and economic interest of the nation-state as “mean” and restrictive.⁶⁵ For Derrida, “this distinction between the economic and political is not only abstract and inconsistent; it becomes hypocritical and perverse. This distinction creates the quasi-impossibility to grant political asylum and to even prevent the best efforts to apply the law subjected to opportunist considerations, whether electoral or politicized, themselves emerging from police order, of real or imagined security issues, of demography or market. The discourse on refuge, asylum or hospitality then becomes pure rhetorical alibis.”⁶⁶ As Melissaris argues, non-status migrants stand outside the “consensus universalis” and “[a]lthough solidarity animates all political action, political action – and especially institutionalised action – can never duplicate the conditions of solidarity.”⁶⁷

Sanctuary policy nevertheless gives some political “presence” to the claims of “non-status” people.⁶⁸ Solidarity networks in the defense of immigrant rights attempt to unsettle the conventional understanding of national citizenship by reasserting the urban as a terrain where rights can be articulated.⁶⁹ Writing about pro-immigration policies and practices of city governments in the United States (despite a different context than Toronto), De Graauw sees urban citizenship advances for undocumented migrants being fostered through access of public service provision, creation of negative (‘Don’t Tell’) and positive (especially labor-related) rights protection policies, and modes of democratic participation (e.g.,

⁶³ UNHRC, “Figures at a Glance: 79.5 Million Forcibly Displaced People Worldwide at the End of 2019.”

⁶⁴ Swerts and Nicholls, “Undocumented Immigrant Activism and the Political: Disrupting the Order or Reproducing the Status Quo?” p. 1.

⁶⁵ Derrida, *Cosmopolities de tous les pays, encore un effort!* p. 31.

⁶⁶ *Ibid.*, pp. 33–34.

⁶⁷ Melissaris, “On Solidarity,” pp. 12, 20.

⁶⁸ Darling, “Forced Migration and the City: Irregularity, Informality, and the Politics of Presence”; Bauder, “Possibilities of Urban Belonging.”

⁶⁹ Bauder, “Possibilities of Urban Belonging.”

voting rights in local elections or decisions).⁷⁰ For De Graauw, such urban citizenship advances bring “a greater sense of local belonging, recognition, and voice” as well as a “modicum of dignity and safety,” but “they do not immediately disrupt traditional understandings of national citizenship or undermine the federal monopoly over immigration and citizenship.”⁷¹ The normative recognition of urban citizenship practices remains highly promising as nonstatus migrants raise their family, work and pay taxes, study, shop, or simply attempt to recreate a life but the protection from deportation remains always discretionary to authorities’ powers.

Although central in the history of immigration politics, solidarity and sanctuary whether motivated through religious or anti-austerity position translates an unequal relationship. This unequal relationship not only potentially frames solidarity efforts, but it also frames the reception of such claims. The municipal state can only support sanctuary claim to some limits, being themselves limited by national immigration regimes or other services jurisdictions to fully embrace the protection of nonstatus residents. The expansion of a progressive local (municipalist) agenda in which “city councils act institutionally, in cooperation with civil society”⁷² is also urgently required to monitor and broaden the climate at city hall for pro-immigration support beyond the solidarity network made of community organizations who often already operate at the seams of their social, political, and financial capacities – especially in a neoliberal context. For Melissaris,⁷³ reconciling solidarity with institutionalization is complicated, but it does not mean that is not worthwhile. The first challenge is to conceive of an institutional structure that espouses the normative interrelations of solidarity. Here, the different discourses and practices of criminalization and securitization deployed by the state against nonstatus individuals render solidarity and membership into the solidary and legally constituted community difficult.⁷⁴ Exclusion is a practical and political barrier of solidarity.

Despite the best intentions of the sanctuary policy to accommodate access to some services, many of these services might not be the most essential to insure inclusiveness – especially in the absence of dedicated

⁷⁰ De Graauw, “City Government Activists and the Rights of Undocumented Immigrants: Fostering Urban Citizenship Within the Confines of US Federalism.”

⁷¹ *Ibid.*, pp. 15–16.

⁷² García Agustín, “New Municipalism as a Space for Solidarity,” p. 57.

⁷³ Melissaris, “On Solidarity.”

⁷⁴ See Hudson in this volume.

portfolios across municipal divisions. In March 2017, a staff report by the Executive Director of Social Development, Finance and Administration (CD19.9) affirms that targeted efforts are still needed to ensure that refugees, refugee claimants, and undocumented Torontonians “are able to access programs and services and improve their quality of life in Toronto.”⁷⁵ The challenge emerges also from the concomitant invisibility of nonstatus migrants and the lack of commitment to data collection and protection.⁷⁶

In [Section 6](#), we point to the fact that nonstatus immigrants do not participate in the larger process of planning – and are therefore not afforded the right to live freely and to imagine their communities. We then center on the question of how can planning be reimagined beyond the false dualism of “compassion and racism” framing othering practices.⁷⁷ How to move from planning *for* to planning *with* those rendered invisible? We thus discuss approaches to reimagine planning’s normative commitments to transform through a praxis of solidarity and the opportunities for a transformative planning practice that may serve the needs of illegalized migrants.

6 Extending Solidarity and Urban Belonging: Planning for the Inclusive City (Yet to Come)

Despite the many limitations, Access TO has undoubtedly unlocked a space – albeit imperfect and incomplete – for undocumented people to momentarily regularize some aspects of their everyday lives in the city. This opening to undocumented migrants may be improved in the future through a deepening of the policy, higher coordination, better staff training and reallocation of functions (starting with the police and other emergency response services) and dedicated services and budgets. There have been some examples of success and innovation to redress access barriers for nonstatus clients worth highlighting among municipal divisions. For instance, the Toronto Public Library system has been praised for showing flexibility with clients through a mail back process as a system that enables nonstatus residents to confirm proof of address when signing

⁷⁵ City of Toronto, “Refugees, Refugee Claimants and Undocumented Torontonians,” p. 2.

⁷⁶ Hudson et al., “(No) Access T.O.: A Pilot Study on Sanctuary City Policy in Toronto, Canada.”

⁷⁷ Kaika, “Between Compassion and Racism: How the Biopolitics of Neoliberal Welfare Turns Citizens into Affective ‘Idiot.’”

up for a library card. Proof of name is still required, but it may be accepted from documents other than government-issued photo identification.⁷⁸ Given the range of services (including access to classes, workshops, computers/Internet, and books), locational advantages across the city, and access to public spaces provided within the public libraries themselves, Toronto Public Libraries can be rightly considered sanctuary spaces in the city. Similarly, a pilot initiative called “On Board” was developed in 2017 by Toronto Public Health involving Community Health Centres and the public shelters system to improve safe referrals to primary care for uninsured clients, particularly those with precarious status.⁷⁹ Despite inadequate institutional and financial support, these examples demonstrate some openness by staff of municipal agencies to reduce the barriers to access services for undocumented migrants. Yet, these efforts are still uneven and insufficient.⁸⁰

Outside the municipal sphere, key selected public institutions within the education and health sectors, including the Toronto District School Board, have adopted ‘Don’t Ask, Don’t Tell’ policies although with slow and inconsistent implementation.⁸¹ More recently, York University adopted a pilot program aimed to expand access to nonstatus applicants. Through a pilot initiative allowing part-time study and offering a bridging curriculum and transitional support, York University extended domestic tuition fees to a small group of nonstatus students, which otherwise would have been changed prohibitive international student fees.⁸²

More comprehensive immigration reform has long been demanded by pro-migration advocates to provide a critical relief to systematic marginalization, but such legal solution has been seen as politically untenable. Current spaces of solidarity with undocumented residents however need to be extended far more broadly to many other sectors and institutions in order to break exclusion. Creating an urban fabric where different sectors and service providers resist ‘irregularity’ to circumvent nonjuridical status may enable a more comprehensive realization of access by extending to

⁷⁸ City of Toronto, “Refugees, Refugee Claimants and Undocumented Torontonians.”

⁷⁹ *Ibid.*

⁸⁰ Aery and Cheff, “Sanctuary City: Opportunities for Health Equity.”

⁸¹ Villegas, “‘Don’t Ask, Don’t Tell’: Examining the Illegalization of Undocumented Students in Toronto, Canada.”

⁸² Armanyous and Hudson, “Barriers vs. Bridges: Undocumented Immigrants’ Access to Post-Secondary Education in Ontario,” and Villegas and Aberman, “A Double Punishment: The Context of Postsecondary Access for Racialized Precarious Status Migrant Students in Toronto, Canada.”

both, physical places and institutional spheres, across society and state.⁸³ An alternative has been to provide access to undocumented people despite timid and inconsistent implementation. Yet, other spaces could emerge for those who are “unaccounted for” and may forge relationships of trust, organize, politicize, and disrupt illegalizing state orders by publicizing their claims to equality and to a more open city.⁸⁴ Writing on politicization of undocumented immigrant youth movement in the United States (and in reference to the Deferred Action for Childhood Arrivals (DACA) program),⁸⁵ Nicholls defines “free spaces” as “frontline sites that allow marginalized and risk-averse groups like undocumented immigrants to meet with others, forge emotional bonds, and construct transgressive collective identities.”⁸⁶ Accommodating not only institutional but also physical spaces in the city is thus equally important in nurturing the politicization process of marginalized people through inclusive spaces. While solidarity across difference cannot be forced or forged, it can be nurtured. Conversely, hostile geographies and uneven socio-spatial planning may prevent those at the urban margins from developing close relations with others and raising their voices to advocate for themselves.

The recent COVID-19 pandemic evinced how low-income and other economically vulnerable groups are particularly reliant on public facilities and infrastructures. During the pandemic, public spaces constitute the only access to outdoor recreational space for socially vulnerable groups, providing respite to those living in small apartments or confined in overcrowded housing arrangements.⁸⁷ Yet, most low-income communities have smaller, undermaintained, or less numerous public spaces than affluent communities. Open public spaces, for instance,

⁸³ Connoy, “(Re)Constructing and Resisting Irregularity: (Non)Citizenship, Canada’s Interim Federal Health Program, and Access to Healthcare.”

⁸⁴ Nicholls, “The Uneven Geographies of Politicisation: The Case of the Undocumented Immigrant Youth Movement in the United States.”

⁸⁵ Differences in the potential for pro-migration mobilization and politicization in Canada and the United States vary greatly given the estimated number of undocumented people, the very different trajectories and histories of migration policy/law and politics (tainted by neoliberal multiculturalism in Canada), and different political and economic realities. Differences in municipal power and institutional capacity have led cities to take more direct actions to recognize the rights of undocumented people (which has also fueled more anti-immigration sentiment).

⁸⁶ Nicholls, “The Uneven Geographies of Politicisation: The Case of the Undocumented Immigrant Youth Movement in the United States,” p. 2.

⁸⁷ Honey-Rosés et al., “The Impact of COVID-19 on Public Space: An Early Review of the Emerging Questions – Design, Perceptions and Inequities.”

should be considered fundamental in an inclusive city. Yet, much is needed for racialized residents and migrants with precarious status to feel safe from policing occurring in so-called public spaces as fear of detention and deportation have long deterred or restricted the use of such spaces.

A city of 'free spaces' would similarly require 'free mobilities.' In arguing for mobility justice, Sheller contends that the recognition of freedom of mobility as a universal human right "exists in relation to class, race, sexuality, gender, and ability exclusions from public space, from national citizenship, from access to resources, and from the means of mobility at all scales."⁸⁸ Undocumented people are subjected to multiple spatial scales and "mobility regimes, including legal regimes ... govern[ing] who and what can move (or stay put), when, where, how and under what conditions."⁸⁹ The "violence of mobility"⁹⁰ is a daily reality for people having to constantly remain invisible in order to avoid detention and deportation. For people with no status, uneven mobilities precondition their access to migration legal regimes just as well as their daily access to services while significantly curbing any claims to 'right to the city' or resistance. The interconnections between the different regimes of mobility show that mobility justice – "from the scale of the racialized body, to the detention of migrants, to the ease of travel for global elites" is not only about documentation or temporary relief of movement but also that justice itself is "an unstable configuration that moves across scales and realms."⁹¹

If a city can better achieve inclusion in practice through the expansion of free spaces and freedom of mobility, what are the opportunities for urban planning – typically a responsibility of local jurisdictions and within the realm of urban governance – to support the realization of such effort? As a key dimension of urban governance and city management, planning is generally concerned with the disposition of land, infrastructures, facilities, and services and how the overall organization of the built environment may improve or limit the interests and circumstances of individuals and groups. It also involves the development of social, cultural, and economic policies that may change the characteristics of places.⁹² Beyond its

⁸⁸ Sheller, *Mobility Justice: The Politics of Movement in an Age of Extremes*, p. 20.

⁸⁹ *Ibid.*, p. 115.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*, p. 20.

⁹² Fincher et al., "Planning in the Multicultural City: Celebrating Diversity or Reinforcing Difference?"

more technocratic aspects, planning as a social practice is one of a few arenas that entertain a collective capacity to aspire,⁹³ “insofar as [planning] does not just analyze and predict, but also develops criteria for judgment and advocates change.”⁹⁴

Planning, however, has a long tradition of entrenching colonial and neoliberal orders in the management of space.⁹⁵ The adoption of the real estate mantra of assigning ‘the highest and best value’ to land uses and the reduction of housing to its exchange value have both belittled planning as an instrument of capital accumulation.⁹⁶ The promotion of white suburbanization, red lining and instances of exclusionary zoning similarly illustrate the use of planning as a regulatory tactic to keep racialized communities contained, oppressed or at a distance.⁹⁷ In many cities, the resulting uneven territorial development has allowed right-populist politics to fan social tensions and capitalize on collective fears of the other such as non-status immigrants or racialized communities.⁹⁸

In extending solidarity and urban belonging for migrants with precarious status, the project of disrupting planning’s entanglements with neoliberal violence, regimes of illegalization, and settler colonialism seems crucial.⁹⁹ For this, it is necessary to break away with current practice and reclaim new forms of planning. In discussing how planning may be “imagined otherwise” to redress exclusions and anti-Black racism in the built environment, Bates calls for envisioning ‘new blueprints’ from spaces of community organizing and artistic expression.¹⁰⁰ A planning project aimed to redress the violence of exclusion for illegalized migrants can similarly benefit from covert forms of ‘planning otherwise’ where the often-hidden collective action and placemaking practices of illegalized migrants and other vulnerable groups are considered in determining the public interest.

⁹³ Inch, Slade and Crookes, “Exploring Planning as a Technology of Hope.”

⁹⁴ Rankin, “Critical Development Studies and the Praxis of Planning,” p. 219.

⁹⁵ Roy, “Praxis in the Time of Empire,” and Rankin, “Critical Development Studies and the Praxis of Planning.”

⁹⁶ Stein, *Capital City: Gentrification and the Real Estate State*.

⁹⁷ Goetz, Williams and Damiano, “Whiteness and Urban Planning.”

⁹⁸ Rivero et al., “Democratic Public or Populist Rabbie: Repositioning the City amidst Social Fracture.”

⁹⁹ Dorries, Hugill and Tomiak, *Settler City Limits: Indigenous Resurgence and Colonial Violence in the Urban Prairie West*; Porter, Roy and Legacy, “Planning Solidarity? From Silence to Refusal.”

¹⁰⁰ Bates et al., “Race and Spatial Imaginary: Planning Otherwise/Introduction,” p. 255.

This planning for solidarity should start by recognizing differences (in status, income, identity, etc.) that characterize urban life, and supporting goals of redistribution, recognition, and encounter.¹⁰¹ Thus, the pursuit of urban justice through planning involves inclusion of marginalized identities without essentializing or fixing them to a targeted category of social policy. Urban practitioners should work under a recognition that places are relational and thus dynamic – constantly being built and used in relation to people and events. Progressive urban practitioners can embrace conceptualizations of urban space as an open and dynamic process that breaks away with white, nationalist, and colonial spatial imaginaries. Such space reflects multiple forms and sources of knowledge; a space that everyone regardless of status is invited to shape. Such politics of place also implies “a consciousness of its links with the wider world”¹⁰² evincing the power relations people are enmeshed into. Furthermore, such a politics of place may enable different groups of residents (whatever their status) to contest and claim, even if partially, their *right to the city*: the possibility of changing and be changed by the city.

A new planning for solidarity can also lead to new ethical commitments; in particular, an “ethics of accountability”¹⁰³ to those excluded or rendered invisible in the planning process. Rather than declaring liberal benevolence, altruism, or compassion for migrants, the focus can then turn to an “otherwise planning” where migrants can safely participate (through anonymous involvement, artistic methods, or community organizing) in reimagining, along with others, the cities they inhabit.¹⁰⁴ In turn, municipal planners and other urban practitioners can inform, convene, facilitate, and politicize the implications of the process.¹⁰⁵

Different “layers” of possibilities of urban belonging can be imagined for illegalized migrants in the city, whether through a reshuffling of current orders, political constructs, and existing material configurations or by a radical reimagination of an “open and unfixed” urban reality where

¹⁰¹ Fincher and Iveson, *Planning and Diversity in the City: Redistribution, Recognition and Encounter*.

¹⁰² Massey, *Space, Place and Gender*, p. 7.

¹⁰³ Roy, “Praxis in the Time of Empire.”

¹⁰⁴ Kaika, “Between Compassion and Racism: How the Biopolitics of Neoliberal Welfare Turns Citizens into Affective ‘Idiot’.”

¹⁰⁵ Marcuse, “From Critical Urban Theory to the Right to the City.”

all of the city's inhabitants and their politics belong.¹⁰⁶ Based on ideas of presence in the city and a territorial polity, a “domicile principle” enabling residents to develop and affirm their belonging would start recognizing their membership in urban polities.¹⁰⁷ As the primary and formal scale of everyday belonging, the urban would be the basis of citizenship enabling other scales of citizenship.¹⁰⁸ As Holston reminds us “the domain of the political ... is the city itself and specifically the city-making activities of its residents, in which they produce the city through their lives and works as a collective social and material product; in effect, a commons” made of practiced solidarities.¹⁰⁹

7 Conclusion

In this chapter, we have examined the challenges faced by illegalized migrants while living invisibly in Toronto, a self-declared sanctuary city. In doing so, we meant to address some of the emerging normative questions raised by researchers studying the ‘local turn’ in migration politics from the perspectives of solidarity movements, municipal governance, power asymmetries, and the opportunities to redress exclusions through broadly defined equity planning practices.

Writing about sanctuary and solidarity in the current moment of the COVID-19 pandemic and anti-racism mobilizations to assess how solidarity has been manifested and hindered in the processes of municipal governance and planning in Toronto has made more salient some of the contradictions and tensions of localized approaches to immigration policy. As we have argued, behind the façade of progressive municipal politics,¹¹⁰ Toronto's sanctuary policy remains limited by the lack of institutional capacity and attention to ensure consistency and monitor results in access to services. Furthermore, the legal structure of governance in Canada, which subordinates municipalities to provincial and federal levels of authority, makes Toronto's claim to ‘access without fear’ a weak one as the municipal services provided may not be the most important to migrants or may not be delivered in a way that guarantees inclusivity.

¹⁰⁶ Bauder, “Possibilities of Urban Belonging.”

¹⁰⁷ Darling, “Forced Migration and the City: Irregularity, Informality, and the Politics of Presence.”

¹⁰⁸ Bauder, “Possibilities of Urban Belonging.”

¹⁰⁹ Holston, “Metropolitan Rebellions and the Politics of Commoning the City,” p. 212.

¹¹⁰ Valverde, *Everyday Law on the Street: City Governance in an Age of Diversity*.

These limitations are aggravated by several factors, including a jurisdictional mismatch between the borders of the sanctuary city and the expansive and lived city-region where most recent migrants and low-income groups reside at the margins, and where protection from detention may no longer hold. Similarly, the violence of gentrification and neoliberal urbanisms that excludes low-income groups from accessing the city defeats the purpose of proclaiming sanctuary when precarious migrants cannot even afford to access it. In the longer term, more than sanctuary in the neoliberal city, what solidarity movements should call for is the right to a different, more open, and democratic city to be shaped and appropriated collectively.

Given that planning is one of a few responsibilities of municipal authorities in Canada, we see some potential for reclaiming the project of planning as a collective social practice with an opportunity to expand and strengthen migrant justice and sanctuary commitments. Planning processes, for instance, can provide a sphere of safe engagement for migrants to contribute imagining the city, and in doing so, disrupt exclusionary spatial imaginaries. Planning can also redress more gradually some of the housing and mobility injustices faced by illegalized migrants, shaping a quality of place where solidarity may be cultivated, and migrants' activism and political subjectivities may flourish.

Although addressing the settlement and service needs of illegalized migrants is crucial to redress exclusions and enable a dignified quality of life, the uncertainties and fear of detention will remain unchanged until immigration regimes open new channels for regularization. Given the unmet immigration targets due to COVID-19, the Government of Canada may feel compelled to offer a path for nonstatus migrants who are already in the country. Unexpectedly, in February of 2021, the Colombian Government did just that, offering Temporary Protected Status and a path to citizenship to over one million 'undocumented' Venezuelan migrants in the country.¹¹¹

A stronger commitment from municipal authorities to advocate and mobilize changes at upper levels of government for a potential reform to immigration regime would of course more effectively redress most of the current challenges of 'living invisibly' in the city. Yet, in the failure of the state to provide such commitment to people excluded from

¹¹¹ Grandi, "Statement by the UN High Commissioner for Refugees on Colombia's New Temporary Protection Measure for Venezuelans."

immigration law, practices of solidarity might still be the most inclusive albeit vulnerable form of belonging. This critical perspective on the limits of sanctuary cities is not aimed to imply, nonetheless, that solutions, including legal ones, could be exclusively found at the nation state level, which could basically stop “illegalizing” migrants. Instead, decentralization and multiple scales of intervention and openings are needed to advance migrant justice and begin to redress pressing economic, social, and labor exclusions.

Postmodern Identity and the Structure of Immigration Control

DANIEL I. MORALES

1 Introduction

Nationalism is on the march and immigrants are in the crosshairs. The reaction had been a long time coming. In 1964, the United States traded in its expressly white supremacist¹ immigration policies for a new vision: to build a global creedal people – of every race, religion, and nationality – between the two great, North American coasts.² By 2020, thanks to the persistence of Donald Trump's immigration guru, Stephen Miller, the old racist impulses recaptured the migration control structures they invented (border patrol, the immigration agency, and plenary immigration power) doing lasting damage to the globalized, creedal project.

In Germany, Angela Merkel tried to meet the moment of the Syrian refugee crisis by harnessing her country's postwar reckoning with fascism to the new end of welcoming strangers in need. "Wir schaffen das" (we can do this), she said: Germany is strong enough to meet its obligations to those who seek refuge, no matter how sizable. Merkel was proved right, in a sense, Germany has not fallen apart in the face of an unprecedented influx of largely Muslim refugees from Syria, but the project was not without cost. It imperiled her own chancellorship and resurrected the remnants of fascistic impulses she wrongly believed Germany's post-holocaust, "never again," cultural re-fashioning had vanquished.³ The rest of the EU is, to varying degrees, in thrall to the same anti-immigrant forces that plague Germany. The Global South is riding the zeitgeist too. India, the world's

¹ Winant, "Racial Democracy and Racial Identity," p. 98.

² Calavita, "Immigration Law, Race, and Identity," p. 6 (noting the passage of the Hart-Cellar Act, which abolished eurocentric immigration quotas in favor of immigration from every part of the globe).

³ Katrin Bennhold, "As Neo-Nazis Seed Military Ranks, Germany Confronts 'an Enemy Within'."

largest, most culturally and religiously diverse democracy is engaged in a radical and violent homogenizing project to make Hindu belief the *sine qua non* of Indian legal and social membership.⁴ The stripping of citizenship from Muslim Indians has played an outsize role in executing this vision.

These nationalist shifts signal, among other things, the desire of a plurality of people across the globe to return to a *mythical*, unitary cultural past free of the messiness of difference, a never-realized time when unity was, nonetheless, emphasized and actively constructed,⁵ rather than difference celebrated and centered. And while the homogeneity of nation-states has always been overstated, the *relative* social and political consensus that prevailed after the second world war – within living memory – is a touchstone for many who are dissatisfied with the pluralism, diversity, dissensus, and agonism of the present.⁶

Immigration law is one important and potent part of the way in which nations understand and produce their identities and manage cultural difference, and so immigration law has come in for reassessment in country after country during the nationalist resurgence. What isn't clear, however, is if the old – relative⁷ – national unity that this global plurality seeks can be recovered after seven decades of postwar globalization; much less, whether stanching immigration or selecting different kinds of immigrants can do the job.

In this chapter, I use the United States as a case study to argue that even the *relative* consensus and *relative* cohesion of the postwar period in the United States cannot be recovered. National identity cannot be put back in the bottle. Deeper, postmodern⁸ currents in human identity construction render the effort to resurrect the old, more unified national identities Sisyphean. And if those national identities cannot be resurrected, it is not at all clear that trying to bring such identities back to life – especially using immigration

⁴ Zachariah, *Nation Games*, pp. 199–225.

⁵ Martha Nussbaum, *Political Emotions*, pp. 1–24.

⁶ Stenner, *The Authoritarian Dynamic*, pp. 14–20.

⁷ Goldman, *After Nationalism*, pp. 4–10 (Emphasizing that the relative cultural social consensus of the post-WWII period was exceptional in American history. The norm in the United States has been sociocultural conflict and dissensus). A similar, relative, consensus existed during the postwar period in many other nations. The consensus was especially powerful in providing a sense that nations were engaged in nation-building projects in pursuit of a common goal.

⁸ I use “postmodern” throughout to signal a still-developing but distinct form of identity construction that is different from the relatively homogenized aspirational forms of identity that

law – is a good idea. Any homogenized national identity imposed from on high at this point in human development, especially in the United States, will fail to satisfy a large portion of many nation's populations, potentially furthering internal conflict, rather than ameliorating it. Because immigration law participates significantly in this identity construction work, it ought to become less centralized and homogenized to accommodate this pluralist reality. Migration governance structures should be decentralized to reflect and reinforce the pluralism of identity that thrives *within* nation-states and the global solidarities that are emerging between them.⁹

A new, more decentralized approach to immigration governance is a better fit than top-down management, for the new postmodern order. Decentralization, I further claim, might in some countries, if properly designed, dial down the heat over immigration issues that the dislocations of global neoliberalism have caused. That heat, produced by numerous interlocking forces, has been narrowly projected onto immigration policy, since it is the dislocating factor that appears most tractable to nation-states. Pushing the immigration power, or a portion of it, down to a level where people can feel more agency over these cultural shifts could dissipate some of the heat immigration generates, or at least channel it into less violent and dangerous directions.

Decentralization also has much to offer the plurality of people across the world who welcome the blurring and pluralizing of national identities and the frisson and beauty of cultural mixing. While the rise of a nostalgic nationalism is easy to see, and rational to fear, the way nationalism rhymes with the twentieth-century past tends to obscure the rise of fecund and cooperative pluralism in sites across the globe. Those places, mostly global cities, but also some rural and suburban locations, and some sub-national regions are in the process of creating postnational identities¹⁰

prevailed for much of the twentieth century and that Gellner describes as serving the functional needs of modernity. Gellner, *Nations and Nationalism*, pp. 38–48. By labeling the identity-making I describe here as “postmodern,” I mean to describe an emergent form of identity construction that is defined by quotation and multiplicity, and that resists easy or fixed categorization and that is anti-syncretic, shifting, and unstable. This form of identity-making shares traits with postmodern philosophy, architecture and art. Bauman, *Postmodernity and its Discontents*, pp. 8–9 (describing a postmodern “sui generis vested interest in the continuing diversification, underdetermination, and ‘messiness’ of the world.”)

⁹ Damien Cave, Livia Albeck-Ripka and Iliana Magra, “Huge Crowds Around the Globe March in Solidarity Against Police Brutality,” *The New York Times*.

¹⁰ Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe*; Saskia Sassen, “Towards Post-National and Denationalized Citizenship.”

with a more constructive relationship to cultural difference. These sites are fragile though. As Ran Hirschl has comprehensively articulated, the urban population centers that thrive on diversity and admixture lack sovereignty; they are oppressed and artificially constrained to their detriment by national and regional powers that draw financial sustenance from the productivity of the miscegenated cities they deny autonomy to¹¹ – this is especially true in the United States.

In these conditions, the key to managing immigration effectively, I argue, is to pluralize our governance approach. With more than one answer to the immigration question, nation-states can nurture new cosmopolitan spaces where they arise and respect the ability of more traditional geographies to manage the cultural change immigrants bring – or, in some cases, reject it altogether – on their – local – terms.

The United States is the focus of this chapter, and its circumstances are *sui generis*. But the identity pressures I articulate are a global phenomenon. Witness, for example, how American race consciousness has travelled to France and become a flashpoint¹² for catalyzing discussions of racial difference that were long suppressed by the unwavering French commitment to colorblindness. That now-contested willful denial of race was long thought constitutive of French identity in combination with *laïcité*, official state secularism that served to suppress religious difference, by suppressing public religious expression. Together, both norms are integral to securing French cultural homogeneity. Like France, other nations are having or will have their own idiosyncratic reckonings with national identity and I trust that the American example may rhyme just enough with the experiences of other territories to be of use in other studies of distinct places.

My argument for decentralization of immigration law proceeds in three parts. **Part I** denaturalizes centralized control of immigration, exposing the way national control is tied to a normative preference for social and cultural homogeneity. I make the case by taking on Michael Walzer's influential characterization of decentralized immigration law as an anticommons of "a thousand petty fortresses," showing how Walzer's fear of a decentralized immigration control structure which he fears might lead to "deracination." **Part II** argues that immigration law does identity-making work and examines the relationship between

¹¹ Hirschl, *City, State*, pp. 17–51.

¹² "Will American Ideas Tear France Apart? Some of Its Leaders Think So," *New York Times*.

that work and the rise of “post-modern” national identities. Doing identity-construction work via centralized and national immigration law pushes a one-size-fits-all national identity that conflicts with the hyper-pluralized and hyphenated identities on the rise today. In [Part III](#), I explore how to structure workable delegations of immigration authority to three distinct American geographies, rural, urban, and suburban, all of which have distinct identity needs.

2 The Purported Moral Value of National Immigration Control

Today’s conventional wisdom on the necessity of national immigration control was captured and distilled by Michael Walzer in 1983. In his much-cited volume, *Spheres of Justice*, Walzer derided a decentralized immigration control system as a premodern artifact and described a world of local immigration control as an anticommons of “a thousand petty fortresses.” Yet with four decades of centralized – and increasingly punitive – national control of immigration behind us, we now know that the alternative to “a thousand petty fortresses” suffers from its own – grander, violent – pettiness. The consistent failure of modern nation-states to make enough room for migrants seeking entry across the globe – despite the economic and social benefits that migrants bring with them¹³ – is its own special irrationality. And the effort to police the arbitrary limits that nation-states place on migration causes morally arbitrary, and potentially vindictive forms of state violence. No moral or legal principle can adequately rationalize these deaths from border crossing, or on whom, in particular, they befall.

Nonetheless, during a period when migration enforcement was far less harsh, and radically less common¹⁴ than it is today, Michael Walzer theorized that the historical rise of nation-level immigration controls that “sometimes restrain the flow of immigrants” is a moral good. Such controls are valuable, per Walzer, because they facilitate human thriving in national communities. Walzer wrote dismissively of prenatal state formations for their cultural pluralism. The world of empires and metropolises, like “the ancient city of Alexandria ... [or] early twentieth century New York,”¹⁵ which permitted unencumbered migration and unrestrained movement over vast territories were less than ideal because

¹³ Caplan, *Open Borders*.

¹⁴ Stats on difference in deportations in the United States.

¹⁵ Walzer, *Spheres of Justice*, p. 38.

their openness produced a lack of fellow-feeling and cultural continuity over the breadth of the territory. Under such conditions, cities and towns became “closed or parochial communities.” For the New Yorker in 1910 or the Ancient Alexandrian, “the Country [or Empire was] an open but also an alien world – or, alternatively, a world full of aliens.” The glory of the Westphalian order circa 1983, then, was not just the ability to zip from Bangor, Maine, through Chicago and down to Galveston, Texas; or from Hamburg to Essen to Stuttgart; or Nantes, to Paris and on to Toulouse – it was to make these trips *and* encounter cultural compatriots all along the way. The Alexandrian on a jaunt to the hinterlands, by contrast, would be mixing with “strangers.”

What held this new and felicitous homogeneity together across large stretches of the globe? National control over immigration played a critical role, Walzer urged. Without such centralized control, Bangor, Hamburg, and Toulouse, as much as Berlin, Paris and Chicago would each stand alone and distinct among “a thousand petty fortresses.” City Walls would be built because cities and towns could not rely on the nation-state to weed out those who would disrupt the social fabric of these locales. Self-policing remained the only option to protect distinctive ways of life. The absence of city walls and national borders would produce a still more distressing outcome: a “world of radically deracinated men and women.”¹⁶

Walzer’s formulation has come in for forceful critique,¹⁷ but it, and related theories, remains extremely influential.¹⁸ His theory also captures a still-reigning conventional wisdom that national, centralized immigration control is essential, necessary, and proper. Efforts to control immigration at other governmental levels are reflexively deviant by contrast; they are vehicles for xenophobia, spaces for symbolic dissent,¹⁹ or, at best, sites of policy entrepreneurship that produce change at the national level. In all respects, local efforts are widely dismissed as “petty” by contrast to their national counterparts.

But Walzer was wrong and the dogma that naturalizes and legitimates centralized immigration authority is wrong. More generously, even if Walzer was not wrong at the time he wrote, he is wrong in this moment. The pathologies of national immigration control today reveal

¹⁶ *Ibid.*, p. 39.

¹⁷ Stevens, *States without Nations*, 1–23; Pogge, “Cosmopolitanism and Sovereignty,” pp. 60–61.

¹⁸ *Spheres of Justice* is one of the most cited books in immigration and citizenship studies.

¹⁹ Gerken, “Dissenting by Deciding.”

the historicity and contingent nature of Walzer's claim – which were long taken to be timeless and universal. Section 2.1 unpacks these claims to expose the way that assumptions about the value of cultural homogeneity are bound to a particular – national, centralized – way of structuring immigration control. I suggest, in turn, that cultural pluralism and decentralization of migration control run together in a similar way.

2.1 *Seeing Immigration Like a Nation*

Walzer's praise for a homogenized identity deployed at national scale; his fear of this manufactured culture's annihilation (in the absence of immigration rules); and his approval of the defense of these values with a particular technology of state control (centralized, and with ample bureaucratic capacity) reflects what James C. Scott has called "high-modernist ideology."²⁰ This way of "seeing like a state," like its architectural cousin, privileges a 10,000 foot view of things; it has a "muscle-bound self-confidence in ... the rational design of social order."²¹ High-modernist ideology, for example, destroyed "blighted," yet culturally rich, neighborhoods of poor racial minorities to build Corbusian housing projects, like Chicago's infamous Cabrini Green; it built the US interstate highway system, in the process, paving over thriving neighborhoods and cutting US cities into pieces; it imagined and made the relatively culturally homogenous nation-states that Walzer finds essential.

As you can tell, ambitious high-modern projects entail violence. The territorialized cultural continuity of nation-states that Walzer valued was particularly bloody. For example, one of the first national immigration policies deployed in the United States aimed to attract European immigrants to the western American frontier with low land prices to encourage settlement.²² The Act²³ was a boon to crowded eastern cities bursting with newcomers, to the immigrants themselves, as well as to the goal of manifest destiny – to "civilize" North America (read: eradicate native civilizations) from the Atlantic to the Pacific. In the 1920s, the near halt to European immigration to the United States secured by the Quota Acts, and then sustained by the Great Depression, lead to a consolidation of

²⁰ Scott, *Seeing Like the State*.

²¹ *Ibid.*, p. 4.

²² Zolberg, *A Nation By Design*, pp. 117–118, 169.

²³ Homestead Act.

formerly distinct and disfavored European ethnic groups²⁴ – Italians, Irish, Greeks, Poles, and Ashkenazi Jews – into “the white race,” making a “nation” with uniform and uniformly enforced white middle class norms.

The violence also produced new social capacities that Walzer found laudable. Relative homogeneity and shared norms during and after the second world war, broadened horizons for coordinated action, economic growth, and social provision (as well as new mechanisms of repressive social control). Yet, it also seems wrong to suggest nation-states in their 1983 form represented the perfect calibration of homogeneity to pluralism. All the more so because the process of homogenization itself may have increased societal tolerance of pluralism. For example, the violent imposition of monolingualism in nation-states creates a shared language for discussing forms of difference, including language difference itself.²⁵ That is, secure in the comfort of a self-reinforcing dominant language, society might then be able to tolerate more linguistic and cultural pluralism in the future.

Walzer’s fear of national “deracination” in the face of unregulated migration rings particularly hollow in the context of an American culture that was itself produced by the forced flattening (white “ethnics”), marginalization (Black, and Latinx people), and erasure (Native Americans) of peoples and cultures. This is not to dismiss such concerns entirely, everywhere. It’s fairly clear that nations vary markedly in their tolerance for cultural pluralism, and, therefore also in their immigrant carrying capacity. Japan, for example, has struggled, until quite recently, to modernize even its gender norms to match the sophistication of its economy or the needs of its citizens (such norms are blamed for a rapidly declining population).²⁶ The rigidity of Japanese cultural norms are poorly suited to an embrace of the cultural pluralism that large-scale immigration may require.²⁷

3 National Immigration Control in a Pluralizing Nation

Walzer’s package of national cultural goods (homogenized national identity) and regulatory means (centralized immigration control) have run their course. We are at an inflection point. Whatever the benefits of a

²⁴ Painter, *The History of White People*.

²⁵ Taylor, *Multiculturalism and the Politics of Recognition*.

²⁶ Steel, *Beyond the Gender Gap in Japan*, pp. 67–83; 25–50.

²⁷ Haig, “*Japanese Immigration Policy*,” pp. 223–236.

relatively homogenized, national identity, the thick, shared(ish) consensus of the postwar period is not recoverable or even desirable any longer, at least not in the rich West – and especially not in the United States.²⁸ The impossibility of a relative re-homogenization – which would entail significant state coercion²⁹ – should be obvious now and has been for some time. Only ten years after Walzer sang the value of sameness, Charles Taylor predicted its disintegration in the *Politics of Recognition*.³⁰ Taylor noticed the tendency of citizens of contemporary democracies that differed from the dominant culture along some criterion to want to be seen *in* the state; to be valorized by it, reflected back to them in officialdom, and to be treated with equal dignity by their government and their fellow citizens. Even a conservative US Supreme Court signed off on the importance of this form of politics and emphasized the way in which it built solidarity and legitimacy in a hyper-diverse nation. Justice O'Connor, writing for the majority, approved of affirmative action at the prestigious University of Michigan Law School, "because universities, and in particular, law schools, represent the training ground for a large number of the Nation's leaders," as a result, in a diverse Nation like ours, the Court held that "the path to leadership must be visibly open to talented and qualified individuals of every race and ethnicity."³¹ Social order and solidarity were thus tied to the institutionalization of the politics of recognition.

Consider also the recent rise of Trump and the "coming out" of White Nationalism. The stunning success of Trump's caricature of white alpha-male masculinity in this context of pluralizing national identities signals how entrenched the politics of recognition have become in the United States. While the material substance of white dominance remains (white men still rule over nearly every public and private institution), its now-sectional purchase in the cultural realm,³² and its demotion from the ideal,³³

²⁸ Samuel Goldman, *After Nationalism*, pp. 1–12.

²⁹ *Ibid.*

³⁰ Taylor, *Multiculturalism and the Politics of Recognition*.

³¹ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

³² In the United States, examples abound that whiteness has been decentered in institutions of cultural production: Zachary Small and Robin Pogrebin, "Basquiat and Other Artists of Color Lead a Swell of Auction Sales," *New York Times*, May 13, 2021; Sarah Ellison, "How the 1619 Project took over 2020," *The Washington Post*, October 13, 2020.

³³ For example, American fashion magazines such as *Vogue* have long defined ideal femininity. The whiteness of that femininity has become increasingly untenable: Robin Givhan, "Fashion's Racial Reckoning," *The Washington Post Magazine*, August 31, 2020.

has put whiteness on the defensive.³⁴ Once normative, white identity now believes itself to be one among many identities competing for esteem – to be *seen*. That the norm to which all others bent, now itself feels a need to be recognized, underlines the degree to which the continued dominance of Whites over other groups can no longer be taken for granted. Not only is White cultural dominance over, a return to it is irretrievable – at least without the sort of violence that constructed it in the first instance. This is not to say that the new, self-consciously sectional and embattled whiteness is something to celebrate. It is causing violence and will continue to do so, especially against racialized Americans and noncitizens.

American Immigration regulation has always had a lot to do with maintaining white cultural dominance and establishing “whiteness” as the national identity. From the ban on Chinese immigration, to the attempt of the 1920s quota acts to purify a white race gone “weak” from the genetic inputs of the “lesser” races of Europe, to the refusal to admit Jewish refugees as they died in concentration camps by Hitler’s hand identity-fashioning was at the core of immigration statecraft. It is hard to view any of these policies as *primarily* keyed to the *material* benefits of exclusion. The substance of these immigration laws, what they did in the material world (say, prevent “excess” labor competition) was always subordinate to their identity-making function. The principle work of all this violence directed at immigrants was to shore up the status anxieties of dominant whites and to secure cultural uniformity, in part through the assimilating pressures that came from placing whiteness at the top of the social hierarchy.

Trump understood all this well and revealed for a new generation the essential identity work that centralized immigration law had always done. The Muslim Ban, Trump’s first official act as president, was an assertion of White Christian primacy; a recognition of the superiority of whiteness achieved by denigration of the Muslim world as unfit for entrance and inclusion in the United States.³⁵ (As everyone knew, especially Trump, the ban had nothing at all to do with protecting the United States from terrorism.) The spectacular cruelty of Trump’s family separation policy at

³⁴ Even classics departments at American universities have come under pressure to examine the white supremacy that some argue classics departments uphold through their construction of “western civilization.” Rachel Poser, He Wants to Save Classics From Whiteness. Can the Field Survive?, *The New York Times Magazine*, Feb 2, 2021.

³⁵ For a more extended analysis, see Daniel I. Morales, “Our Sovereignty” (draft on file with author) describing how Trump’s rhetoric and action of Muslim exclusion was intended to elevate white Christianity as the normative American identity.

the US–Mexico border, was the Muslim ban’s Latino twin. Such obvious inhumanity communicated to Whites the depth of the status threats that brown people on the move posed to white dominance. In the reflection of such menace, whiteness saw itself recognized in both of these racist policies as worth preserving at any cost.

There is a – sectional – hunger for this spectacle: “today, for citizens who remain invested in whiteness as ‘a badge of status,’ there are fewer legally sanctioned outlets for publicly engaging in” practices that valorize whiteness. “Anti-migrant rhetoric ... offers nativists democratic pleasures that are increasingly difficult to access.”³⁶ A bread and circus leader, Trump always gave his followers the satisfactions they most desired using whatever tools were at his disposal. Yet, Trump could only provide this form of violent recognition to his following because of centralized national control and a multi-decade ramp-up in bureaucratic capacity. And these tools were put in place and upheld as constitutional over the last two centuries for precisely the purposes Trump put them to (and which Walzer valued) to secure a homogenous national identity.

Immigration law scholars have largely ignored this relationship between ideology and the structure of the immigration power, or believed it had been permanently sublimated into the service of a new multiracial immigration consensus with the Hart-Cellar Act of 1965. That act was a *centralized national* response to the pressures of anticommunism and the civil rights movement that ushered in a radical diversification of the United States. In 1970, 80 percent of American immigrants were of European origin – today less than 10 percent are. Even though national centralized control had been designed to serve white dominance, in that moment in 1965, it also ushered in the demographic eclipse of whiteness through the front door.³⁷ Still, Trump’s use of immigration law to shore up white nationalism is not incongruous or exceptional, but it is a return to form. The dramatic demographic and cultural revolution that the Hart-Cellar Act yielded should not distract from the reality that centralized, national immigration control has an unavoidable antipluralist structural bias – if only because it gives a single answer to the question of “who belongs” in a dispersed nation of 325 million individuals.

³⁶ Cristina Beltrán, *Cruelty as Citizenship*, p. 27.

³⁷ Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*; Roger White, *Immigration Policy and the Shaping of U.S. Culture*, Ch. 5.

Still, we should recognize that the post-1965 transformation of the United States' demographic composition was *also* a product of high-modernist ideology. And, like all governance strategies that involve "muscle-bound self-confidence in ... the rational design of social order," the civil-rights era transformation of American identity via immigration law could not account for all the downstream consequences of this ambitious, continent-wide, and diversity-promoting endeavor. While the project dramatically enriched the United States and successfully stretched the median American's tolerance for diversity, it has also produced dislocations that many native-born Americans feel constitute its own kind of violence. We are encountering the most dangerous effects of the fallout today and must grapple with it: in particular what to do with the violent white rage the post-1965 transformation has added fuel to.

We must face head on the fact the immigration regulates metaphysical life in nation-states as much or more than material reality. Part of that grappling, I suggest in the rest of this chapter, should come from creating a better fit between migration governance structures and the reality of postmonocultural, postmodern American identity. If who "we" are as a nation is radically more plural than was ever thought possible in the high-modern period, then governance strategies related to migration need to become supple and plural enough to account for this new diversity of identity needs.³⁸

4 Postmodern Identity and Immigration Law Structure

High-modernist identity construction was a top-down process that produced cultural continuity across massive national geographies. Postmodern identity construction is bottom-up, chosen, curated; it produces strong continuities, but ones that are geographically *discontinuous* across the national terrain.³⁹ These newer identities and cultures do have a loose geography (and one that maps nationally), they form a recursive pattern across national territory that tracks housing density.⁴⁰ Today, the culture of rural Michigan has more in common with rural Texas than ever before, but both places have far *less* in common culturally than they used

³⁸ Goldman, *After Nationalism*, pp. 6–9.

³⁹ Bill Bishop and Robert G. Cushing, *The Big Sort*; E. M. Uslaner, *Segregation and Mistrust*; Jonathan Haidt, *The Righteous Mind*.

⁴⁰ Jacob R. Brown and Ryan D. Enos, "The Measurement of Partisan Sorting for 180 Million Voters."

to have with central Houston or Detroit, or even with those cities' respective suburbs. Houston, Columbus, Ohio, or even Salt Lake City, Utah, have more in common with each other, than any of these cities has with its hinterlands.

This new discontinuous geography of cultural norms is distinct from what came before, but it is *not* a return to the unintelligibility of ancient Alexandrians to the barbarians outside their gates, as Walzer might fear. The significant *gains* in cultural continuity purchased in the period of high-modern nation-making remain in place: New identities and cultural mores have been graphed on top of them. So while the culture has pluralized, the change has not been as destabilizing as it might otherwise have been. With common and contiguous foundations of a national cultural already in place, pluralism could increase substantially without creating a Babel.

Even so, the rise of cultural pluralization, and the sorting of individuals with overlapping commonality along multiple demographic markers – economic, racial, educational attainment, and political affiliation – into specific, nationwide geographic patterns is a source of consistent concern in public and academic discourse. It is not overstatement to characterize these critiques as portending the death nelly to national social cohesion.⁴¹ And, surely there is much to worry about in this new order. After all, the culture that results from this geographic sorting gains its normative superiority to top-down arrangements to the extent that the “foot-voting” that creates these places and cultures actually reflects individual preferences and choices.⁴² To the extent the most powerful groups use zoning and other governmental tools to hoard common resources for themselves and serve their own interests over others, the new order really is worse than what came before.⁴³ Still, the relentless pessimism about this sorting seems over the top. (Perhaps, all new human geographies will be feared as they come into being?)

Just as with high-modernist cultural production, postmodern national identities are constructive too. Metropolitan area productivity levels, which diverged markedly by region 100 years ago have now converged, creating more wealth nationally than existed before the “big sort.”⁴⁴ And from a welfarist point of view, it seems hard to argue that the homogenized

⁴¹ Robert Putnam, *Our Kids*.

⁴² Illya Somin, *Free to Move*.

⁴³ *Ibid.*

⁴⁴ Bishop and Cushing, *The Big Sort*; Enos, “The Measurement of Partisan Sorting.”

status quo ante served the mass of individuals better than what exists today. To the extent the prior, contiguous national culture that Walzer favored was good it was good because it created thick cultural bonds. Arguably, new arrangements are just as thick, even thicker. Surely, the thick cultural bonds created in communities where shared cultural norms run deep are also valuable – and all the more valuable for being more freely chosen. Moreover, the pluralization of cultural norms between geographies within the same nation means that more people actually have a meaningful choice of what kind of community to affiliate with.

Beyond sorting, there are other aspects to postmodern identity formation that bear mention. Postmodern identity is bespoke. Individuals contain multitudes and those multitudes seek out social affirmation. The shift began as identities repressed or subordinated by the high-modernist cultural mode began seeking recognition. The Black civil-rights movement first, next women's equality and reproductive freedom, and then queer identity. Work continues in all these areas, of course, but identities have multiplied on from there (nonbinary, asexual, genderqueer, and biracial), and the focus of recognition now encompasses repressed subgroups *within* broader oppressed categories⁴⁵ (e.g., respectability politics and colorism in the Black community, white heteropatriarchy in Queer movements).

The proliferation of identities has made the search for recognition increasingly personalized. The concept of intersectionality inspires and sustains this mode. Following intersectional insights, ways of knowing and forms of knowledge are increasingly grounded in standpoint epistemology⁴⁶ (as a biracial, genderqueer, first-generation college student, etc.). These intersecting, plural, self-made selves increasingly demand recognition in every context – the workplace, educational institutions, religious institutions, bathrooms, and the law. What looks like it might descend into unmanageable social atomization is actually anarchy in the best sense, a spontaneous order – a commitment to bottom-up social organization and a resistance to norms imposed from above especially where they impinge on personal choices that do no material harm to others. Emergent norms to accommodate these needs for recognition, like declaring personal pronouns, stretch our capacities for pluralism further.

⁴⁵ Cathy J. Cohen, *The Boundaries of Blackness*.

⁴⁶ Gaile Pohlhaus, "Knowing Communities: An Investigation of Harding's Standpoint Epistemology."

What might all this have to do with the structure of immigration control? Simply put, immigration law does and has always done identity work, and high-modernist immigration control looks increasingly at odds with the nature and geography of postmodern identity construction. In the metropolitan geographies where the postmodern mode reigns, social boundaries of every sort – including the borders Walzer took as fundamental – look increasingly artificial. As the locus of culture focuses increasingly on the individual and whatever voluntary groupings individuals wish to be a part of – from a reactionary Catholic intentional community that gives the Latin mass to a polyamorous nudist commune – the invasion of “foreign” cultures into the milieu seems ever less threatening to “national identity” itself, and the fear of cultural “deracination” still more absurd and unintelligible. How can you “deracinate” a culture increasingly defined by the personal freedom to shape a bespoke, individualized, and cross-cutting set of commitments?

Moreover, for all the mockery endured by the young social entrepreneurs that have relentlessly pushed the boundaries of identity and demands for recognition, this work has yielded an increasingly muscular capacity for these geographies to manage, coexist, and thrive in this hyper pluralist environment. In these geographies, old-school, high-modern identity differences – like national origin – just do not register as broadly threatening, much less *uniquely* threatening to the cultural continuity of these geographies. Indeed, we may be at the point where openness to immigration is *constitutive* of these geographies. Maintaining an openness to a radically plural and ever-expanding mix of personal identity commitments is difficult to square with a posture of exclusion toward noncitizens.

Rural areas, by contrast increasingly occupy a universe where the disintegration of high-modern identity is acutely threatening. Just as metropolitan identities have thickened in place, so too have rural ones. And economic decline in rural areas has only compounded the sense of threat felt by the inversion of the national identity hierarchy.⁴⁷ In such normative environments, immigration *does* register as an existential threat. Capacities for managing difference in these areas have *not* grown as substantially as they have in cities and metro areas. Indeed, most who might have challenged the rural cultural status quo have increasingly and relentlessly exited those geographies, leaving homogeneity partisans

⁴⁷ Nina Glick Schiller and Ayse Çağlar, “Towards a Comparative Theory of Locality in Migration Studies”; Nina Glick Schiller and Ayse Çağlar, *Migrants and City-Making*.

behind. And, as Trump underlined, the culture of these rural geographies feels increasingly threatened and unrecognized – unseen – by the broader culture.

While the metaphysical aspects of immigration and identity may be felt symmetrically across differing geographies, the material effects are radically asymmetrical. The vast majority of immigrants land in major metropolitan areas. Where immigrants do land in rural areas, the impact is often disproportionate to numbers because of the differing cultural ecologies in rural areas. Votes for Trump in the 2016 election cycle were highly correlated to the percentage change in immigrant population in a particular local geography. But again, the difference in material impacts is another strike against high-modernist immigration control and another reason to adjust course for a postmodern order.

5 Seeing Immigration from Different Vantage Points

If immigration law has a lot to do with identity construction, and national identity has ruptured into distinct, national identities that track housing density, then to design an immigration – or identity law – system that fits this new geography of identity, we need to look at immigration from different geographic vantage points. Seeing through diverse perspectives is an increasingly mandatory skill in diverse societies because of their increasingly pluralism. High-modernist immigration control is crafted from a *single* dominate perspective, so it should not surprise that it yields unsatisfactory results. Different vantage points, of course, offer different kinds of information.

In light of the increasing divergence in perspectives and cultures that map to differences in geography, I offer accounts of three distinct geographic perspectives below. We will “see” immigration like a city, a suburb, and “the country,” that is, from urban, suburban, and rural vantage points. For each of these vantage points, I offer suggestions for how certain forms of immigration power might be devolved down from the national level and what policy shape those powers might take. The claim is that immigration power devolution would nurture the identities these geographies sustain and help them to adapt and to thrive, along with the immigrants that become part of these communities. With the identity needs of these geographies accommodated, the nation as a whole will be better positioned to accommodate the difference that we already have and the new differences that we invite with immigration.

5.1 *Seeing Immigration Like a City*

Cities churn. Even in cities that do not grow, people come and some years later, many go. As a result, cities and their cultures have a high capacity to adopt newcomers of all sorts, including the foreign born. Of late, this culture of “welcome” has been embraced in urban laws that create equality of access and treatment for residents who lack national legal status. Chicago’s “Welcoming City Ordinance,” for instance, builds on multi-decade movements to make the city a “sanctuary” for undocumented people. The ordinance had for many years prohibited, with a few prominent exceptions, cooperation between local law enforcement and Immigration and Customs Enforcement (ICE), the American national government’s deportation force. During the Trump years, the ordinance was amended to prohibit virtually any collaboration between the city’s police and US ICE. (Previously, Chicago police were permitted to cooperate with ICE where noncitizens were listed in the city’s gang database, had an outstanding criminal warrant, had been convicted of a felony, or had a felony charge pending.)⁴⁸

This new, posture of total noncooperation is quite radical and reveals something important about the identity of an increasing number of cities. Think back to Walzer’s claim about the need for city walls in the absence of national filtering. Here, we have the national government performing a function that, in Walzer’s terms ought to be welcome: ridding the City of persons that the *city itself* has identified as agents of disorder. And yet, here Chicago is, claiming the disorder of noncitizens as its own and protecting these criminal citizens from expulsion. Walzer claimed that cities would *have* to be fortresses if the nation-state stopped keeping the “bad” immigrants out. Here, Chicago has identified disruptive immigrants and wants, nonetheless, to keep them in. Chicago’s update to its Welcoming City Ordinance looks a lot like empirical evidence that Walzer’s thesis is false.

What this means for immigration structure is that cities themselves see that they have more capacity to handle free movement into and out of their line of sight than the national government thinks that they do. And since the criminal realm is one where cities endogenize all the costs of disordered behavior, Chicago’s standpoint on the issue appears grounded in

⁴⁸ Frequently Asked Questions – Sanctuary Cities www.chicago.gov/content/dam/city/depts/mayor/Office%20of%20New%20Americans/PDFs/SanctuaryCitiesFAQs.pdf (describing the impact of Chicago’s Welcoming City Ordinance).

a robust insight about the city's material reality and corresponding capacities. But of course, the city's welcoming posture also has a metaphysical dimension that produces a certain kind of identity claim. To be the kind of place that refrains from banishing those caught up in the criminal dragnet is to be a place that stakes a claim to a certain kind of morality; a geography that can tolerate the reality of human frailty and that has enough confidence in the city's capacity to absorb the consequences of these failings without breaking⁴⁹; a city that says, in effect, both that no one is irredeemable and that no one is illegal (worthy of banishment even for violent crime). In short, any person who wishes to make a life here is welcome.

Not all cities have the combination of traits that can tolerate this sort of anarchic pluralism. And there is an unsavoriness to such capacities. Part of what makes cities like Chicago able to function without becoming fortresses is that neighborhoods have invisible walls. These barriers of wealth and race are routinely and appropriately criticized for facilitating and perpetuating inequality and structural racism. But bugs in urban life may be uncomfortable *features* when applied to noncitizens, since they allow cities to increase their immigrant carrying capacity. As Rick Su has argued, the receptivity of cities to immigrants has a lot to do with these invisible walls.⁵⁰ The isolation of immigrants' social and residential lives in immigrant enclaves, even as they are integrated into the economic life of the city through their jobs and via public transit links, allows cities to capture the economic benefits of a larger productive population than it would otherwise have, without disrupting the social and residential lives of wealthier, longer established residents. Immigrant "ghettos" also provided a kind of home away from home for new migrants, easing the transition into American society and permitting networking, solidarity, and mutual aid to conationals. Immigrants descendants, over the generations, then, may integrate into neighborhoods from which their ancestors were excluded – or not. The point is not to endorse the segregation of immigrants as ideal, but rather to build off the capacities it produces for increasing national immigrant carrying capacity.

This exclusionary spatial arrangement can – ironically – facilitate a broad-based civic solidarity of inclusion that can support policies like a welcoming city ordinance. Established residents may not want certain immigrants in "their" neighborhood, but they would be willing to resist

⁴⁹ Daniel Morales, "Transforming Crime-Based Deportation."

⁵⁰ Rick Su, "Local Fragmentation as Immigration Regulation."

threats by the national government to the neighborhood of their fellow Chicagoans, whom they identify as “neighbors” even if they are kept at arm’s length. In the best of all possible worlds, this kind of segregation would not be as productive for immigrant integration as it is in our world. Yet, here we are. Geographic structures that facilitate limited integration in the first immigrant generation are useful technologies for increasing immigrant carrying capacity. Urban areas have this technology in large measure and can accommodate more immigrants than other areas as a result. This technology is useful because in the absence of such spaces, fewer immigrants would be admitted at all.⁵¹ This bargain is a subideal one. But, then, so is high-modernist immigration control. A postmodern migration governance structure that granted cities the ability to grant visas (subject to national background checks) or protect noncitizen residents from deportation would facilitate a better match between the identity of global city residents, the material needs of such cities, as well as then needs of migrants themselves.

There are many ways that this delegation of formal immigration powers down to cities could be structured. And the delegation need not be total to have salutary effects on immigration governance. For instance, cities of a certain size might be granted a tranche of supplementary or existing visas to allocate as they wish, to refugees, advanced-degree holders, family of existing noncitizen residents, or in any other form that cities find desirable. National allocation of national visas could remain the same, in such a supplementary system.

Cities also might be granted the power to protect or, perhaps, even select noncitizens for deportation. Obvious candidates for protection include long-term undocumented residents. In the United States, the median undocumented person has resided there for sixteen years.⁵² Support for regularizing the status of these persons runs high nationally, and especially in the cities and other places in which they are concentrated. Many cities and some states have already done much to normalize life for populations that the national government wishes to remove.⁵³ What cities have not been able to do, however, is to prevent national immigration enforcement authorities from snatching their long-standing residents. Granting cities

⁵¹ *Ibid.*

⁵² Jeffrey S. Passel and D’Vera Cohn, “U.S. Unauthorized Immigrant Total Dips to Lowest Level in a Decade.”

⁵³ Christopher N. Lasch, et al., “Understanding Sanctuary Cities.”

the power to affirmatively block such enforcement would help make such cities actual – not just aspirational – sanctuaries.

To accommodate jurisdictions that have different perspectives on the value of undocumented people, or immigrants with criminal records, such status could end at the city limits, or cities or other subnational jurisdictions could enter into voluntary agreements to recognize the status granted by other jurisdictions. For example, Houston could chose to allow settlement of undocumented people granted status by Seattle. Enforcement of residency limits need not be complex. Violations, such as settlement in an area outside the scope of residence could – quite harshly – void the right of residence altogether, or result in deportation by the national enforcement agency. Free, temporary, travel nationally should be allowed, while permanent settlement outside jurisdictions that have not recognized the status should be barred. This balance would allow nations to retain a relative openness of movement throughout the national territory (freedom to travel paired with harsh sanctions for permanent residency outside the granting jurisdiction reduces the need for checkpoints or friction in travel within nation-states), while making room for subnational forms of permanent membership.

Assuming such a system increases the total number of foreign-born persons compared to an exclusively national immigration system, automatic deportation to the country of origin for settlement violations (consistent with nonrefoulement commitments in international law) would be normatively defensible and superior to the status quo. Remember that undocumented people and noncitizens who have committed certain crimes have no *legal* protection from national enforcement at present. Protection within city limits, or a larger metropolitan area is superior, all else equal. It is important to remember too that many cities, and especially many metropolitan areas, have economies that are as large as national economies. The Chicago metropolitan area of about ten million persons, for instance, has an economy larger than Switzerland.⁵⁴ If we don't decry as unconscionable the limits placed on people granted immigration status in Switzerland, we should not treat a Chicago regional visa any differently.

⁵⁴ Gross Domestic Product in the Chicago Metro Area was 709 Billion Dollars in 2019. U.S. Bureau of Economic Advisors <https://apps.bea.gov/itable/iTable.cfm?ReqID=70&step=1>. Switzerland's GDP stood at 703 Billion Dollars in the same year <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=CH>. All values are expressed in 2021 US Dollars.

Given that people are literally risking their lives – and dying – to reach the shores of the rich, developed nations, any policy that increases total migration to jurisdictions that human beings clearly wish to reside in is superior to the status quo that leaves people to drown or sends people back to live in places where they face serious harm or no longer desire to make their lives. Whatever qualms denizens of rich nations may have about a geographically truncated offer of belonging in rich nations, it seems hard to imagine that prospective immigrants themselves (largely excluded now by a lack of visas) would prefer less immigration, but more internal freedom of movement, to more immigration with less internal freedom of movement.

Moreover, the geography of welcome⁵⁵ is unlikely to be static. Sanctuary cities, like New York, Los Angeles, and Chicago have already scaled the politics of welcome up to the state level. New York State, California, and Illinois all grant driver's licenses and other public benefits to undocumented people after many years of advocacy, and following the debut of city-level politics of welcome. There is no reason to think that delegating more formal immigration power to such jurisdictions would weaken such normative movement. Though, as I discuss later, it may be desirable for rapidly diversifying democracies to refrain from state level or national level consolidation of welcoming postures over strong dissent from rural or even some suburban geographies. Accommodating the identity needs of such areas (especially rural areas in decline) can come at relatively low cost to immigration levels and potentially give nonurban geographies room to reckon with and manage the shifts in identity that come from migration and other social forces that these areas find threatening.

5.2 *Seeing Immigration Like "The Country"*

The postwar changes to immigration and the increasing recognition and centering of the diversity of American culture has alienated rural residents most. The cultural shift is not the only change that rural America has had to absorb. The forces that have centralized the economy in metro areas (free trade, the financialization of the economy, technological change) have left rural areas out of the loop.⁵⁶ Once the symbolic center of national conversation – the so-called heartland of America – rural whites have

⁵⁵ Kirsi P. Kallio and James Riding, "Geographies of Welcome."

⁵⁶ Kenneth M. Johnson and Daniel T. Lichter, "Rural Depopulation."

literally been left behind for more prosperous geographies. Trump converted that alienation into votes. One of the highest correlated statistics to pulling the lever for Trump is not having moved more than ten miles from one's place of birth,⁵⁷ a much more common characteristic in rural areas than in the metropolises that are sites of extensive domestic in-migration.

Trump played the politics of recognition with these voters brilliantly. He saw these voters, fawned over them, and his ascension to the Presidency consistently put them back at the center of American life. The daily owning of "the libs," the dismissal of "experts," – his statement that "I love the uneducated" – all of this validated rural America's feeling that residents of dominant metropolitan centers look down on them, or worse, hold them in contempt. Trump "rescued" rural American from alienation and put them back at the center of the American story, tweet by tweet.

Tweeting about and acting on immigration also consolidated rural malaise onto a distinct, digestible outsider target. Trump's relentless focus on defaming immigrants, labeling them criminals and "takers," and taking action at the border and abroad made rural America feel taken care of, protected, and defended, all as they felt more threatened than ever by the outside menace that Trump manufactured by repeating ad nauseum unrepresentative stories of undocumented immigrants committing violent acts. Underlying racism, or "racial resentment," as political scientists call it, had a lot to do with this success of Trump's tactics,⁵⁸ but it would be a mistake to think that was all there was. When we consider Trump's success in rural America we have to remember that Obama also won many of these voters handily four years prior to Trump's election despite their prejudice.⁵⁹ This does not of course, absolve these voters of racism, but it does suggest that there is something else at work in addition to racial animus or a fondness for the old racial hierarchy. It also tells us that rural America is not forever or inevitably captive to the fascist style. There may be other ways to provide this part of America with the recognition and material sustenance it needs without spawning national demagoguery.

Unlike cities, for which immigration policy autonomy might be a supplement to national policy, rural areas likely need veto power over

⁵⁷ Daniel Cox and Robert Jones, "Still Live Near Your Hometown? If You're White, You're More Likely to Support Trump."

⁵⁸ Tyler T. Reny, Loren Collingwood and Ali A. Valenzuela, "Vote Switching in the 2016 Election."

⁵⁹ Michael Woods, "Precarious Rural Cosmopolitanism."

admission of immigrants for permanent settlement *in their jurisdictions* in order adequately to manage their geographically bound identities. To see why, consider an example of how national immigration control works today in rural areas as distinct as Iowa and Ireland.⁶⁰ Meatpacking plants have become large employers in rural areas that have suffered from economic decline. The managers of these plants engage in international recruitment of labor with either the blessing of the national government with work-visas or through nationally condoned undocumented channels. Either way, the rural towns and spaces are left to adapt to the cultural influx, often without any economic support for the integration of immigrants into a close-knit, homogenous, and traditional rural life. Rural localities thus (relatively reasonably) feel that these immigrants are thrust on them against their will. Unlike, say, a wealthy suburban town that can use its governmental powers to refuse the factory, or regulate land use to drive home prices up to a level that low-wage immigrants cannot afford, most rural places cannot exclude the factory or the workers that the factory owners select for employment and residence in the area.

Were such rural places given the power to say no to the residence of the workers, it is true that some factories and the immigrant employees they hire might not exist. On the other hand, granting rural areas veto power over the immigrants the factory might employ is likely to yield, in many cases, to bargaining between the rural area and the factory that wishes to locate there. A rural town might extract some rents for permitting the importation of foreign labor to run the factory. Those rents might in turn be used to purchase public goods benefitting the town as a whole, or to offset the costs of educating immigrant children, or for other services to help integrate new immigrants into the prickly social fabric of these rural areas.⁶¹ The grant of this veto power, then, is far more likely to result in less resentment of the immigrant population – or even a “rural cosmopolitanism” – than the national status quo. People tend to like things they chose more than things imposed on them.⁶² Under current national immigration governance structures, immigrants in rural areas are the embodiment of an array of unseen forces – imposed from national capitols or distant shores – that have reshaped rural life to its detriment since the 1980s. This

⁶⁰ Ibid.

⁶¹ Zachary Whyte, Birgitte Romme Larsen and Karen Fog Olwig, “New Neighbors in a Time of Change.”

⁶² Peter John, Graham Smith and Gerry Stoker, “Nudge Nudge, Think Think.”

arrangement does not set immigrants or their hosts up for success and helps to drive a national reactionary politics.

Should rural areas choose, they might also be granted the power to invite immigrants themselves. Indeed, it might be salutary to have such immigrants invited by local associations of individuals, much as private sponsorship works in Canada or Australia. Again, the key for rural integration of immigrant populations and for the prevention of national backlash is the ability of rural communities to control the amount of noncitizen diversity they encounter. Policy autonomy over immigration also forces rural areas to endogenize the costs and benefits of migration and think about them critically for themselves in concrete terms. Native-born rural citizens might imagine they would enjoy a return to the homogeneity of the past – as Trump promised – but with the power to execute that vision in hand, rural areas would have to grapple with the cost of such a move in concrete terms: A lack of laborers to till the fields and tend the livestock, perhaps? Thus, metaphysical wishes for homogeneity are subject to a kind of reality check. Where national governments were playing that role, the reality was far less visible and the nostalgia much more potent. With local rural residents in the driver's seat, they will have to face the tradeoffs head on. A more grounded politics of immigration might emerge from such a shift.

Of course, some rural areas will use their power to implement the nostalgic, homogenous, anti-outsider vision happily, even at great economic cost. This outcome does not trouble me. As identities pluralize, it is the risk of the reimposition of homogeneity over the entirety of the nation-state by a particular sect that is most troubling to the stability and felicity of a new postmodern order. This is one of the lessons of the global turn to fascistic populism. Put another way, cabining the ambitions of rural nostalgia into a smaller territory is far better than a national takeover by that nostalgia, as we've seen in the Trump years, and as displayed in numerous European countries.

5.3 *Seeing Immigration Like a Suburb*

Suburbs are a kind of borderland, a barrier region between urban and rural ways of living. They are parasitic on resources nurtured on either side of their boundaries. Suburban growth depends on consumption of rural land; city amenities and jobs help enrich the suburban tax base by attracting residents who want ready access to the City without bearing the costs of supporting attractive amenities and while living at a distance from urban conflicts and problems. Segregation and homogeneity are in

suburbs' DNA,⁶³ but they nonetheless have become increasingly more accessible and diverse in the last thirty years. They are the geography in which most Americans now live, including people of color and immigrants.⁶⁴ Indeed, a large number of immigrants now skip the inner city ghettos of prior generations and move from abroad directly into the suburbs.⁶⁵ Like native-born Americans of all races, noncitizens move directly to the suburbs for the schools. Some suburbs become ethnic enclaves, reaching a critical mass of nationals from different countries and regions, but they rarely achieve the kind of density and homogeneity of their urban ghetto predecessors.

This new diversity in the suburbs can lead to conflict and violence. Suburban expansion was driven in the postwar area in part by violent conflicts that attended the peaceful efforts of African Americans to integrate into all-white neighborhoods. Rather than integrate, most whites fled to all-white federally subsidized suburbs. For native-born Americans, then, the suburbs are a "white" geography which people live in, consciously or unconsciously, in part because they value that sort of cultural and racial homogeneity. The disruption of that homogeneity by foreign-born non-white noncitizens is threatening to the identity of many suburbanites, which is bound up in a pastoral white middle-class respectability.⁶⁶

The increased presence of immigrants in the suburbs has coincided with increasing economic instability in such areas.⁶⁷ Thus, long-term white residents in diversifying suburbs face at least two identity-based threats when immigrants move in: a decline in homogeneity *and* economic status of the suburb they call home. Compounding the impact of these threats, rescuing suburbs from economic decline may entail *welcoming* productive non-white newcomers whose presence disturbs native-born white's racial and cultural identity. This conflict between material and metaphysical needs may amplify the dissonances these demographic changes spawn.

⁶³ Douglas S. Massey and Jonathan Tannen, "Suburbanization and Segregation in the United States: 1970–2010."

⁶⁴ Lorie Frasier-Lockley, *Racial and Ethnic Politics in American Suburbs*.

⁶⁵ See Thomas J. Vicinio, *Suburban Crossroads: The Fight for Local Control of Immigration Policy* (Rowan and Littlefield 2013), p. 10 (suburbs are increasingly diverse and one of the most notable changes is the rise of immigrant populations in the suburbs).

⁶⁶ Caroline B. Brettell and Faith G. Nibbs, "Immigrant Suburban Settlement and the 'Threat' to Middle Class Status and Identity."

⁶⁷ Thomas J. Cooke and Curtis Denton, "The Suburbanization of Poverty? An Alternative Perspective."

It's perhaps unsurprising, then, that some suburbs that have experienced the rapid influx of immigrants have become sites of anti-immigrant local legislation.⁶⁸ The response to such legislation by the Courts and commentators has largely been to dismiss these local anti-immigrant responses as violative of national rights, prerogatives, and the supremacy of national law. Nondiscrimination norms in particular are strongly entrenched in the United States and offer robust coverage for discrimination based on national origin. The precedents that suppress local efforts to limit the lives of immigrants and indirectly disincentivize immigration are well established. Even as the US Supreme Court aided and abetted *national* anti-Chinese legislation in the late nineteenth century,⁶⁹ it condemned as unconstitutional local legislation that aimed to run Chinese immigrants out of towns with ordinances that disparately impacted Chinese business. The Court did this even where localities disguised the animus behind these laws in rationales that were facially neutral.

Suburbs that contain housing stock or schools that appeals to noncitizens thus have few legal tools at their disposal for excluding or managing the influx of noncitizen newcomers. And unlike residents of cities for whom the diversity of the city has increasingly become at least a notional *benefit* of living in the city (even as cities remain highly segregated) keeping non-whites at a distance is, in a fairly deep way, what American suburbs were always designed to achieve.

All of this is not terribly different from what has happened in rural areas, but unlike rural areas, the existence of welcoming suburban places is far more important for the viability of immigration. Were suburbs to close the gates on immigrants en masse – not a likely, but not an impossible outcome in a fully decentralized system – it's less clear that decentralized immigration powers would be an improvement over the status quo, at least from the perspective of immigrants. So when we see immigration like a suburb, the threat level is high, and the tools for managing the “threat” are stronger than in rural areas, but still weaker than many residents would like. This is especially true in older suburbs where the decline in the quality of the housing stock and amenity level means high home prices cannot do the work of exclusion (rich suburbs, like wealthy city neighborhoods are more readily able to maintain cultural and racial homogeneity). What happens then? Suburbanites take their grievances up the chain

⁶⁸ Justin Peter Steil and Ion Bogdan Vasi, “The New Immigration Contestation.”

⁶⁹ *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

where power actually resides. At the national level, suburbanites fearful of growing ethnic diversity can seek a remedy to lower the national level of immigrants. Alternatively, they can sponsor state-level representatives to help push for national change or at least block welcoming city legislation from being consolidated across the state at the state level. Of course, the success of this sort of response creates another version of the problem of centralized national control, it imposes the culture of the suburbs on the city, reproducing the mismatch of national control, but at the state level.

The suburbs present the most challenging design issue for a decentralized immigration system. Suburbs already suffer from an anticommons problem where they have trouble coordinating mutually beneficial infrastructure projects and public policies, like public transportation, across economically interdependent – but politically *independent* – jurisdictions that make up metropolitan areas.⁷⁰ A suburban landscape completely walled off from immigration is undesirable, even if it is an unlikely outcome of granting migration policy autonomy to that geography. (Some suburbs will surely take in immigrants, just as some rural areas will.) And given the fact that immigrants are increasingly choosing to bypass cities to settle in the suburbs, disruptions to those pathways would be harmful to immigrants themselves.

Since suburbs, like rural areas, are threatened by the cultural changes that immigration brings, it seems wise to give suburbs some autonomy over immigration policy. On the other hand, the importance of this geography perhaps means that the ability of suburban localities to set policy should be partial. Suburbs might be granted the power to dial immigration for permanent settlement down by up to twenty or so percent based on current levels of in-migration, or they, might be permitted to dial immigration up from baseline to any degree. The precise degree of autonomy matters less for managing the identity concerns that underly suburban fears than that the local ability to impact migration levels exists at all.

Another issue with suburbs setting immigration policy is the variety of and numerosity of jurisdictions and their varying scale. In some places, like Northern Virginia, suburbs mimic cities in size and reach. Fairfax County, just outside Washington DC, has 1.15 million residents over 406 mi² and runs a school district to serve 188,000 students. For these larger jurisdictions, city-like autonomy in setting immigration policy may be appropriate. In Illinois, by contrast, there are hundreds of suburban

⁷⁰ Richard Schragger, *City Power*; Ran Hirschl, *City, State*.

jurisdictions that serve a similar geographic scale and density – with the largest suburban school district outside Chicago serving only 26,000 students, or 13 percent of Fairfax County’s student population. Land-use regulatory powers map on to these tiny school districts, which use those power engage in rampant exclusionary zoning, forbidding in many places any apartment construction, for example. As a result, schools receive wildly divergent funding per pupil based on the wealth of the jurisdiction – and are able to exclude student populations that require more effort to educate – like English-language learners. In this kind of atomized geography exclusion and resource-hoarding is the norm.⁷¹ Granting such tiny scales immigration authority seems likely to reinforce the maldistribution of resources that is already recognized as exceedingly problematic in suburban jurisdictions. That said, the elite-serving anticommons of American suburbs has come in for broad critique and appears to be on the cusp of reform. The Biden Administration, for example, is seeking to address the exclusionary land-use problem by offering national funds to localities that loosen zoning restrictions to allow for more affordable housing.

In this context, it might be optimal for the national government to delegate immigration powers down to local regions based on their economic relationship to a central city, much as metropolitan statistical areas are constituted. After pulling the city out of the metropolitan statistical area, what’s left is a suburban region that encircles the central city. Such a region will cut across numerous jurisdictions that will vary in scale across the nation. Nonetheless, such regions are reasonably differentiated from city centers and from rural areas and have a common organizational core around a city. Granting immigration powers to these “donut” jurisdictions reflects a common “suburban” identity that these citizens share that cuts across the jurisdictional lines – which were formed with exclusion of undesirable citizens in mind.

Having to coordinate policy across these jurisdictions will be challenging for suburbs, especially places with extremely pluralized suburbs, like Illinois. Nonetheless, the work should pay dividends across multiple coordination problems suburbs face and might even catalyze and deepen a cross-jurisdictional suburban identity in positive ways. Independent of immigration there is a need for a stronger suburban identity to help overcome problems and inequities that haunt the places where most Americans and American immigrants live.

⁷¹ Richard Child Hill, “Separate and Unequal: Governmental Inequality in the Metropolis.”

6 Conclusion

Human identity construction has changed in ways that are discordant with one-size-fits-all, high-modern, national identity of the sort that Walzer validated, and that a plurality of citizens across the global north wish to return to. Because immigration law plays such an integral role in structuring national identity – reminding the body politic who it is and is not with every visa issuance and every deportation – the structure of immigration law must adapt to this new reality. In this chapter, I have suggested decentralization of immigration powers down to subnational levels of government as a prescription to better match American identity needs with the pluralism of those needs across a variety of different geographies: the city, the country, and the suburbs. The wisdom of this strategy will vary across nation-states, but the geography of the phenomena I have described track across nation-states, suggesting the American case holds insights for other places across the Globe.

Community Sponsorship of Refugees and Local Governance

Towards Protection Principles

NIKOLAS FEITH TAN

1 Introduction

Following almost forty years of operating essentially in isolation in Canada, community sponsorship has gathered recent international momentum, with fourteen countries piloting or establishing community sponsorship schemes since 2015 alone. In the EU, the fallout of the 2015 migrant and refugee crisis has driven a search for innovative approaches to protection, including the development of community sponsorship schemes in Germany, Ireland, Italy and Spain, as well as the United Kingdom. In the recent New Pact on Migration and Asylum, the European Commission calls for the development of a ‘European model’ of community sponsorship, though the key features of such an approach remain unexplained.¹ Outside Europe, both Australia and New Zealand have piloted community-based models.² Most recently, the United States has launched a community sponsorship programme to support evacuated Afghans.³ Beyond traditional resettlement states in the Global North, Argentina has implemented a community sponsorship model supporting the integration of Syrian refugees.

Community sponsorship has no settled definition, but inherent to the model is shared responsibility between civil society and the state for the admission and/or integration of refugees.⁴ Community sponsorship has

¹ Radjenovic, “Community Sponsorship Schemes under the New Pact on Migration and Asylum”, p. 6.

² Hirsch, Hoang and Vogl, “Australia’s Private Refugee Sponsorship Program”.

³ US Department of State, “Launch of the Sponsor Circle Program for Afghans”.

⁴ European Commission, “Study on the Feasibility and Added Value of Sponsorship Schemes”, p. 37; European Resettlement Network, “Private Sponsorship Feasibility Study – Towards a Private Sponsorship Model in France”, p. 6.

been described by the UN High Commissioner for Refugees (UNHCR) as ‘programmes where individuals or groups of individuals come together to provide financial, emotional and practical support toward reception and integration’ of refugees.⁵

The rise of community sponsorship has tracked the development and implementation of the Global Compact on Refugees (‘the Compact’), a non-binding international agreement for ‘predictable and equitable responsibility-sharing’ passed by the UN General Assembly in December 2018.⁶ In particular, community sponsorship is closely linked to one of the four Compact objectives focused on the expansion of ‘third country solutions’ through resettlement and complementary pathways.⁷ UNHCR defines complementary pathways as ‘safe and regulated avenues for refugees that complement resettlement by providing lawful stay in a third country where their international protection needs are met’.⁸ Complementary pathways identified in the Compact are family reunification, private refugee sponsorship, humanitarian visas and labour and educational opportunities for refugees.

The global push to expand community sponsorship may be traced to the 2016 New York Declaration, which calls for the expansion of resettlement and other alternative avenues to asylum for refugees. The Global Refugee Sponsorship Initiative was launched in the margins of the New York Declaration, with a mandate to ‘encourage and support the adoption and expansion of refugee sponsorship programs around the world’.⁹ More broadly, community sponsorship is aligned to the Compact as an example of a whole-of-society approach to refugee protection, which includes local authorities.¹⁰ At the first Global Refugee Forum held in December 2019, Brazil, Belgium, Malta and Portugal pledged to explore pilot community

⁵ UNHCR, “Complementary Pathways for Admission of Refugees to Third Countries”, p. 8; Solano and Savazzi, “Private Sponsorship Programmes and Humanitarian Visas: A Viable Policy Framework for Integration?”, p. 5.

⁶ United Nations, Report of the United Nations High Commissioner of Refugees, *Part II: Global Compact on Refugees*, UN Doc. A/73/12 (*Part II*).

⁷ Global Compact on Refugees, paras. 7 and 95.

⁸ UNHCR, “Complementary Pathways for Admission of Refugees to Third Countries”, p. 5. Van Selm defines complementary pathways in the context of the EU as “programs for the selection and organized transfer of refugees from a country of first asylum to a European country”; Van Selm, “Complementary Pathways to Protection”, p. 144. The term “complementary pathways” seems to have replaced “safe and legal routes to asylum” previously used by UNHCR. See Crisp, “Briefing: Are Labour Mobility Schemes for Skilled Refugees a Good Idea?”

⁹ Global Refugee Sponsorship Initiative, “Co-Designing Sponsorship Programs”, p. 1.

¹⁰ UNHCR, “The Three-Year (2019–2021) Strategy on Resettlement and Complementary Pathways”, p. 33.

sponsorship models, while Finland has recently completed a feasibility study for a pilot scheme.¹¹

Against the backdrop of this rapid uptake of community sponsorship models, this chapter seeks to set out key protective principles drawn from international human rights and refugee law. At this early stage of the development of community sponsorship beyond Canada, the purpose of these principles is to guide the implementation of community sponsorship and inform policymakers and advocates seeking to implement new or adjust existing programmes. In keeping with this volume's focus on the 'local turn' in migration governance, the chapter further addresses the current and potential roles of local authorities in community sponsorship schemes.¹² The chapter concludes that while national governments remain the 'ultimate gatekeepers' in terms of the creation and scale of community sponsorship models, globally engaged local authorities have the potential to ensure a principled approach to community sponsorship as a means to increase protection space.

This contribution proceeds in five sections. First, the role of resettlement and complementary pathways in the Compact is discussed, as a counterpoint to the lack of access to asylum in destination states in the Global North. Second, the chapter frames community sponsorship as a flexible concept that may take the form of resettlement or standalone a complementary pathway to protection. Third, the chapter uses the recent proliferation of community sponsorship models to draw out both promising and problematic practices in terms of refugee protection. Fourth, the role of local authorities in the various community sponsorship models is explored. Finally, the chapter puts forward a number of protection principles to inform new and existing community sponsorship models, before providing some concluding reflections on the place of community sponsorship in the international refugee regime and the role of local authorities in developing this form of refugee protection.

2 Resettlement and Complementary Pathways in the Global Compact on Refugees

The adoption of the Compact as a global responsibility sharing instrument comes against a backdrop of the 'deterrence paradigm'¹³ in traditional asylum countries, in which a broad array of 'non-entrée' measures

¹¹ See UNHCR, "Pledges & Contributions Dashboard"; Turtiainen and Sapir, "Feasibility Study on the Potential of Community-Based Sponsorship in Finland".

¹² See Baumgärtel and Miellet, introduction to this volume.

¹³ Gammeltoft-Hansen and Tan, "The End of the Deterrence Paradigm?".

prevent asylum seekers accessing the territory or asylum procedures of destination states.¹⁴ As a result, lack of legal access to asylum for refugees has emerged as a key gap in the international refugee regime in the past thirty years, with some authors predicting the end of the right to seek asylum in the Global North.¹⁵

The Compact does not directly address challenges of access to asylum, instead placing the expansion of resettlement and complementary pathways as one of its four objectives.¹⁶ Paragraphs 94–96 provide that such pathways should act as a ‘complement to resettlement’, and the Compact aims to significantly increase their availability and predictability. The Compact further provides that complementary pathways ‘contain appropriate protection safeguards’, though it does not elaborate on what standards these contain.¹⁷ Following the adoption of the Compact, UNHCR set out highly ambitious targets for increased resettlement and complementary pathways in the decade ahead.¹⁸

Such controlled pathways are often the preferred modes of protection in destination countries, rather than spontaneous asylum.¹⁹ Resettlement is not an international legal obligation but rather a discretionary policy choice.²⁰ As Hashimoto points out, ‘no state has a legal obligation proactively to admit refugees via resettlement who are still outside their jurisdiction; nor can a refugee claim a “right” to be resettled’.²¹

Resettlement is palatable to destination states as it is a means of providing asylum that meets their control interests in a number of respects. First, resettlement involves the orderly movement of recognised refugees across international borders, in some contrast to the spontaneous arrival of asylum seekers.²² Second, resettlement involves the predictable

¹⁴ Hathaway, “The Emerging Politics of Non-Entrée”.

¹⁵ Ghezelbash, *Refuge Lost*, 185–6.

¹⁶ Global Compact on Refugees, para. 7.

¹⁷ *Ibid.*, para. 94.

¹⁸ UNHCR has set a target of third-country solutions for three million refugees (one million via resettlement and two million via complementary pathways) in 2028. UNHCR, “The Three-Year (2019–2021) Strategy on Resettlement and Complementary Pathways”, p. 11.

¹⁹ Hashimoto, “Refugee Resettlement as an Alternative to Asylum”.

²⁰ According to the UNHCR Resettlement Handbook, resettlement involves admission to “a third State which has agreed to admit them – as refugees – with *permanent* residence status”; UNHCR, *UNHCR Resettlement Handbook*.

²¹ Hashimoto, “Refugee Resettlement as an Alternative to Asylum”, p. 165. See also de Boer and Zieck, “The Legal Abyss of Discretion in the Resettlement of Refugees”.

²² As early as 2004, Van Selm noted: “The emerging thought in Europe is that if a country resettles refugees, as opposed to seeing them arrive spontaneously, the authorities know who they are, the people enter legally, and the process can be managed”. Van Selm, “The Strategic Use of Resettlement”, p. 43.

allocation of annual quotas, allowing the destination state to predetermine how many refugees receive protection in a given year. Furthermore, resettlement allows destination states to allow access to recognised refugees only, thereby avoiding the entry of migrants not requiring international protection. This is particularly pertinent in the EU, where implemented return rates hover around 40 per cent.²³ In a number of destination states, admission of refugees under an organised resettlement program tends to be more politically popular than the admission of asylum seekers.²⁴

Resettlement and complementary pathways allow destination states to maintain a commitment to the international refugee regime, holding out a form of responsibility sharing to ‘trade-off’ deterrence efforts.²⁵ This tendency is evident in the linking of the two approaches. The EU–Turkey Statement, for example, includes a built-in resettlement element, with one Syrian refugee resettled for every one returned. Australia’s deterrence efforts are often justified in terms of a relatively generous resettlement program.²⁶ This relationship between deterrence, on the one hand, and controlled pathways via third-country solutions, on the other, runs as a red thread through the implementation of the Compact.²⁷

3 Conceptualising Community Sponsorship

Community sponsorship may be either a form of resettlement or a complementary pathway.²⁸ A 2018 study undertaken by the European Commission, as well as a number of individual country feasibility studies, demonstrate the wide range of approaches to community sponsorship, straddling more established forms of resettlement and standalone

²³ European Commission, Council EU Action Plan on return COM(2015) 453 final, 9 September 2015, p. 2.

²⁴ Van Selm, “The strategic use of resettlement”, p. 47; McKay, Thomas, and Kneebone, “It Would Be Okay if They Came Through the Proper Channels”.

²⁵ Hashimoto offers four explanations for states’ resettlement programs: egoistic self-interest; humanitarian altruism; reciprocity; and international reputation. Hashimoto, “Refugee Resettlement as an Alternative to Asylum”, p. 166.

²⁶ As Garnier notes, “[i]n Australia ... it is increasingly commonly accepted that expanding the humanitarian intake justifies enhanced deterrence towards ‘boat people’ claiming asylum”; Garnier, “Migration Management and Humanitarian Protection”, p. 954.

²⁷ See Carrera and Cortinovis, “The EU’s Role in Implementing the UN Global Compact on Refugee”, Crisp, “After the Forum” as well as Tan and Vedsted-Hansen, “Inventory and Typology of EU Arrangements with Third Countries”.

²⁸ This section draws on Tan, “Community Sponsorship in Europe”.

complementary pathways.²⁹ The following explains how the concept is best understood as an ‘umbrella’ term encompassing several different modalities.³⁰

Community sponsorship as a tool for resettlement focuses solely on *integration* support for resettled refugees matched with civil society sponsors. Rather than creating a pathway to admission, community sponsorship involves integration assistance for resettled refugees. This model of community sponsorship uses existing UNHCR and state resettlement channels (including selection, referral, health checks etc.) to admit refugees. Civil society involvement is generally limited to the provision of support *after* arrival and focused on the successful integration of refugees. Moreover, community sponsorship as resettlement usually benefits UNHCR-referred refugees, rather than ‘named’ individuals, although practice varies between jurisdictions.³¹

Existing community sponsorship schemes in Ireland and the United Kingdom are squarely focused on the support of resettled refugees, initiated within the state resettlement quota with the intention of becoming additional over time.³² Similarly, the German Neustart im Team (NesT) programme is a clear example of community sponsorship as a resettlement tool.

Community sponsorship models that involve privately led *admission and integration* of asylum seekers and refugees create a standalone complementary pathway. Such programmes are firmly separated from state-run resettlement as an ‘initiative by private associations with recognized expertise in the field to provide for an alternative, legal, and safe pathway’.³³ In its original form in Canada, community sponsorship involved the ‘naming’ of individual refugees by sponsors and the creation of a pathway independent of other channels to admission.³⁴ More recently,

²⁹ European Commission, “Study on the Feasibility and Added Value of Sponsorship Schemes”, p. 42; Tan, “The Feasibility of Community-Based Sponsorship of Refugees in Denmark”; European Resettlement Network, “Private Sponsorship Feasibility Study – Towards a Private Sponsorship Model in France”.

³⁰ Hueck, “Community Based Sponsorship Programmes in Europe: What Next?”.

³¹ New Zealand’s community sponsorship pilot, for example, accepted both civil society nominations and UNHCR referrals, though all sponsored refugees had to be recognised by UNHCR.

³² Phillimore and Reyes, “Community Sponsorship in the UK”; UK Home Office, “New Global Resettlement Scheme for the Most Vulnerable Refugees Announced”.

³³ Ricci, “The Necessity for Alternative Legal Pathways”.

³⁴ UNHCR, “Complementary Pathways for Admission of Refugees to Third Countries”, p. 8.

the Humanitarian Corridors model pioneered in Italy is a good example of community sponsorship as a complementary pathway.³⁵ Community sponsorship may also form a complementary pathway for the purpose of family reunification, such as the German Federal *Länder* Sponsorship Scheme, in place between 2013 and 2018.³⁶

Community sponsorship as a complementary pathway raises questions of the extent to which the model provides protection to refugees, rather than other migrants. Hashimoto has recently critiqued the role of complementary pathways as risking the transformation of the institution of asylum into ‘a neoliberal, privatised immigration enterprise reserved only for highly skilled and educated migrants or for certain ethnic or religious groups’.³⁷ By contrast, Van Selm highlights their potential as ‘ways out of the asylum and refugee policy debate and deterrence in Europe’.³⁸

Finally, the long-standing question of additionality is a constant tension between an approach that is complementary to existing resettlement, thus expanding protection, and a model that replaces state resettlement, leading to concerns of outsourcing or privatisation of refugee protection.³⁹ In essence, additionality in community sponsorship expands refugee protection, while community sponsorship that replaces resettlement allows the state to outsource its responsibility.⁴⁰ To meet the principles outlined in this contribution, community sponsorship models should expand refugee protection, not merely shift responsibility from government to civil society or private actors.

Nevertheless, additionality is not a straightforward concept, and pragmatic considerations may require that initial community sponsorship models take place within existing resettlement quotas.⁴¹ In such cases, a shift to additionality in the short to medium-term should remain a focus, with the realistic understanding that some national governments may seek to dilute or reverse-engineer additionality.⁴² As discussed later, local authorities have a key role to play in holding national governments to

³⁵ See Humanitarian Corridors, “The Humanitarian Corridors”.

³⁶ Hueck, “Community Based Sponsorship Programmes in Europe: What Next?”.

³⁷ Hashimoto, “Are New Pathways of Admitting Refugees Truly ‘Humanitarian’ and ‘Complementary’?”, p. 16.

³⁸ Van Selm, “Complementary Pathways to Protection”, p. 150.

³⁹ Ritchie, “Civil Society, the State, and Private Sponsorship”; Hirsch, Hoang and Vogl, “Australia’s Private Refugee Sponsorship Program”.

⁴⁰ Ritchie, “Civil Society, the State, and Private Sponsorship”.

⁴¹ Tan, “Community Sponsorship in Europe”, p. 9.

⁴² *Ibid.*

account in this respect, to ensure that community sponsorship models expand rather than outsource refugee protection.

Relatedly, the establishment of community sponsorship schemes in states with no existing resettlement programme raises complex questions of pragmatic or realistic approaches. On the one hand, community sponsorship has the potential to kick start resettlement by mobilising local authorities, civil society and private funding where national governments have historically proven unwilling. Some authors have recently pointed out that the introduction of complementary pathways, including community sponsorship, may lead to the ‘development of fully-fledged and regular resettlement programmes’.⁴³ On the other hand, the establishment of privately led resettlement may disincentivise governments from assuming their traditional responsibilities for such programmes whatsoever.

4 Promising and Problematic Practices

The primary objective of community sponsorship models should be the protection of refugees. The proliferation of new and varied community sponsorship models offers some recent but rich examples of practices to be emulated and avoided. The following makes some reflections on promising and problematic practices in the development of community sponsorship since 2015.

A number of community sponsorship models have successfully *expanded protection* for refugees, by remaining or emerging as additional to state resettlement. Canadian sponsors supported 62,000 Syrian refugees between 2015 and 2020 alone, over and above the Canadian government’s resettlement scheme.⁴⁴ Humanitarian Corridors Italy has provided a safe and legal pathway to protection for 3,632 refugees since 2016, in addition to the country’s annual resettlement programme of 1,000 places.⁴⁵ On a smaller scale, Germany’s NeST model is additional to the national resettlement program, with 400 sponsored refugees admitted from Germany’s

⁴³ Hashimoto, “Are New Pathways of Admitting Refugees Truly ‘Humanitarian’ and ‘Complementary?’”, p. 26. Similarly, Van Selm concludes that such programmes “could provide a spring-board to the long term resettlement programs that some wish to see”; Van Selm, “Complementary pathways to protection”, p. 150.

⁴⁴ Government of Canada, “By the Numbers – 40 Years of Canada’s Private Sponsorship of Refugees Program”.

⁴⁵ Ricci, “The Necessity for Alternative Legal Pathways”, p. 268. Community of Sant’Egidio, “Humanitarian Corridors in Figures” (January 2022).

overall resettlement quota of 5,500.⁴⁶ The United Kingdom Community Sponsorship Scheme started out within the state's resettlement quota, with the government pledging additionality at the Global Refugee Forum.⁴⁷

A further promising practice is the provision of *permanent protection* to refugees under a number of community sponsorship models. In this respect, the close links between community sponsorship and resettlement have proven useful. While complementary pathways generally provide refugees with 'lawful stay in a third country where their international protection needs are met',⁴⁸ most community sponsorship schemes currently provide permanent protection to refugees, or at least temporary visas with the expectation of subsequent permanent residence.⁴⁹ There are at least two possible reasons for this relatively generous level of protection. First, the use of resettlement channels for sponsored refugees introduces a presumption of permanent protection, as resettlement by definition involves the 'transfer of refugees from one State in which they have sought protection to a third State which has agreed to admit them – as refugees – with permanent residence status'.⁵⁰ Second, the integration-focused role of sponsors tends towards permanent rather than temporary protection. In Denmark, for example, the feasibility of community sponsorship is significantly hampered by a recent policy shift to temporary protection of refugees.⁵¹

Finally, some recent community sponsorship programs have placed significant focus on *practical safeguards* for sponsored refugees. In particular, the creation of civil society focal points with expertise in refugee support to screen, select and train sponsors is good practice to ensure refugees benefit from sponsors. Such a body is vital to act as liaison between sponsors and government, as well as to step in in the case of sponsorship breakdown.⁵² Building on Canada's Sponsorship Agreement Holders model, Ireland, Germany and the United Kingdom have all established such civil

⁴⁶ Resettlement.de, "Current Admissions".

⁴⁷ UNHCR, "Pledges & Contributions Dashboard".

⁴⁸ UNHCR, "Complementary Pathways for Admission of Refugees to Third Countries", p. 4.

⁴⁹ Australia, Canada, Italy, New Zealand, Ireland and the United Kingdom provide permanent residence status immediately, while Germany's NeST programme provides a three-year protection visa; see Neustart im Team, "Neustart im Team (NeST)".

⁵⁰ UNHCR, *UNHCR Resettlement Handbook*, p. 3.

⁵¹ Tan, "The Feasibility of Community-Based Sponsorship of Refugees in Denmark", p. 15. On recent temporary protection policy in Denmark, see Tan, "The End of Protection".

⁵² European Commission, "Study on the Feasibility and Added Value of Sponsorship Schemes", p. 84.

society focal points. Relatedly, recent practice has prioritised monitoring and evaluation of community sponsorship schemes, in part to ensure refugees are adequately supported during sponsorship.⁵³ Systematic evaluations have been undertaken soon after implementation in, for example, the Basque region,⁵⁴ New Zealand⁵⁵ and the United Kingdom.⁵⁶

A number of more problematic practices may also be observed. Some community sponsorship models have featured *discrimination* between refugees on the basis of religion. For example, *ad hoc* community sponsorship models in the Czech Republic, Poland and Slovakia provided admission only to Christians, with no consideration of international protection needs.⁵⁷ Refugees admitted under these schemes either moved on to another EU member state or returned to their country of origin.⁵⁸ By contrast, community sponsorship schemes in Germany (NesT), New Zealand and the United Kingdom draw beneficiaries from UNHCR's resettlement submission categories, which focus referrals on seven objective criteria in line with the humanitarian basis of resettlement.⁵⁹

Still, other community sponsorship models have shifted the focus of community sponsorship *away from protection* to particular migration streams, such as labour migration or family reunion. Australia's Community Support Program, notably, provides for 1,000 sponsored refugees per year within Australia's resettlement scheme. However, the scheme only supports refugees who are 'job-ready' with 'functional English' and sponsors pay significant costs related to visas, administration and integration.⁶⁰ As a result, the Community Support Program has been criticised as 'an exercise in the privatization of resettlement responsibilities and costs'

⁵³ On the importance of monitoring and evaluation, see Beirens and Ahad, "Measuring Up?".

⁵⁴ Instrategies, "Auzolana II Pilot Community Sponsorship Experience".

⁵⁵ New Zealand Government, "Community Organisation Refugee Sponsorship Category Pilot: Process Evaluation".

⁵⁶ Phillimore and Reyes, "Community Sponsorship in the UK".

⁵⁷ European Commission, "Study on the Feasibility and Added Value of Sponsorship Schemes", p. 61. On discrimination on the grounds of religion in resettlement policy, see Zagor, "Martyrdom, Antinomianism, and the Prioritising of Christians".

⁵⁸ European Commission, "Study on the Feasibility and Added Value of Sponsorship Schemes", p. 65.

⁵⁹ The categories are legal and/or physical protection needs, survivors of torture and/or violence, medical needs, women and girls at risk, family reunification, children and adolescents at risk, and lack of foreseeable alternative durable solutions. See further de Boer and Zieck, "The Legal Abyss of Discretion in the Resettlement of Refugees", and Hashimoto, "Are New Pathways of Admitting Refugees Truly 'Humanitarian' and 'Complementary'?", p. 19.

⁶⁰ Hoang, "Human rights: Private Sponsorship of Refugees and Humanitarian Entrants".

more akin to a labour migration or family reunification scheme than a humanitarian mechanism.⁶¹ Similarly, New Zealand's pilot included job-focused eligibility criteria.⁶² Previous practice has also placed onerous requirements on sponsors, causing stress for both sponsors and refugees. Germany's Federal *Länder* Sponsorship Scheme, a family reunification model in place between 2013 and 2018, was criticised for requiring individuals to commit to five years of sponsorship.⁶³

Finally, *inadequate policy frameworks* have revealed corruption in community sponsorship in at least one case. In Belgium, a city counsellor has been arrested on suspicion of selling humanitarian visas to refugees for €20,000 under a humanitarian corridors pilot.⁶⁴ Notwithstanding its undoubted successes, the Humanitarian Corridors model places significant responsibility for selection of refugees on faith-based actors. A robust policy framework at both national and local levels is necessary to avoid such governance problems, especially where pilot programs are used to test the possibility of a permanent community sponsorship model.⁶⁵

5 The Role of Local Authorities in Community Sponsorship

The role of local authorities in community sponsorship models requires further research. In Canada, the question is less relevant as the federal government is responsible for the country's community sponsorship streams, with the exception of the provincial government of Quebec. Hitherto, in those jurisdictions where community sponsorship is in a pilot or relatively recent phase, focus has tended to remain on the role of national authorities and civil society.⁶⁶ Nevertheless, the legal, policy and operational roles of local authorities are often essential to the inception and implementation of community sponsorship models.

The role of local authorities in refugee governance more broadly is addressed in the Compact as 'among the actors that experience the most

⁶¹ Hirsch, Hoang and Vogl, "Australia's Private Refugee Sponsorship Program", p. 110.

⁶² New Zealand Immigration, "Community Organisation Refugee Sponsorship Category Introduced".

⁶³ European Commission, "Study on the Feasibility and Added Value of Sponsorship Schemes", p. 130.

⁶⁴ Kennedy, "Belgian Councillor Arrested on Suspicion of Selling Humanitarian Visas".

⁶⁵ See, for example, Department of Justice and Equality, "Community Sponsorship Ireland: Initial Policy Framework".

⁶⁶ See, for example, Tan, "Community Sponsorship in Europe" and Ricci, "The Necessity for Alternative Legal Pathways", p. 271.

significant impact over the medium term'.⁶⁷ However, while the Global Compact on Refugees goes on to call on cities and municipalities to share their good practices and innovative approaches in supporting refugees, it falls short of outlining the role of local governance actors in resettlement and complementary pathway arrangements, including community sponsorship. Sabchev and Baumgärtel have sought to bridge this gap, calling for the upscaling of 'locally organised, city-led routes' to protection for refugees in the EU, given the capacity of municipal and regional authorities to assess local capacity to host and integrate refugees, manage refugee reception and integration and a recent tendency of local governments to cooperate directly with key international organisations, notably UNHCR and International Organization for Migration.⁶⁸

Three overlapping tendencies in the roles of local authorities are observed here, telegraphing the increasingly important role of local authorities in both the uptake and implementation of community sponsorship schemes. First, local authorities *champion* locally driven community sponsorship, often as a counterpoint to the restrictive policies of national governments. Since 2015, for example, Barcelona, Vienna and Hamburg have repeatedly expressed their willingness to host and support refugees, often in direct opposition to their national counterparts.⁶⁹ Similarly, Barcelona and Athens agreed in 2016 to cooperate on a pilot project to relocate 100 refugees living in camps in the Greek capital to Barcelona, which was ultimately rejected by the national Spanish government.⁷⁰ With respect to complementary pathways more broadly, German self-declared 'Safe Ports' municipalities have lobbied their states to develop humanitarian admission programmes. Most recently, a Thuringia state proposal for a humanitarian admission programme aimed at Afghans was blocked by the German federal interior ministry.⁷¹

Such city-led advocacy with respect to community sponsorship in some ways reflects the broader sanctuary cities movement from the United States dating back to the 1980s,⁷² as well as the emergence of the Solidarity Cities project in Europe since 2016.⁷³ However, the advocacy of

⁶⁷ Global Compact on Refugees, para. 37.

⁶⁸ Sabchev and Baumgärtel, "The Path of Least Resistance?", p. 38.

⁶⁹ *Ibid.*

⁷⁰ Radjenovic, "Community Sponsorship Schemes Under the New Pact on Migration and Asylum", p. 9.

⁷¹ Flüchtlingsrat NRW, "Thüringer Landesaufnahmeprogramm für Afghanistan gescheitert".

⁷² See Lasch and Morales in this volume.

⁷³ Solidarity Cities, "About".

local authorities with respect to community sponsorship is distinct from the sanctuary city concept in important respects. Perhaps most notably, cities calling for the introduction of community sponsorship are actively seeking to provide an *avenue to protection* for refugees, rather than supporting the enduring residence of those already present. Moreover, cities calling for community sponsorship models generally propose protection for a relatively small group of refugees, rather than large groups of existing migrant or refugee populations.

Second, and related, subnational authorities have played a *catalytic* role in certain settings. The Basque regional government in Spain led the country's community sponsorship pilot, advocating for the scheme through negotiations with national authorities in Madrid.⁷⁴ The pilot supporting five Syrian families took place within Spain's National Resettlement Program,⁷⁵ with a 2019 agreement between the Ministry of Labour, Migration and Social Security, the Basque regional government, UNHCR Spain, Caritas Euskadi and Ellacuría Foundation placing responsibility for the reception of sponsored refugees with the Basque regional government.⁷⁶ The Spanish pilot is further an example of cooperation between regional and municipal authorities, as the Basque regional government distributed beneficiaries among the three major Basque cities of Bilbao, Donostia and Vitoria.⁷⁷ Local authorities in other EU states have expressed interest in piloting local or regional models, with a number of Swedish municipalities currently considering a pilot.⁷⁸

Finally, local authorities clearly often play an important *operational* role in implementing a community sponsorship scheme. In many European states, municipal authorities are responsible for delivering the entirety or majority of refugees' integration programmes, ranging from housing assistance, language classes, cultural orientation and employment support.⁷⁹ In the United Kingdom, for example, the cities of Bristol and Birmingham support local community sponsorship by raising awareness

⁷⁴ Manzanedo, "Community-Based Refugee Sponsorship in Spain".

⁷⁵ Instrategies, "Auzolana II Pilot Community Sponsorship Experience", p. 45.

⁷⁶ Radjenovic, "Community Sponsorship Schemes Under the New Pact on Migration and Asylum", p. 9.

⁷⁷ Manzanedo, "Community-Based Refugee Sponsorship in Spain", p. 4.

⁷⁸ Tan, "A Study on the Potential for Introducing a Community Sponsorship Programme for Refugees in Sweden", p. 27.

⁷⁹ For a series of factsheets on European countries, see European Resettlement Network, "Integration Phase".

among volunteer organisations and training and coordinating and monitoring sponsorship groups.⁸⁰

However, the inclusion of civil society in integration systems run by local authorities that community sponsorship entails gives rise to questions of complexity. In a recent UNHCR scoping report on the feasibility of community sponsorship in Sweden, existing coordination between multiple national agencies and municipalities was identified as a challenge to the devolution of certain responsibilities to a civil society actor.⁸¹ In contrast, a recent Finnish study on the potential for introducing community sponsorship found extensive cooperation between municipalities and civil society, concluding that existing cooperation provides ‘a functional foundation for a community sponsorship programme’.⁸²

6 Towards Protection Principles

The proliferation of new community sponsorship models since 2015 bring both risks and opportunities for refugee protection. On the one hand, the rapid growth of community sponsorship means national and local policymakers may quickly be informed of the various models implemented in multiple jurisdictions. On the other hand, the inherent flexibility of the concept may leave it open to co-option where, for example, governments use community sponsorship to replace resettlement, or discriminate by protecting only particular groups. To mitigate these risks, the following section suggests six protective standards drawn from international human rights and refugee law and lessons from recent practice.⁸³

6.1 *Additionality*

Additionality should remain at the forefront of discussions on community sponsorship, to avoid the effective outsourcing of government responsibilities. Community sponsorship should not replace resettlement.⁸⁴

⁸⁰ Radjenovic, “Community Sponsorship Schemes Under the New Pact on Migration and Asylum”, p. 9.

⁸¹ Tan, “A Study on the Potential for Introducing a Community Sponsorship Programme for Refugees in Sweden”, p. 19.

⁸² Turtiainen and Sapir, “Feasibility Study on the Potential of Community-Based Sponsorship in Finland”, p. 39.

⁸³ On the role of local authorities vis-à-vis international human rights law more generally, see Oomen and Baumgärtel, “Frontier Cities”.

⁸⁴ Hirsch, Hoang and Vogl, “Australia’s Private Refugee Sponsorship Program”, p. 119.

However, the question of additionality is becoming increasingly complex. It is notable, for example, that the EU Pact on Migration and Asylum does not stress additionality in proposing the development of an ‘European model’ of community sponsorship.⁸⁵ While ideally community sponsorship schemes should be additional to existing resettlement programmes *from the outset*, pragmatic considerations may require that community sponsorship models initially take place within existing resettlement quotas. This is because national governments are, in general, reluctant to increase annual resettlement quotas. In such cases, a shift to additionality in the short to medium-term must remain a priority – an approach that may be termed ‘additionality in principle’. Moreover, some national governments may seek to ‘reverse engineer’ additionality when negotiating the state quota in relation to community sponsorship.

The result of increased involvement of local governments with respect to additionality may be somewhat mixed. On the one hand, local governments focused on integration outcomes may not support additional community sponsorship quotas, as their primary interest lies in improved integration of refugees under existing resettlement quotas. On the other hand, other local governments can play a crucial role in insisting upon additionality by joining forces with local and transnational sponsorship actors, especially given municipalities’ key operational role in European countries. To uphold this principle, local authorities involved in community sponsorship programmes need an eye not only to integration outcomes but also the overall purpose of community sponsorship as a means to increase protection space.

6.2 *Respecting the Right to Seek Asylum*

The introduction and expansion of community sponsorship models should not be used by national governments to justify restrictions on access to spontaneous asylum.⁸⁶ In other words, community sponsorship should not be instrumentalised to distract from deterrence policies. While state resettlement has long been used strategically in this way,⁸⁷ there is little evidence that the strategic use of resettlement has actually driven

⁸⁵ Duken and Rasche, “Towards a European Model for Community Sponsorship”, p. 3; Radjenovic, “Community Sponsorship Schemes Under the New Pact on Migration and Asylum”, p. 7.

⁸⁶ In the Canadian context, see Labman, “Queue the Rhetoric”, p. 62.

⁸⁷ Van Selm, “The Strategic Use of Resettlement”, p. 43.

down spontaneous asylum.⁸⁸ Given its locally driven nature, community sponsorship should be at least somewhat insulated from national government interests in this regard.

Increased involvement of local authorities in community sponsorship schemes are likely to support this principle. Municipalities and regional governments playing a key role in driving community sponsorship models often serve as a counterweight to the restrictive agendas of national governments. While national governments retain sovereign power in terms of admission to the state and the creation of new community sponsorship models, the combined advocacy role of international actors ‘from above’, such as UNHCR and the Global Refugee Sponsorship Initiative, and subnational authorities ‘from below’, such as regional and municipal authorities, have the potential to shore up the right to seek asylum through pressure on national governments.⁸⁹

6.3 *Non-Discrimination and Equal Treatment*

The principle of non-discrimination flowing from international human rights and refugee law must inform state practice on community sponsorship.⁹⁰ As UNHCR notes, community sponsorship should be ‘non-discriminatory and not distinguish on the basis of nationality, race, gender, religious belief, class or political opinion’.⁹¹ Learning from previous practice in Eastern Europe, future community sponsorship models should avoid discrimination in the selection of refugees for sponsorship. Moreover, principles of equal treatment require that sponsored refugees not be treated differentially from government-resettled refugees during integration, and *vice versa*. In particular, in the case of relationship breakdown, the principle of non-discrimination requires that the government (be it municipal, regional or national, depending on modalities) step in to protect the rights of a sponsored refugee and ensure equal treatment between sponsored and traditionally resettled refugees.

⁸⁸ See, for example, Schneider, *The Strategic Use of Resettlement: Lessons from the Syria Context*.

⁸⁹ On the role of city leaders transnationally, see Acuto, “City Leadership in Global Governance”. For an account of this dynamic with respect to shelter for undocumented migrants, see Oomen and Baumgärtel, “Frontier Cities”, pp. 617–9.

⁹⁰ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art. 3.

⁹¹ UNHCR, “Complementary Pathways for Admission of Refugees to Third Countries”, p. 12.

While non-discrimination should be a key principle across local and national governments, the involvement of multiple subnational authorities in a community sponsorship scheme can provide flexibility in accommodating particular demographic preferences. Provided the principle of non-discrimination informs the *selection and admission* of sponsored refugees, it is appropriate for local authorities to be ‘matched’ with beneficiaries on the basis of relevant demographics or background.

6.4 *Protection-Focused*

Community sponsorship should remain firmly focused on refugee protection. At a minimum, beneficiaries must meet the definition of refugee-hood set out in Article 1A(2) of the 1951 Refugee Convention, or a regional variation thereof, to be eligible for a community sponsorship scheme. This means, for example, learning the lessons from Australia’s Community Support Program, which is as much centred around labour market integration as refugee protection. Equally, the use of community sponsorship to facilitate family reunification should neither replace the state’s family reunification obligations⁹² nor place unreasonable burdens on sponsors.⁹³

The initiative of some local authorities in proposing, realising and operating community sponsorship schemes with the explicit aim of refugee protection suggests that increased involvement of local authorities support this principle. For example, the Basque pilot in Spain was undertaken in alignment with the regional government’s ‘commitment to solidarity, human rights and peace’.⁹⁴ Equally, the repeated calls from German Länder and municipalities to establish humanitarian admission programmes for Afghan refugees points to the more principled approach of some local authorities over national governments.

6.5 *Clarity of Legal Status*

Community sponsorship approaches should provide a clear legal status to sponsored refugees. In general, refugees admitted under a community sponsorship scheme should be entitled to the full set of rights

⁹² Nicholson, “The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied”.

⁹³ For an overview of issues raised by the German Federal *Länder* Sponsorship Scheme, see Pauline Endres de Oliveira, “Humanitarian Admission to Germany—Access vs. Rights?”.

⁹⁴ Instrategies, “Auzolana II Pilot Community Sponsorship Experience”, p. 45.

afforded other refugees in the country, in line with the principle of non-discrimination and socio-economic rights set out in the 1951 Convention.⁹⁵ As a matter of international law, responsibility for the provision of these rights rests with the national government, though as a matter of practice – particularly in the EU – municipalities are responsible for securing the integrative rights of refugees through, for example, education and employment training.

Community sponsorship as resettlement carries the additional status of providing a durable solution, thus often amounting to permanent residence more rapidly than community sponsorship as complementary pathway. Once again, the EU Pact on Migration and Asylum does not address legal status in its initial proposal for a ‘European model’ of community sponsorship.⁹⁶

6.6 *Robust Policy Framework*

Finally, community sponsorship approaches should be supported by a robust policy framework at both national and local levels. In particular, any model involving a ‘naming’ element should include safeguards to ensure the integrity of the selection process and, at a minimum, a requirement that the named individual meet the definition of refugee contained in Article 1A(2) of the 1951 Refugee Convention, or a regional variation thereof.⁹⁷ Ultimate responsibility for refugees must clearly remain with state authorities, not private actors.

With respect to local governance, a clear, workable division of labour between national, regional and local authorities is crucial, particularly in countries where municipalities are central to the integration of refugees. In her work on resettlement, for example, Stürner has called for increased ‘local ownership’ and even the creation of a Municipal Resettlement Programme within the EU.⁹⁸ A recent evaluation of the Basque pilot, called noted that ‘local administrations can enrich community sponsorship and should be involved from the outset’.⁹⁹

⁹⁵ Refugee Convention, Articles 2–34.

⁹⁶ Duken and Rasche, “Towards a European Model for Community Sponsorship”, p. 3; Radjenovic, “Community Sponsorship Schemes Under the New Pact on Migration and Asylum”, p. 7.

⁹⁷ UNHCR, “Complementary Pathways for Admission of Refugees to Third Countries”, p. 12.

⁹⁸ Stürner and Bendel, *Valuing Local Ownership*.

⁹⁹ Instrategies, “Auzolana II Pilot Community Sponsorship Experience”, p. 46.

7 Conclusions: Community Sponsorship, Local Governance and the International Refugee Regime

The scale, additionality and protection-focus of community sponsorship will define its success in meaningfully contributing to the international protection of refugees. With low resettlement numbers since the COVID-19 pandemic and pressure on the Compact to deliver, the push to expand community sponsorship is already being felt.¹⁰⁰ In the coming years, we are likely to see the emergence of new community sponsorship models that challenge the protective core of the concept. Three critical reflections are provided here: the role of community sponsorship with respect to the Global Compact on Refugees; the relationship between local authorities and international actors in community sponsorship; and the current and potential future role of local authorities in this area.

First, community sponsorship is emerging as a key pillar of the Global Compact on Refugees, both as a tool for resettlement and a standalone complementary pathway.¹⁰¹ Community sponsorship is part of a suite of ‘controlled’ avenues to protection with the potential to meet the Compact objective of expanding access to third-country solutions. However, against a backdrop of restrictions on territorial asylum exacerbated by the COVID-19 pandemic,¹⁰² it remains highly unlikely that community sponsorship and other third-country solutions can be scaled up to fill the substantial protection gaps extant in the international refugee regime.

Moreover, there is a risk that community sponsorship may be employed as a ‘fig leaf’ to divert from restrictions on access to asylum. For example, the introduction of a small-scale community sponsorship pilot by a particular state cannot meaningfully contribute to solutions for refugees when the national government is simultaneously preventing access to territory and/or national asylum procedures for spontaneous arrivals.

Second, and related, locally led efforts towards community sponsorship under the auspices of instruments like the Compact can lead to

¹⁰⁰ Only 22,700 refugees were resettled via UNHCR in 2020 and 39,266 people in 2021; UNHCR, “Resettlement Data”. See further UNHCR, “Global Trends: Forced Displacement in 2019”, pp. 51–52.

¹⁰¹ For example, community-sponsored refugees are now included in UNHCR’s global resettlement statistics. See UNHCR, “Global Trends: Forced Displacement in 2019”, UNHCR, “The Three-Year (2019–2021) Strategy on Resettlement and Complementary Pathways”, and UNHCR, “Complementary Pathways for Admission of Refugees to Third Countries”.

¹⁰² Crawley, “The Politics of Refugee Protection in a Post-Covid-19 World”; Ghezelbash and Tan, “The End of the Right to Seek Asylum?”.

the ‘decoupling’ of local policies from national approaches in the field of migration governance.¹⁰³ The engagement of cities, municipalities and regional governments with the Compact establishes transnational feedback loops between local authorities and UN processes and entities. Indeed, such transnational networks are already emerging, through UNHCR’s granting of the regional Nansen award to the Humanitarian Corridors initiative and the use of the Compacts’ ‘good practices’ portal by local authorities.¹⁰⁴ While I am not confident we will see what Sabchev and Baumgärtel label a ‘paradigm shift in migration governance’ through locally led community sponsorship,¹⁰⁵ the connecting of local governments with transnational and international actors, such as the Global Refugee Sponsorship Initiative and UNHCR, increases the prospects of the emergence of a principled approach to the community sponsorship of refugees.

Third, the role of local authorities in driving the principled development of community sponsorship is not straightforward. On the one hand, as a locally driven initiative community sponsorship is particularly well suited to leadership from subnational authorities. The track record of some local authorities in proposing, advocating for and implementing community sponsorship schemes indicates the enormous potential for local ownership of this new mode of welcoming refugees. On the other hand, as community sponsorship is inherently concerned with the admission of refugees (either through traditional resettlement pathways or as a standalone complementary pathway), local authorities equally face the reality that national authorities remain the ultimate ‘gatekeeper’ in terms of uptake, durability and scale of community sponsorship schemes.

There may be no elegant solution to this tension in the role of local governments in community sponsorship models. A key factor here is the need for local authorities to be globally engaged, with an eye not only to immediate local outcomes but also the sustainability of community sponsorship as a means to increase refugee protection locally, nationally and internationally.

¹⁰³ See, notably, Scholten, “Between National Models and Multi-Level Decoupling” and Baumgärtel and Oomen, “Pulling Human Rights Back In?”

¹⁰⁴ See, for example, Fernández and Pías, “Community-Based Refugee Sponsorship in Spain-Basque Country”.

¹⁰⁵ Sabchev and Baumgärtel, “The Path of Least Resistance?”

Conclusion: Method, Not Theory

MARIANA VALVERDE

1 On Municipal Governance: Who Is ‘The City’?

It is high time to collectively dispel the myth that there is a single legal and financial entity, ‘the city’ – one that acts autonomously except when engaging with or being buffeted by ‘higher’ levels of government. City staff and city-level politicians constantly interact with civil society organizations and individuals in their daily work, though the identity of these interlocutors will differ across geographies. (For example, in China, city leaders will be in constant touch with Communist party leaders.) A notable example of this porousness of ‘the city’ is found in the networks of developers, philanthropists and city officials that are common in North American and British urban revitalization efforts. These formal or informal groups that wield leadership in urban affairs include business interests as well as local authorities and link them through ad hoc, evolving relationships. Other civil society interests besides the influential businessmen that have traditionally dominated urban elites can be and sometimes are very visible, to the point that in some instances, civil society groups become almost part of the city apparatus. Traditionally, homeowners’ associations had great power in United States and English Canadian cities. In recent years, however, African-American interests have emerged as occasional but important interlocutors for American city governments.

Other civil society groups have managed to become important actors in urban governance in many places, including advocates for migrants and refugees and organizations representing wage workers, women and/or ‘special’ groups, such as India’s urban ‘pavement dwellers’. These and other types of civil society groups have in many urban contexts become quite central to the decision-making process, at least some of the time. Some Canadian municipalities, for instance, have taken it upon themselves to seriously consult with Indigenous organizations, usually representing nearby Indigenous communities, on issues such as infrastructure

and public health projects.¹ Depending on the depth and sincerity of the ‘consultations’, repeated interactions can bring Indigenous leaders and entities, formerly rarely visible at the local municipal level, into decision-making circles. In New Zealand, and parts of Australia, Indigenous leaders and organizations have also sometimes managed to gain visibility in the networks that govern urban spaces and urban issues, although as in the case of Canada, their influence is usually greater in non-urban areas. Cities elsewhere similarly feature locally specific networks in which the municipality, usually represented by paid staff, interacts with and is, to some extent, influenced by civil society interests.

Urban governance is thus one thing; the formal municipal apparatus is another. The two can be coterminous, when city officials act on their own; but it is not unusual for a formal city decision to be motivated by a complex chain of behind-the-scenes negotiations with particular civil society organizations or with select corporate firms. How urban governance is produced in practice requires close empirical study of ‘the city’, which may have to extend well beyond the activities of officials on city salaries. Furthermore, while many critical urban scholars, especially in the UK and the United States, have for decades now focused on the role played by business corporations in urban decision-making, in recent decades many cities have become somewhat more democratic and more responsive to a variety of civil society entities and interests, as mentioned previously in the case of African-American groups in US cities and Indigenous interests in Canadian city governance. Close attention not only to financial flows and business interests but also to countervailing forces ‘from below’ will be needed as scholars document city decision-making in different settings.

2 Is ‘The City’ a Scale of Governance? Jurisdiction vs Scale

In both legal studies and political science, it is traditional to claim that there are four scales of law: the international, the national, the subnational (the state/province or the ‘region’), and the municipal. Socio-legal scholar Boaventura Santos developed his influential notion of ‘interlegality’ in

¹ See, for example, Anderson and Flynn, *Indigenous-Municipal Legal and Governance Relationships*,

1987 based on the assumed existence of separate scales of government and law, although his interest was not in the abstract Russian-doll model but in how the different scales interact (hence his term ‘interlegality’, which is to legal studies what ‘intertextuality’ is to literary studies). However, recent thinking about ‘jurisdiction’ (within legal studies, work by Annelise Riles and Shaun McVeigh, for instance) has complicated this picture. It turns out that when one pays attention to what are often dismissed as ‘legal technicalities’, scale and jurisdiction often coincide: but not always. Furthermore, as Rhadika Mongia’s contribution to this book shows, and as Indigenous scholars all over have pointed out, imperial relations and habits of governing persist into our present, well after empires have been officially dismantled. There is thus an imperial scale of governance, and even of formal law, in many places today, from Latin America and North America to Africa and Asia.

Jurisdictions are often functional rather than spatial. We see this in this book’s premise, namely that within the boundaries of cities there are matters – such as immigration – that are not within municipal jurisdiction. Geography is thus not much of a help in determining jurisdiction. Furthermore, jurisdiction over a certain geographic area (say the legal boundaries of a city) does not mean that every regulation applies to/governs that whole space. A city ordinance regulating parks, for example, is obviously an exercise of municipal jurisdiction: but its scale is not that of ‘the city’, but rather that of special spaces within ‘the city’ that have particular functions and uses. Hence, the governance of issues and problems that are located in urban settings requires an understanding of the complexities, in that instance, of both scale and jurisdiction.

This brings us to the question of whether official cities, cities as sites of norm-making and regulation, have a distinct way of operating: that is, one that is different from that associated with national states, which often (though not always) utilize a certain top-down gaze – ‘seeing like a state’, in James Scott’s influential formulation. I have argued elsewhere that cities do in fact often manage problems in a pragmatic and contextual fashion rather than imposing strict criminal-law style rules; but in some areas, such as public health, cities often ‘see like a state’ rather than ‘seeing like a city’.² Thus, when I refer to ‘seeing like a city’, I do not

² See Valverde, “Seeing Like a City”.

mean to create a binary opposition between a Jane-Jacobs style of local informality on the one hand and the disciplinary gaze of national-level law and national-level actors on the other. Instead, I draw attention to the persistence, particularly notable in municipal contexts, of premodern forms of knowledge and power (such as the embodied and after-the-fact logic of nuisance law and nuisance-style regulations), and the ability of premodern knowledges/powers to coexist with modernist techniques of governance. But premodern knowledges and powers and governing styles are certainly found at all other levels of law and governance as well, though there they may be more heavily disguised under the rhetorics of legality and prevention.

In addition, within legal geography and within socio-legal studies generally, there is a tendency to privilege cities and urban affairs and to see those as paradigmatic of local governance as such. The conflation of 'the local' and 'the urban' is highly problematic, however, theoretically and empirically. Migrants who cross rural municipalities or eventually settle in them become a local 'issue', and if large cities are generally more attractive to migrants and sometimes promote progressive policies such as 'sanctuary cities', it would be quite dangerous for scholars as well as activists to assume that pro-migrant activism and legal reform can only be promoted within cities. In Canada today, a good number of privately sponsored refugees are settling in small towns and even in rural areas, due to the emergence of private citizen groups interested in sponsoring migrants (and helped by the far lower price of housing in rural areas). In general, it is true that migrants tend to be attracted to cities; but the local governance of migration and of refugees cannot be assumed to be coterminous with the urban governance of migration.

Indeed, if the rise of 'cities of refuge' is currently an important topic and a theme, for scholarship and for activism and legal reform, 'municipalities of refuge' as a broader movement that would include small towns and villages may also have a future.

We see a concrete example of the unpredictability of the knowledge/power assemblages that produce and govern the urban when city councils declare that their city is a 'refuge' or 'sanctuary' for migrants. When they do so, as several contributions in this book point out, they run into difficulties, and their legal texts often lack political clarity and legal certainty. Cities have no role in formal immigration policy. And yet, the sanctuary/refuge movement can be more than merely symbolic, as Hudson and other contributors point out. Sometimes such a declaration is essentially a political resistance statement aimed at conservative anti-immigrant higher levels

of government, one that has little effectivity on the ground. But the declarations, if accompanied by actual changes in bureaucratic processes, can shape the lived experience of migration for many for the better.

I saw this personally in 2016, when accompanying a Syrian refugee family to the Toronto Public Library very soon after their arrival in Canada. The public library follows the city's sanctuary policy and even exceeds it: they are remarkably flexible with ID requirement. The Syrian children were provided with cards – and hence the beginning of a new urban identity – without any need to show legal immigration status (though they did have that).

While many suburban and rural municipalities have also acted to receive and welcome new immigrants, especially refugees, there is no doubt that cities are the primary site for on-the-ground struggles around migration. In my experience of Toronto (where I have lived as a first-generation migrant for over 40 years), migrants sometimes say they wanted to come to Canada (especially refugees fleeing from war or persecution), but in most cases, migrants state that they wanted to go to Vancouver or Montreal or Toronto. However and wherever they arrive, once within the borders they tend to congregate not only in certain cities but in certain neighbourhoods, in Toronto forming a 'little India', a Korea Town, and some 15 km away but still in the same city, a Little Mogadishu, among many other 'ethnic enclaves'.

In general, immigration experiences are clearly shaped by local structures and local policies and local norms as well as national policies and personnel. And as several chapters in the book show, Canada is perhaps a good place to highlight the cross-jurisdictional character of state policies in regard to migrants. Unlike in many European countries, where state officials perform the state's work to a much greater extent, the actual work of what is called 'settlement' (meaning immigrant reception and associated services) is in Canada to a large extent devolved on assemblages characterized by great legal and financial complexity.

Community agencies, more often than not staffed by newcomers, often professionals, receive regular grants from the Immigration federal department to deliver services to newcomers. While their activities are often highly regulated by funding systems, nevertheless, they are, in the aggregate, an actor in the network of immigration policy. In the 1980s, I volunteered as a translator at the local Centre for Spanish Speaking Peoples, then receiving many refugees from Central America. Translation was not a routine part of 'settlement' work, so I had to volunteer; but the agency staff were paid through federal 'settlement' funding. Importantly,

the federal government was not the sole funder. As is the case today, the same agencies in receipt of federal 'settlement' money also received philanthropic funding from the local United Way, which required a great deal of grant writing and auditing. They also obtained special funding, often grant-based rather than permanent, from other levels of government (e.g. provincial job retraining programs.)

In my experience, few immigrants understood just how services were being provided and by whom; indeed, they did not care, for good reasons. For that matter, the Canadian-born lawyers who provided immigration law services also did not appreciate the incredible complexity of the 'immigrant settlement' assemblage. But readers of this book might like to know that a key service for migrants, English as a second language classes, was and still is provided in part by the federal government, free of charge, and for several years; but very similar classes are provided by voluntary-sector agencies and religious organizations, and not federally funded, at least not on a permanent basis. In other words, the actual reception of migrants and refugees in a country that has long seen itself as a nation of immigrants (and where half of the largest city's inhabitants were born in another country) is the work of multi-jurisdictional assemblages of considerable complexity.

These are vulnerable assemblages, since an unpredictable event such as a decrease in philanthropic donations due to the pandemic can greatly affect an agency that requires for its basic functioning more resources than what the federal immigration department provides. The immigrant-reception assemblage is not even a single thing, since its composition differs from province to province and city to city – even though immigration law is uniform across the country.

These days it is fashionable to talk about 'multi-level governance'. Insofar as it helps to undermine the antiquated myth of a single sovereign power hovering godlike over every other organized political and social entity, the term is to be welcomed. However, the phrase can also act as one of those shortcuts to thinking that prevent us from seeing what is actually happening.³ The term 'multi-level' sounds vaguely collaborative; but it only gestures in the direction of organizational complexity. It doesn't describe anything in particular, and it could hinder us from investigating how exactly powers and resources are allocated among the 'levels' and discovering which actors wield what kind of power over which other

³ Campomori and Ambrosini, "Multilevel Governance in Trouble."

actors. (For instance, I have long heard from people who work in community agencies that the philanthropic giant the United Way exercises much more surveillance over organizations than government funders; this could well be true, in which case the formal organizational chart picture of ‘multi-level governance’ would be misleading.)

Is the field of migration/immigration governance particularly complex? Are the examples in this book of city actors doing things they may not be legally empowered to do totally unusual? I have not studied migration empirically, but I have studied many other aspects of urban governance. And on that basis, I do not think that immigration is an unusually complicated subject. The inherent complexity of the multi-jurisdictional assemblage that is present in the most mundane activity of a community centre serving immigrants is also found in other fields of urban or municipal governance. Studying infrastructure governance, for instance, I have discovered very complex arrangements that are seldom made visible to the taxpaying public – arrangements whose dynamics and effects are concealed rather than revealed by the constant use of the vague phrase ‘partnerships’.

In general, in many countries and cities today, the actual work of the elusive network of entities that some still call ‘the state’ is not neatly organized and divided up ahead of time by scale, or indeed by jurisdiction. State resources, state personnel, and state rules and policies are mixed, in practice, with the resources, competences, personnel, and norms and policies of an unpredictable range of organizations.

3 Analysing Governance Networks Dynamically

The neat organizational diagrams featuring boxes linked by arrows routinely found in both official documents and scholarly papers are necessarily misleading. Why? Because political and governance realities are always *in motion*, with the various actors always doing something, or trying to do something, whether by allying with other actors or by other means. Static models found in official ‘org charts’ or produced by order-seeking scholars necessarily fail to capture how things work. In the real world, a federal agency may well be responsible for a certain service; but the specific path by which the service is delivered may change, with the change in ‘delivery’ greatly affecting the experiences of the people in question. Similarly, a city council may be thought of as a mini-sovereign, at least over matters not already claimed by higher levels of government. But that may not be true. The Toronto Public Library mentioned previously

in relation to Syrian refugees in Toronto has its own board; because the board is largely progressive the Library implemented a migrant-friendly policy regarding the ID required to get a library card. But as an arms-length agency of the city, their board could have decided to create new bureaucratic obstacles frustrating the city's official 'sanctuary' declaration. Indeed, the Toronto police force, also governed by an arms-length appointed police services board rather than directly by city council, has refused to follow the city's sanctuary policy – with dire consequences for those hapless residents who, finding themselves in contact with police, even as victims of crime, may end up being deported as the police officer decides to call a buddy who works in immigration enforcement. So much for the sanctuary city, then. Or indeed, so much for 'the city'.

Generally, decisions classed as merely administrative, such as the choice to contract out work previously done by civil servants, could have more significant effect on people than a change in the law. What 'the state' amounts to in real life depends more on administration than on law, it could be argued. For example, Canada has contracted out consular services in some countries, and this has greatly affected the people needing visas; but it will obviously also have a major impact on the lives and careers of the civil servants who are now out of a job or are moved elsewhere – thus shaping their experiences of 'the Canadian state'.

Static models of jurisdiction make for tidy charts – but these charts are not just simplifications: they are in many cases highly misleading and to that extent they are bad simplifications. Especially in countries where constitutions are difficult to amend and/or countries where legislatures are unlikely to ensure that the formal legal apparatus is up to date with social and economic and technical developments, the formal allocation of legal powers or competences may bear very little resemblance to the practical realities of governance. In the case of 'cities of refuge', whether cities have a formal legal role in immigration policy or not, it is quite possible that many cities are not reduced to simple acts of political resistance, such as 'sanctuary city' declarations. It is likewise possible that certain officials or the mayors of some big cities are consulted and their advice is taken, quite outside of formal law.

Governance is always dynamic and interactive, and hence unpredictable. For example, some 'city of refuge' declarations may have been prompted not only by a xenophobic national government but also by other events, such as the actions of certain rogue law enforcement bodies. To study cities of refuge, the text of a city council resolution is not always the best place to start. Like all political statements and laws, and indeed

like all human speech acts, any text that matters is always a response to something else, to another statement or to an action that one either likes or dislikes, approves or disapproves.

It is thus no surprise to find that the ever-shifting, largely contingent reality of immigrant and refugee policy greatly differs across cities and regions that are in theory governed by the same national laws. Law in action, as American legal thinker Roscoe Pound said a century ago, is different from law in the books. And law in action has to be studied dynamically, looking at how policy evolves, what paths were not taken, how compromises are negotiated or not negotiated – while attempting to document who are the actual decision-makers, as well as who is considered a legitimate interlocutor for the state and who is considered a mere gadfly to be shooed away or ignored.

As Nietzsche pointed out over a century ago, human thinking gravitates naturally to static abstractions. People are happy to repeatedly ask questions about abstractions, questions for which the human intellect can never provide answers ('what is the meaning of life?' or 'do humans have a free will?').

Similarly, typologies of states or typologies of migration regimes are of limited use to those interested in understanding how migration and migrants are governed, and understanding whether what is observed is a purely temporary phenomenon due to unexpected circumstances or whether it is rooted in long-term governance habits. The Canadian system of 'private refugee sponsorship', for example, heavily used to bring Syrian families such as the one I accompanied to the public library, is rooted in a very long history of state funds provided to the mainly religiously based organizations that from the earliest days of white settlement provided health care and social services (such as orphanages and homes for the aged). Currently, there are efforts to export what is known as 'the Canadian model' to other countries; but if these efforts are mere attempts at 'policy transfer', they are unlikely to succeed (see Nik Tan's chapter).

The 'cities of refuge' theme thus draws attention to a situation that is not as unusual as some would have it. During the pandemic, there have been many examples of entities, public and private, taking on new tasks for which they did not necessarily have formal legal authority. How governance works on the ground – including the governance of migration and refugee flows – cannot be deduced from some chart about formal legal powers; it needs to be studied concretely. As practitioners well know, one can look at this or that city and label a project as 'best practices'; but

whether the underlying conditions that made the practice possible in the first place are ones that exist elsewhere or can be replicated is a difficult question.

4 Spacetimes of Migration and Migrant Reception

In a recent book, *Chronotopes of Law*, I argued that social and legal scholars engaged in empirical studies of governance might benefit from choosing as their object of study not an institution but rather a network or assemblage, and analysing its spatiotemporal dynamics. For example, instead of focusing on the US–Mexico border, one might inquire into a particular event or series of related spatiotemporally specific events – such as vigilante actions by US citizens who try to make physical entry into the United States more difficult or dangerous as well as the parallel actions of benevolent pro-immigration activists who try to make that same entry easier, physically and legally. Including both would-be excluders and would-be includers in the same study would be illuminating, since implicitly or explicitly they are engaged in battle against each other. However, delimited, though, each network or assemblage of migration, enforcement, benevolence, legality, illegality, and resistance is both enabled and limited by a particular spatiotemporal scale (or more than one).

The vigilantes and their benevolent opponents likely all do their actual day-to-day work at same highly local spatial scale (a small part of the US–Mexico border); but their connections and supporters around the country and perhaps around the world are arguably also important, and so the larger scale of national and/or global politics cannot be ignored, even though one might have to rely on other people’s research to fill that in. One might also include in one’s study the ‘push’ factors, in Central America or Mexico, that drive particular groups towards the US border – even if that part of the network cannot be documented in the same detail.

Clearly, different processes converge at any of the points one might choose as the site of one’s study, and it is impossible to study all of them personally: but the best studies are those that show at least an awareness of the lines of force and influence that extend well beyond one’s research site.

5 Conclusion: Method, Not Theory

How would a greater awareness of jurisdiction, scale and spatiotemporal dynamics work, in practice? It may be that apparently opposite

chronotopes or spatiotemporal scales can be documented as operating at the same time in the same place. In that case, paying attention to spatiotemporal dynamics might shed some new light on old tensions and conflicts. Continuing with the hypothetical example of the US–Mexico border, immigration enforcement agents, within the state or in vigilante groups, necessarily rely on sovereignty tropes – the integrity of ‘America’ construed as both a mystical body of citizens and as a destiny-filled special geographical space. But that transcendental spacetime is physically acting upon the actual, all too vulnerable bodies of the specific migrants being policed, or helped as the case might be.

In the language of my book *Chronotopes of Law*, we could say that the regulation of so-called illegal migrants at the US–Mexico border is likely to both rely upon and reproduce two different spatiotemporalities at the same time: that of the individual, mainly physical ‘body of the condemned’ (pace Foucault), with its vulnerability to pain, on the one hand, and on the other hand the spacetime of the sovereign state, which especially in the case of the United States has acquired not only a sacred spatiality (as ‘the land of the free and the home of the brave’) but also an almost timeless quality, visible in the constant popular appeals to a constitution that is supposed to be eternal (as when Republican politicians refuse gun control measures because ‘the Second Amendment is sacred’, as if that text had a clear meaning and as if that text were more sacred than people’s lives.) The spatiotemporality of the United States as a nation-state has managed to acquire the semi-divine spatiotemporality of medieval kings; the sacralization even in popular speech of a certain view of what ‘the constitution’ says is part of that. But in the case of the Mexican or Salvadorean migrant in the act of walking through the desert or swimming across the Rio Grande, the mystical and almost placeless spacetime of American sovereignty bears down hard on a spacetime of almost opposite characteristics: the embodied spacetime of *this* breathing body, *right now*.

Those whose interest is piqued by the fashionable term ‘multi-level governance’ could thus consider including the spatiotemporal dynamics of relevant assemblages in their analytical framework, including the assemblage that is the body of the actual migrant, often left out in legally oriented studies of migration. Furthermore, it needs to be remembered that the spatiotemporality of particular legal tools or particular governance assemblages cannot be deduced from their location in the formal apparatus of law; understanding spatiotemporalities concretely requires an appreciation of the history and the social context.

It is conventional to end academic discourses by calling for more theory or claiming that such and such a phenomenon is ‘undertheorized’. I beg to differ. In my view, conversations amongst researchers, activists and policy analysts may instead benefit from exploring the rich array of methodological tools offered by today’s social science, including scale, jurisdiction and spatiotemporal analysis.

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