

# Bordering Migration/Migrating Borders

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*From the Great Wall of China to the Berlin Wall, border walls have long served as symbols of visible, fortified manifestations of sovereign control. Increasingly, however, prosperous countries utilize sophisticated legal tools to restrict mobility by detaching the border and its migration control functions from a fixed territorial marker, creating a new framework: the shifting border. This shifting border, unlike a reinforced physical barrier, is not fixed in time and place. It relies on law's admission gates rather than a specific frontier location. The remarkable development of recent years is that the border itself has become a moving barrier, an unmoored legal construct. These dramatic transformations unsettle ideas about waning sovereignty just as they illustrate the limits of the push toward border-fortification. By charting the logic of a new cartography of borders and membership boundaries, Professor Shachar shows both the tremendous creativity and risk attached to these new legal innovations and the public powers they invigorate and propagate. This Article further demonstrates that debates about migration and globalization can no longer revolve around the dichotomy between open versus closed borders. As an alternative to these established theoretical poles and as part of a broader attempt to overcome policy deadlocks at the domestic and international level, Professor Shachar proposes a new approach to human mobility and access to membership in a world marred by unequal opportunities for protection and migration.*

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“It is truly astonishing that the concept of territoriality has been so little studied by students of international [law and] politics; its neglect is akin to never looking at the ground that one is walking on.”<sup>1</sup>

“[A] border for immigration purposes [is defined] as any point at which the identity of the traveler can be verified...[viewing] the border not as a geographical line but rather as a continuum of checkpoints along a route of travel from the country of origin to [destination].”<sup>2</sup>

## INTRODUCTION

From Donald Trump’s campaign promise to build an “impenetrable, physical, tall, powerful, beautiful southern border wall,”<sup>3</sup> to the brisk construction of barbed-wire fences by European countries as diverse as Austria, Bulgaria, Estonia, France, Hungary, Greece, Latvia, Lithuania, Norway, and Slovenia in response to the refugee crisis,<sup>4</sup> border walls and razor fences signal that even in a supposed post-Westphalian era, physical barriers are still considered powerful measures to regulate migration and movement.<sup>5</sup>

Instead of becoming relics of a bygone era, as many had predicted after the fall of the Berlin Wall, border walls have become visible, fortified manifestations of (real or imagined) sovereign control.<sup>6</sup> As important as these walled borders are,

<sup>1</sup> John G Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations*, 47 INT’L ORG. 139, 174 (1993).

<sup>2</sup> OFFICE OF THE AUDITOR GEN. OF CAN., REPORT OF THE AUDITOR GENERAL OF CANADA TO THE HOUSE OF COMMONS CH. 5, at 8 (2003); *see also* CAN. BORDER SERVS. AGENCY, DEPARTMENTAL PERFORMANCE REPORT 2008–09 § 2 (2009); Statement of Mutual Understanding on Information Sharing Among the Department of Citizenship and Immigration Canada (CIC) and The U.S. Immigration and Naturalization Service (INS) and the U.S. Department of State (DOS), Preamble, Feb. 19, 2003, <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/statement-mutual-understanding-information-sharing/statement.html> [hereinafter SMU].

<sup>3</sup> *Transcript of Donald Trump’s Immigration Speech*, N.Y. TIMES (Sept. 1, 2016), <https://www.nytimes.com/2016/09/02/us/politics/transcript-trump-immigration-speech.html>.

<sup>4</sup> U.N. High Commissioner for Refugees (UNHCR), Border Fences and Internal Border Controls in Europe (Mar. 2017), <https://data2.unhcr.org/fr/documents/download/55249>.

<sup>5</sup> For a critical exploration of border walls, *see* WENDY BROWN, *WALLED STATES, WANING SOVEREIGNTY* (2010). *See also* Moria Paz, *The Law of Walls*, 28 EUROPEAN J. INT’L L. 601 (2017).

<sup>6</sup> Definitions of sovereignty may vary, but legally there are three enduring constituent features: people, territory, and political authority exercised over that territory and its people. As Robert Jackson observes, “[s]overeignty is an idea of authority embodied in those bordered territorial organizations we refer to as ‘States’.” ROBERT JACKSON, *SOVEREIGNTY: THE EVOLUTION OF AN IDEA*, at ix, 1

both symbolically and practically, this Article highlights an equally striking yet under-studied trend: the surge of *invisible* borders—borders that rely on sophisticated legal techniques that detach migration control functions from a fixed territorial marker.

One might reasonably expect that the regulation of access to the territorial state would automatically correspond with its recognized physical and cartographic frontiers. In contrast with the fixed lines we find in our maps and law books, however, the *location* of the border is shifting when it comes to migration control: at times the border penetrates into the interior, while in other circumstances it extends beyond the edge of the territory. In other contexts, fixed territorial borders are “erased” or refortified. This reinvention of the border is occurring in the midst of growing political anxiety over immigration and “uncontrolled” entry.<sup>7</sup> The fixed black lines we see in our world atlases do not always coincide with those comprehended in—indeed, created by—the words of law. Increasingly, prosperous countries utilize sophisticated legal tools to selectively restrict—or, conversely, accelerate—mobility by detaching the border and its migration control functions from a fixed territorial marker, creating a new framework that I call the *shifting border*.

This shifting border, unlike a reinforced physical barrier, is not fixed in time and place. It relies on law’s admission gates rather than a specific frontier location. The remarkable development of recent years is that the border itself has become a moving barrier, an unmoored legal construct. This is part of a shifting-border strategy that strives, as official government policy documents plainly and tellingly explain, to “push the border out’ as far away from the actual [territorial] border as possible.”<sup>8</sup> The idea, enthusiastically endorsed by governments in relatively rich and stable regions of the world, is to screen people *at the source* or origin of

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(2007). In international law, Article 1 of the Montevideo Convention on the Rights and Duties of the State, echoes the traditional Westphalian view, stating that: “The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relation with other States.” Convention on the Rights and Duties of the State (Montevideo Convention) art. 1, Dec. 26, 1933, 165 L.N.T.S. 19. In international politics, the centrality of territory to sovereignty is acknowledged as a basic norm of the Westphalian order. See Michael Zürn et al., *International Authority and its Politicization*, 4 INT’L THEORY 69 (2012).

<sup>7</sup> My focus throughout the discussion is on the formal, legal aspect of crossing international borders. The terms “unauthorized,” “undocumented,” and “irregular migration” are used interchangeably. The International Organization for Migration (IOM) defines irregular migration as “[m]ovement that takes place outside the regulatory norms of the sending, transit and receiving countries. There is no clear or universally accepted definition of irregular migration. From the perspective of destination countries irregularity requires entry, stay or work in a country without the necessary authorization or documents required under immigration regulations. From the perspective of the sending country, the irregularity is seen for example in cases in which a person crosses an international boundary without a valid passport or travel document or does not fulfil the administrative requirements for leaving the country.” INT’L ORG. MIGRATION, KEY MIGRATION TERMS, <https://www.iom.int/key-migration-terms>.

<sup>8</sup> GOV’T OF CANADA, CUSTOMS AND BORDER MANAGEMENT, BORDER MANAGEMENT IN CANADA (2018), <https://www.canadainternational.gc.ca/eu-ue/policies-politiques/border-douanes.aspx?lang=eng>.

their journey (rather than at their destination country) and then again at every possible “checkpoint along the travel continuum—visa screening; airport check-in; points of embarkation; transit points; international airports and seaports.”<sup>9</sup> The traditional static border is thus reimagined as the *last* point of encounter, rather than the first.<sup>10</sup>

Just as the shifting border extends the long arm of the state to regulate mobility half the world away, it also stretches deep into the interior, creating within liberal democracies what have been referred to as “waiting zones” or “constitution lite zones.”<sup>11</sup> In these zones, ordinary constitutional rights are partially suspended or limited, especially for those who do not have proper documentation or the necessary legal status to remain in the country.<sup>12</sup> Each of these spatial and temporal contractions and protrusions has dramatic implications for the scope of rights and protections that migrants and other non-citizens enjoy, and contribute to a global mobility divide between the haves and have-nots.<sup>13</sup> As migration pressures mount, governments in rich countries frantically search for new ways to expand the reach of their remit, both conceptually and operationally, inwards and outwards, while in the process reinventing one of the classic dimensions of sovereignty in the modern era: territoriality.

Under the Westphalian lens and lexis, the modern state is a territorial state. Territoriality, or the territorial principle—understood here as the proposition that a legitimate government has ultimate authority over a defined territory and its population—is a central feature of the classical understanding of the current

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<sup>9</sup> SMU, *supra* note 2.

<sup>10</sup> My reference here is to the current legal situation which holds, in the words of the European Court of Human Rights, that “[s]tates enjoy an ‘undeniable sovereign right to control aliens’ entry into and residence in their territory.” *Saadi v. UK*, App. No. 13229/03, Eur. Ct. H.R., para. 64 (2008) (internal references omitted).

<sup>11</sup> See *United States v. Gabriel*, 405 F. Supp. 2d 50, 59 (D. Me. 2005) (noting the constitutional implications of “pushing the border in”). In the United States, Customs and Border Patrol agents are invested with the statutory authority to stop and conduct searches on vessels, trains, aircraft, or other vehicles within “a reasonable distance from any external boundary of the United States” for purposes of “preventing the illegal entry of aliens into the U.S.” Immigration and Nationality Act, 8 CFR § 287(a)(3); 8 U.S.C. § 1357(a)(3) (2012). See CHRIS RICKERD, AM. CIVIL LIBERTIES UNION, CUSTOMS AND BORDER PROTECTION’S (CBP’S) 100-MILE RULE, [https://www.aclu.org/sites/default/files/assets/14\\_9\\_15\\_cbp\\_100-mile\\_rule\\_final.pdf](https://www.aclu.org/sites/default/files/assets/14_9_15_cbp_100-mile_rule_final.pdf). This “reasonable distance” is defined through regulation as “100 air miles,” although a distance of more than 100 miles may also be considered reasonable due to unusual circumstances. See 8 C.F.R. § 287.1(b), <https://cdn.loc.gov/service/ll/fedreg/fr022/fr022236/fr022236.pdf>.

<sup>12</sup> Legal status here refers to a right to enter or remain in the country. See Hiroshi Motomura, *Haitian Asylum Seekers: Interdiction and Immigrants’ Rights*, 26 CORNELL INT’L L.J. 695, 696 (1993) (discussing the concept of the “functional equivalent of the ... border”). In the European context, these have been referred to as “waiting zones” (*zones d’Attente*). For a concise overview, see Tugba Basaran, *Legal Borders in Europe: The Waiting Zone*, in *A THREAT AGAINST EUROPE: SECURITY, MIGRATION AND INTEGRATION* (Peter Burgess & Serge Gutwirth eds., 2001).

<sup>13</sup> Steffen Mau et al., *The Global Mobility Divide: How Visa Policies Have Evolved over Time*, 8 J. ETHNIC & MIGRATION STUD. 1192 (2015); see Ayelet Shachar, *Citizenship for Sale?*, in *THE OXFORD HANDBOOK OF CITIZENSHIP* 789 (Ayelet Shachar et al. eds., 2017) (discussing the unequal value of passports).

international world order.<sup>14</sup> On this familiar and naturalized account, the territorial principle plays a key role in constituting respect for international borders and justifying their operation to demarcate “places, territories, and categories,”<sup>15</sup> thereby producing a cartographic image of the world as a “jigsaw puzzle of solid colour pieces fitting neatly together.”<sup>16</sup> Borders, according to this perspective, are the black lines we draw in our maps to divide up the world, with dramatic ramifications for the scope of rights and protections offered to individuals, depending on where said individuals stand in relation to these divvying lines. This process distinguishes between member and non-member, insider and outsider, and the interior and the exterior. Only citizens have a guaranteed right to enter and remain within the jurisdiction of the territorial state; all others (with the exception of those seeking refuge and asylum) require permission to gain such access. For the bulk of humanity, then, gaining lawful admission to desired destination countries remains “a privilege granted by the sovereign.”<sup>17</sup> This makes control of the border the liminal and legal linchpin of migration regulation.

In a world where borders are transforming, but not dissolving, I aim to show that the question of legal spatiality—*where* a person is barred from onward mobility, and *by whom*—has dramatic consequences for the rights and protections of those on the move, as well as the correlating duties and responsibilities of the countries they seek to reach and the transit locations they pass through. Here lies the deep paradox of the shifting border: when it comes to controlling migration, States are willfully abandoning traditional notions of fixed and bounded territoriality, stretching their jurisdictional arm inward and outward with tremendous flexibility; but when it comes to granting rights and protections, the very same States snap back to a narrow and strict interpretation of spatiality, which limits their responsibility and liability by attaching it to the (illusionary) static notion of border control. This duality is perhaps most profoundly pronounced in the case of asylum seekers who trigger protection obligations only once they reach the destination country’s soil, even as access to these territorial spaces of protection is increasingly unavailable. States shut those on the move out long before they reach the gates of the promised lands of migration and asylum.<sup>18</sup>

By charting the logic of a new cartography—a legal reconstruction—of borders and membership boundaries I seek to show both the tremendous creativity

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<sup>14</sup> For an illuminating conceptual and historical overview, see Matej Avbelj, *Theorizing Sovereignty and European Integration*, 27 *RATIO JURIS* 344 (2014). See also Ran Hirschl and Ayelet Shachar, *Spatial Statism*, 17 *INT’L J. CONST. L.* 1 (2019).

<sup>15</sup> ALEXANDER C. DINER & JOSHUA HAGAN, *BORDERS: A VERY SHORT INTRODUCTION* 1 (2012).

<sup>16</sup> Karen Knop, *Statehood: Territory, People, Government*, in *THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW* 95 (James Crawford & Martti Koskenniemi, eds., 2012).

<sup>17</sup> This is the classical formulation articulated by the United States Supreme Court in the case of *United States ex. rel. Knauff v. Shaughnessy*, 228 U.S. 537, 542 (1950). In rule-of-law societies, which are the subject of inquiry here, such determinations are made by authorized officials based on rules, regulations, and provisions stipulated in domestic and international law.

<sup>18</sup> See, e.g., Thomas Gammeltoft-Hansen, *The Refugee, the Sovereign, and the Sea: EU Interdiction Policies in the Mediterranean*, in *SOVEREIGNTY GAMES: INSTRUMENTALIZING STATE SOVEREIGNTY IN EUROPE AND BEYOND* 171 (Rebecca Adler-Nissen & Thomas Gammeltoft-Hansen eds., 2008).

and risk attached to these new legal innovations and the yet-to-be regulated governmental powers they invigorate and propagate. I further aim to establish that debates about migration and globalization can no longer revolve around the dichotomy between open versus closed borders. Instead, the unique and perplexing feature of this new landscape is that countries simultaneously engage in *both* opening *and* closing their borders, but do so *selectively*. Countries indicate, quite decisively, whom they desire to admit (those with specialized skills, superb talents, or increasingly, deep pockets), while at the same time erecting higher and higher legal walls to block out those deemed unwanted or too different.<sup>19</sup>

This dialectical relationship between restrictive closure and selective openness is what makes the study of the new legal gates of admission ever more vital. This relationship is also where the reformulation of basic conceptions of membership boundaries intertwine with profound questions of justice and distribution about how, by whom, and according to what principles, well-off societies should allocate access to safety and protection in an unequal world like our own. It further reveals, quite vividly, the recalibration of new immigration and border regimes as “public statements,” as a recent study put it, “about who we are now, who we want to become, and who is morally worthy to join us.”<sup>20</sup>

The shifting border is a key pillar in prosperous countries’ wholesale agenda to strategically and selectively sort and regulate mobility. As a result, it is increasingly difficult for unwanted and uninvited migrants to set foot in the greener pastures of the more affluent and stable polities they desperately seek to enter. Conversely, wealthy migrants wishing to deposit their mobile capital in these very same countries find fewer and fewer restrictions to fast-tracked admission.<sup>21</sup> Increasingly, the world’s most prosperous and stable democracies rely on the shifting border concept and practice to (re)ascribe meaning to borders and gatekeeping far beyond the traditionally fixed sovereignty-territory nexus, making borders “semi-permeable to some and inescapable for others.”<sup>22</sup>

To substantiate these claims, my discussion proceeds in three parts. Part I begins by painting a picture of the complex, multilayered, and ever-transforming border, one that is drawn and redrawn through the law. To comprehend the novelty of the shifting border, I contrast competing models: the classic, clearly demarcated territorial border that serves as the frontline for setting barriers to

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<sup>19</sup> Ayelet Shachar, *Picking Winners: Olympic Citizenship and the Global Race for Talent*, 120 YALE L.J. 2088 (2011); Ayelet Shachar & Ran Hirschl, *On Citizenship, States and Markets*, 22 J. POL. PHIL. 231 (2014); Ayelet Shachar, *Selecting by Merit: The Brave New World of Stratified Mobility*, in MIGRATION IN POLITICAL THEORY: THE ETHICS OF MOVEMENT AND MEMBERSHIP (Sarah Fine & Lea Ypi eds., 2016).

<sup>20</sup> David Cook-Martin & David FitzGerald, *Culling the Masses: A Rejoinder*, 38 J. ETHNIC & RACIAL STUD. 1319, 1320 (2015); see also Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

<sup>21</sup> Shachar, *supra* note 13 at 794.

<sup>22</sup> As Frontex, the European border agency, has explicitly put it, these measures are designed to curb the flow of “the billions of less fortunate people of the world.” See JAMES FERGUSON, TWELVE SECONDS TO DECIDE: IN SEARCH OF EXCELLENCE, FRONTEx AND THE PRINCIPLE OF BEST PRACTICE 8 (2014).

admission, which I call the *static* model and the alternate, globalist vision of a world in which extant borders are, or soon will be, traversed with the greatest of ease, to the extent that they become all but meaningless. This we might label the *disappearing* border. The latter has led some scholars to claim that the grip of borders, or even the fundamental principle of territoriality itself, is waning in a world “where agency (individual choice) takes precedence over structure (the laws and rules of territorial States).”<sup>23</sup> As a corollary, some argue that in the current age of globalization, States are losing control over their authority to determine whom to include and whom to exclude.<sup>24</sup> The actual legal practices of and exercise of authority by governments operating under the shifting border framework, alas, refute this narrative of global, unidirectional progression toward a borderless world. Instead, we witness a more dynamic process of change whereby States—acting alone or in concert—are reinventing and reinvigorating their borders and membership boundaries in profound ways.<sup>25</sup> By understanding the *shifting* border as an alternative to the established theoretical poles of static and disappearing boundaries, I aim to show that the proposed framework of analysis more fully captures and accounts for the profound patterns of change that we are witnessing in the world around us.

Part II focuses on the legal innovations adopted by the world’s leading immigrant-receiving countries spearheading the shifting border paradigm: the United States, Canada, and Australia. I also demonstrate how the European Union and its member States have rewritten pages—if not chapters—of the shifting border book. These case studies provide a rich empirical foundation upon which the rest of the discussion relies.

Part III moves from the positive to the normative to the prescriptive. It articulates the contours of a new approach that seeks to realign the almost boundless reach of migration control in the age of shifting borders with some degree of accountability, legal responsibility, and adherence to important constitutional limitations and human rights norms by state actors or their delegates, public and private. I argue that in order to effectively constrain the excesses of the shifting border, jurists and activists must adapt to its perplexing “everywhere-and-nowhere” logic. One promising way to respond to the multiple,

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<sup>23</sup> James F. Hollifield, *Sovereignty and Migration*, IMMIGRATION AND ASYLUM FROM 1900 TO THE PRESENT 575 (Matthew J. Gibney & Randall Hansen eds., 2005).

<sup>24</sup> See YASMIN NUHOGLU SOYSAL, LIMITS OF CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE (1994) (defending the post-national claim that universal personhood has surpassed the significance of national belonging); DAVID JACOBSON, RIGHTS ACROSS BORDERS: IMMIGRATION AND THE DECLINE OF CITIZENSHIP (1996) (same). More critical accounts have emphasized the themes of immobilization, entrapment, the tightening of entry controls and the emergence of a “paradigm of suspicion.” The term, “paradigm of suspicion,” is from Ronen Shamir, *Without Borders? Notes on Globalization as a Mobility Regime*, 23 SOC. THEORY 197, 197 (2005).

<sup>25</sup> While in some cases operating unilaterally, States are also devising increasingly complex and multilayered mobility control regimes that require extensive interstate cooperation. See, e.g., Agreement Between the Government of Canada and the European Community on the Processing of Advance Passenger Information and Passenger Name Record Data, Mar. 21, 2006, 49 O.J. L82, <http://www.treaty-accord.gc.ca/text-texte.aspx?id=105046>.



mobile and diffuse features of the shifting border is to apply the presumption that “when legal power is brought to bear, so too are legal protections.”<sup>26</sup> This presumption adheres to basic rule of law principles holding that “the political branches ... [cannot] govern without legal constraints.”<sup>27</sup> When a country such as the “United States acts outside its borders, its powers are not ‘absolute and unlimited.’”<sup>28</sup> Basic rights protections are not “turned on or off at will.”<sup>29</sup> Instead of focusing on *where* the act of border regulation took place, the proposed approach requires adopting a functional or jurisdictional test according to which obligations to protect are activated as soon as effective control by official agents of States, or their delegates, occurs.<sup>30</sup> The idea is to treat the everywhere-and-nowhere logic of the shifting border as a new feature of governance which invites innovation to tame the most excessive and yet-unregulated exercise of de-territorialized migration and border control. I will argue that by applying familiar principles to novel circumstances, the restless agility and multiscalar operations of the shifting border may *elicit* a set of rights-enhancing protections from the restricting States, which hitherto have relied on this new technology of governance and spatiality to *escape* accountability and constrain rights. This line of response incorporates the very logic of de-territorialized migration control that lies at the heart of the shifting border, while at the same time subverting it, and relies on three prongs: (i) expanding the extraterritorial reach of human rights; (ii) requiring states to extend their shifting borders in favor of mobility, rather than to limit it; and (iii) rethinking legal spatiality as a resource, rather than a barrier, for migrants in need of protection. While this three-pronged approach is not a panacea, the endeavor is to break the current deadlock and refute the claim that applicable solutions are beyond reach or impossible to imagine.

## I.

### THE SHIFTING BORDER

To comprehend the novelty of the *shifting* border, we must contrast it with contending models: the classic, clearly demarcated territorial border that serves

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<sup>26</sup> Kal Raustiala, *The Geography of Justice*, 76 FORDHAM L. REV. 2503, 2504 (2005). This presumption is rebuttable, as Raustiala rightly points out. Indeed, some of the most lasting debates center around defining the precise geographical reach of this presumption. For an excellent overview of these debates, see Shown E. Fields, *From Guantánamo to Syria: The Extraterritorial Constitution in the Age of ‘Extreme Vetting,’* 39 CARDOZO L. REV. 1123, 1129–41 (2018).

<sup>27</sup> See *Boumediene v. Bush*, 553 U.S. 723, 765 (2008).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> See *infra* notes 194–207 and accompanying text. This position is shared by many human rights organizations and is also the theory that guided the European Court of Human Rights (ECtHR) in the landmark decision of *Hirsi Jamaa v. Italy*, App. No. 27765/09, Judgment, Eur. Ct. H.R. (2012). See generally, EXTRATERRITORIAL IMMIGRATION CONTROL: LEGAL CHALLENGES (Bernard Ryan & Valsamis Mitsilegas, eds., 2010). For an early defense of the position that “[n]arrow territorial interpretation of human rights treaties is anathema to the basic idea of human rights, which is to ensure that a State should respect human rights of persons over whom it exercises jurisdiction,” see Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT’L L. 78, 82 (1995).

as the frontline for setting barriers to admission and the contrasting, globalist vision of a world in which extant borders are traversed with the greatest of ease, to the extent that they become all but meaningless. It is convenient to refer to these competing approaches as the static versus disappearing conceptions of the border. I discuss each in turn.

*A. Neither Static Nor Disappearing*

The classic Westphalian ideal of statehood sees the border as a permanent and *static* barrier that stands at the frontier of a country's territory. This formidable border serves a crucial role in delimiting (externally) and binding (internally) a nation's territory, jurisdiction, and peoplehood, correlating with a notion of fixed "legal spatiality."<sup>31</sup> For many years, this concept permeated our thinking about mobility, borders, and sovereignty, ensnaring us in what political geographers refer to as the "territorial trap."<sup>32</sup> This trap, and the assumption undergirding it, reifies and naturalizes the lines demarcating States as though they represent bounded, mutually exclusive territorial units. By envisioning States as having a monopoly over the legitimate exercise of power and authority within their domains, the territoriality principle politicizes space and brings it under juridical control.

With the rise of the discourse of globalization, a competing vision emerged. The thought *de jour* was that borders are, or soon will be, *disappearing*. Theorists of post-nationalism, trans-nationalism and open-border admission policies have painted a picture of a new world order in which borders are on the decline, global commerce and human mobility is on the rise, and international human rights instruments gain sway. Catchphrases such as the "end of the nation-state," "waning sovereignty," and a "borderless world" have gained traction. In the post-Westphalian literature of the last quarter century, the core prognosis is that borders are becoming things of the past, sovereignty is diminishing, and States as territorially-bounded "containers" of authority are dissipating.

These predictions are now contested. From the surge of nationalist populism to the backlash against supranational courts and challenges to the multilateral architecture of the post-war international order, reports of the demise of States and borders appear to have been, like the rumors of Mark Twain's death, greatly exaggerated. Whereas adherents to the disappearing border thesis have claimed that States can no longer restrict access by non-citizens seeking to enter, an opposite trend has appeared. By severing the link between the territorial border and the exercise of migration control, the shifting border has given governments and regulatory agencies (operating primarily but not only at the national level) *greater* latitude to develop new enforcement policies that manipulate the location and spatial reach of the border—seeping into the territory's interior or extending

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<sup>31</sup> Raustiala, *supra* note 26; see also John H. Herz, *Rise and Demise of the Territorial State*, 9 WORLD POL. 473, 480–481 (1957).

<sup>32</sup> John Agnew, *The Territorial Trap: The Geographical Assumptions of International Relations Theory*, 9 REV. INT'L POL. ECON. 53 (1994).

well beyond its outer limits—in the process deterring access by uninvited migrants.

*B. The Sites of Regulation: “At the Border”*

Given the close connection between sovereign authority, territory, and legal spatiality, the Westphalian model logically assumed that it is precisely *at the border* that agents of the State are permitted to exercise the utmost control over access, including through the power to make the decision “to turn back from our gates any alien or class of aliens.”<sup>33</sup> The core precedents in the corpus of American immigration law repeat the observation that an alien who is stopped at the border enjoys far less protection than a person who is already within the country.<sup>34</sup> Such rights remain unavailable to would-be immigrants, so long as they remain outside the geographical borders of the United States.<sup>35</sup> The notion that legal circumstances affecting non-members substantively change after they cross “our gates” manifests a vision of a world order characterized by hermetically sealed legal spatiality alongside delineated and permanent borders. However, these assumptions are increasingly strained. While continuing to formally rely on the fixed conception of a border with rigid binary distinctions between the exterior and the interior, regulatory agencies and actors situated at multiple levels and junctures of governance simultaneously expand the actual (largely unchecked) scope and reach of their migration and border control activities far beyond the edges of the territory and deep into the interior.

Relaxing the relationship between law and territoriality has created a whole new purview for exercising sovereign control over migration *anywhere* in the world in the name of securing the integrity of the home territory and vigilantly protecting its membership boundaries. This new interpretation profoundly challenges the classic Westphalian conceptualization of the border as static and fixed. Instead, the shifting border resourcefully turns the border, which was once territorially affixed to the edge of a country’s geopolitical frontier, into a moving barrier. As such, it can be “implanted” wherever and whenever mobility control operations are required. While retaining the foundational notions of inclusion and exclusion, the shifting border fractalizes them such that they can be reoriented across time and space distally remote from the actual protected homeland, relocating the encounter between the non-citizen and the state’s power of exclusion *away* from the physical border toward the outermost concentric ring of regulation that is closest to the departure point and time. These dramatic measures also blur and erode the once-firm distinction between the full-fledged rights-holding citizen and the less-welcome alien.

As both scholars and law enforcement agencies are quick to observe, States have the capacity and the authority to “determine those to admit and to whom

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<sup>33</sup> *Shaughnessy*, 228 U.S. at 550 (Jackson J., dissenting).

<sup>34</sup> This dates back to the early twentieth century. *See, e.g., Kaplan v. Tod*, 267 U.S. 228 (1925).

<sup>35</sup> *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990).

citizenship should be granted.”<sup>36</sup> Under the static image of the Westphalian international system, each state has its own clearly-demarcated and exclusive territory and citizenry. The legal drawing of borders and membership boundaries—and the consequent authority to control who enters the territory—is seen as a *sine qua non* of sovereignty.<sup>37</sup> However, the flexible way in which these traditional concepts of sovereignty and jurisdiction are now put into operation are novel, leading to pressing and yet unresolved tensions between these new measures of controlling mobility across (ever-shifting) borders and rule-of-law countries’ declared commitments to constitutional and human rights standards and protections. These tensions reveal the inadequacy of seeking (or creating) legal cover under the static conception of the border while persistently breaching it through the devising of far more dynamic, multifaceted, and de-territorialized techniques of governance that rely on the shifting border. I now turn to chart the surprisingly sophisticated and imaginative “re-bordering” techniques that enable the far-reaching reinvention of the border as simultaneously more open *and* closed.

## II.

### DOMESTIC AND COMPARATIVE EXAMPLES

Ongoing developments in the regulation of immigration around the world demonstrate a complex shift in the way modern states implement and situate border controls. Consider the following examples, from near and far.<sup>38</sup>

#### A. *Seeping Inward*

As part of a major reform to border control and immigration regulation, the United States adopted a procedure called “expedited removal.”<sup>39</sup> This legal

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<sup>36</sup> Myron Weiner, *Ethics, National Sovereignty and the Control of Immigration*, 30 INT’L MIGRATION REV. 171, 171 (1996); see ANNE T. GALLAGHER & FIONA DAVID, THE INTERNATIONAL LAW OF MIGRANT SMUGGLING 2 (2014) (discussing the international legal framework against migrant smuggling).

<sup>37</sup> This sentiment is perhaps best captured by Emmerich de Vattel’s milestone mid-eighteenth century international law treatise, THE LAW OF NATIONS. Fast forwarding to the early twenty-first century, however, we find that many of the most heated debates in legal and political theory today reexamine this, once taken for granted, authority of States to exclusively control their membership boundaries and to unilaterally control the borders of entry and admission, or put more bluntly, their right to exclude. See, e.g., Arash Abizadah, *Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders*, 36 POL. THEORY 37 (2008). For a contrasting view, see Christopher Heath Wellman, *Immigration and Freedom of Association*, 119 ETHICS 109 (2008). While these theoretical debates are illuminating and potentially path-breaking, they often lack the kind of minute detail and sensitivity to context offered by legal or sociological analysis.

<sup>38</sup> These examples are elucidatory and cumulative rather than exhaustive.

<sup>39</sup> The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) § 302 (revised § 235(b)(1)(A)(i) and (ii) of the Immigration and Nationality Act, 2017) (“If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 212(a)(6)(C) or 212(a)(7), the officer shall order the alien removed from the United States without further hearing or review unless

provision permits frontline officers and border patrol agents to expeditiously turn away undocumented migrants at the border and review the legal status of individuals detected up to one hundred miles away from any external boundary of the United States.<sup>40</sup> In effect, expedited removal has moved the border from its fixed location at the country's territorial edges and into the interior.

This legal maneuver not only relocates the border, but also augments what has been referred to as a "constitution-free" or "constitution-lite" zone *within* the United States—allowing law enforcement agents to set up checkpoints on highways, at ferry terminals, or on trains, requiring any random person to provide proof of their legal status in the United States.<sup>41</sup> Such governmental surveillance of movement and mobility—traditionally restricted to the actual location of border crossing—is now spilling into the interior. This trend is depicted in *Figure 1: United States: The Shifting Border—Seeping into the Interior*, located in the Appendix.

The most recent official US census data reveal that no less than two-thirds of the United States population lives in this one hundred-mile constitution-lite zone.<sup>42</sup> That is, more than 200 million people live in the malleable or moveable border zone.<sup>43</sup> The whole State of New York, for example, lies completely within one hundred miles of the land and coastal borders of the United States.<sup>44</sup> So does Florida, another migrant-magnet State.<sup>45</sup> And the governmental agency responsible for managing the shifting border, the Department of Homeland Security, has gone on record declaring that its border-enforcement measures may well expand "*nationwide*."<sup>46</sup>

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the alien indicates either an intention to apply for asylum under section 208 or a fear of persecution.").

<sup>40</sup> The current temporal and spatial specifications of expedited removal appear in the Federal Register. In 2002, expedited removal was extended to all those who had entered the United States without authorization by water and could not establish to the satisfaction of a border agent that they had been continuously present in the country for at least two years. Cuban nationals were originally exempted from this class. However, that exemption was rescinded on January 17, 2017. In 2004, the reach of expedited removal was expanded to include aliens apprehended within one hundred miles of a US international border within fourteen days of entry. *See* Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877 (Aug. 11, 2004).

<sup>41</sup> The US Supreme Court has held that such internal checkpoints on highways leading to or away from the border are not a violation of the constitutional guarantee against unreasonable searches and seizures, and the border patrol agents "have wide discretion" to selectively refer motorists for additional questioning. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 564 (1976). Such checkpoints are "located on major U.S. highways and secondary roads, usually 25 to 100 miles inland from the border." *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 09-824, BORDER PATROL: CHECKPOINTS CONTRIBUTE TO BORDER PATROL'S MISSION, BUT MORE CONSISTENT DATA COLLECTION AND PERFORMANCE MEASUREMENT COULD IMPROVE EFFECTIVENESS 7 (2009). People who enter the United States without permission and are apprehended within one hundred miles of a US international border within fourteen days of entry are subject to expedited removal. *See* Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877 (Aug. 11, 2004).

<sup>42</sup> Rickerd, *supra* note 11.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Press Release, U.S. Dep't of Homeland Sec., Fact Sheet: Secure Border Initiative 1 (Nov. 2, 2005)

Until recently, the prospect of nationwide implementation seemed to belong squarely in the realm of the futuristic and the implausible. However, in today's political environment of "getting tough" on immigration, the current administration's commitment to "using all these statutory authorities to the greatest extent practicable"<sup>47</sup> potentially translates into a massive spatial and temporal expansion of expedited removal.<sup>48</sup> Supplemented by multiple executive orders and accompanying memos, expedited removal could potentially reach "any immigrant *anywhere* in the United States who can't prove that they've been in the country for two or more years."<sup>49</sup> A simple notice in the Federal Register is all that is required to make this sweeping augmentation of the border a legal reality. Under the shifting border paradigm, the "interior" could be recast as the "exterior" for the purposes of immigration control with the stroke of a pen.<sup>50</sup>

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(emphasis added).

<sup>47</sup> Memorandum from John Kelly, Sec'y, Dep't of Homeland Sec., to Kevin McAleenan, Acting Comm'r, U.S. Customs & Border Protection, et al. on Enforcement of the Immigration Laws to Serve the National Interest (Feb. 20, 2017), [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf).

<sup>48</sup> On January 25, 2017, President Donald Trump issued Executive Order 13767 ("Border Security and Immigration Enforcement Improvements") and Executive Order 13768 ("Enhancing Public Safety in the Interior of the United States") which cumulatively hold the potential to dramatically expand the reach of expedited removal. Subsequently, then-DHS Secretary John Kelly issued two memos on the implementation of the aforementioned executive orders. Read together, the memos committed to using all "statutory authorities to the greatest extent practicable" and promised a new Notice Designating Aliens Subject to Expedited Removal to be published in the Federal Register. Memorandum from John Kelly, *supra* note 47; Memorandum from John Kelly, Sec'y, Dep't of Homeland Sec., to Kevin McAleenan, Acting Comm'r, U.S. Customs & Border Protection, et al. on Implementing the President's Border Security and Immigration Enforcement Improvements Policies (Feb. 20 2017), [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf). Based on the language of the executive orders and memos, some observers have concluded the Secretary intends to utilize his discretion to the fullest extent authorized, both spatially (nationwide) and temporally (two years). *E.g.*, INA § 235(b)(1)(A)(iii); 8 U.S.C. § 1225(b)(1)(A)(iii) ((I) The Attorney General may apply clauses (i) and (ii) of this subparagraph to any or all aliens described in subclause (II) as designated by the Attorney General. Such designation shall be in the sole and unreviewable discretion of the Attorney General and may be modified at any time. (II) An alien described in this clause is an alien who is not described in subparagraph (F), who has not been admitted or paroled into the United States, and who has not affirmatively shown, to the satisfaction of an immigration officer, that the alien has been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility under this subparagraph.).

<sup>49</sup> Parties in *Castro* and *Peralta-Sanchez* raised the likelihood of such expansion in their arguments (emphasis added). See *Castro v. United States Dep't of Homeland Sec.*, 835 F.3d 422 (3d Cir. 2016); *United States v. Peralta-Sanchez*, 847 F.3d 1124 (9th Cir. 2017), opinion withdrawn on grant of reh'g, 868 F.3d 852 (9th Cir. 2017), and on reh'g, 705 F. App'x 542 (9th Cir. 2017), cert. denied sub nom *Sanchez v. United States*, 138 S. Ct. 702, 199 L. Ed. 2d 575 (2018) [*Peralto-Sanchez*']. For information on an interview with ACLU lawyers for *Castro*, see Esther Yu Hsi Lee, *Immigrant Families Aren't Getting Their Day in Court*, THINKPROGRESS (May 20, 2016, 1:09 PM), <https://thinkprogress.org/immigrant-families-arent-getting-their-day-in-court-f7edc1026c2c/> and for information on *Peralta-Sanchez*, see Bob Egelko, *Court Denies Immigrants Right to Attorney in Expedited Deportations*, SFGATE (Feb. 7, 2017, 4:57 PM), <http://www.sfgate.com/nation/article/Court-denies-immigrants-Sright-to-attorney-in-10915296.php>.

<sup>50</sup> To date, no such notice has been issued. If such an expansion were to occur, major litigation

The notion that legal circumstances affecting non-members change dramatically after migrants “passed through our gates” is well-established, as canonical case law from *Shaugnessy* to *Zadvydas* attests.<sup>51</sup> However, in addition to conjuring house of mirrors-like stretching and contracting movements, the shifting border distinguishes between *physical entry* into the country (which does not count for immigration purposes) and *lawful admission* through a recognized port-of-entry (which makes one’s presence in the territory permissible, and therefore visible, in the eyes of the regulatory state). Accordingly, entry into the territory—the material act of crossing the geographical border and physically being present within the jurisdiction of the United States—does *not* equate with legally “being here.”<sup>52</sup> This change in meaning is formalized in law: “an alien present in the United States without being admitted,” to recite the somewhat cryptic language of the Immigration and Nationality Act, is treated as though the irregular migrant (who is already present in the territory) had never really crossed the border into the country.<sup>53</sup> This legal fiction bears serious consequences for those aliens present in the United States without being admitted. For instance, their unlawful admission effectuates the preclusion of status regularization or the application of waivers during the removal process, thereby causing them to forfeit their prospect of future lawful admission to the United States.<sup>54</sup> Moreover, the very act of crossing without inspection and permission (the otherwise unrecognized presence of the non-citizen in the territory) becomes the “main substantive charge used to remove them.”<sup>55</sup>

Another such ramification is that those on the “inside” are deemed to be “outside.” This includes the hundreds of thousands of people expeditiously removed each year, who find themselves in a parallel universe of “nonexistent procedural safeguards.”<sup>56</sup> As a recent court decision put it, for those facing expedited removal “[t]here is no right to appear in front of a judge and no right to hire legal representation. There is no hearing, no neutral decision-maker, no evidentiary findings, and no right to appeal.”<sup>57</sup> When such far-reaching denial of procedural justice occurs in an established democracy such as the United States,

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challenging its constitutionality on due process grounds will likely follow. I thank Alex Aleinikoff and Jaya Ramji-Nogales for helpful discussions regarding these various legal scenarios.

<sup>51</sup> *Shaugnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953); *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); see also *Kaplan v. Tod*, 267 U.S. 228 (1925).

<sup>52</sup> The term “being here” is drawn from Linda Bosniak’s critical investigation into the ethical significance of territorial presence of unauthorized migrants. See Linda Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants*, 8 THEORETICAL INQUIRIES IN L. 389 (2007); see also Leti Volpp, *Imaginations of Space in Immigration Law*, 9 LAW CULTURE & HUMAN. 456 (2013).

<sup>53</sup> 8 U.S.C. § 1182(a)(6)(A)(i) (2012). These individuals will have certain constitutional protections while in the country, including procedural or substantive due process, or both.

<sup>54</sup> 8 U.S.C. § 1182(a)(6)(A)(i) and 8 U.S.C. § 1227 (2012). The waivers from removal specified in 8 U.S.C. § 1227(a)(1)(H) are easier to establish than those appearing in 8 U.S.C. § 1182(i).

<sup>55</sup> There is also a ten-year bar to re-admission. See Immigration and Nationality Act § 212(a)(9)(B)(i)(I)-(II).

<sup>56</sup> *United States v. Peralta-Sanchez*, 847 F.3d 1124, 1143 (2017) (Pregerson, J. dissenting).

<sup>57</sup> *Id.* at 1142.

it tests not only our notions of territoriality, but legality as well. Recent figures show that a “staggering 83% of the people removed from the United States . . . were [expeditiously] removed without a hearing, without a judge, without legal representation, and without the opportunity to apply for most forms of relief from removals.”<sup>58</sup> The traditional constitutional and human rights arsenal of responses has proven toothless in the face of these new realities. To begin to counter this phenomenon, we must familiarize ourselves with the shifting legal ground upon which this immense, and almost unrestricted, governmental power to determine whom to exclude or remove now stands.

In creating the legal distinction between “entry” and “admission,” US immigration law effectively treats individuals present in the country without authorization as though they had been stopped *at the border*, depriving them of the traditional protections enjoyed by non-citizens who have actually made it into the interior. Such a legal maneuver can only occur by “redrawing the traditional exclusion-deportation line” under a shifting conception of the border.<sup>59</sup> The exclusion-deportation line has become *de-territorialized*; the key factor for the legal analysis is not whether the person has passed through the territory’s physical frontiers. Rather, the question for immigration regulation purposes is whether the person has crossed at any time or place through the law’s gates of admission, which, as the authorizing legislation proclaims, are *not* territorially fixed but rather designated by the executive branch of government.<sup>60</sup>

### B. *Stretching Outward*

Just as the shifting border seeps into the interior, it extends the long arm of the state outwards, ever more flexibly, to regulate mobility at a distance. To provide but one example, travelers that wish to embark on a US-bound flight now regularly encounter the US border, or its authorized guardians (US officials located on foreign soil), in places as diverse as Freeport and Nassau in the Bahamas, Dublin and Shannon in Ireland, or Abu Dhabi in the United Arab Emirates.<sup>61</sup> Thanks to a legal carve-out known as the pre-clearance system, these

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<sup>58</sup> *Id.* at 1143. The 83 percent figure comes from Department of Homeland Security immigration enforcement data for fiscal year 2013 and covers expedited and reinstatement of removal procedures, both of which are grounded in the IIRIRA reform and fast-tracked. *Id.* at 1142–43.

<sup>59</sup> THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 428 (2003).

<sup>60</sup> 8 U.S.C. § 1182(a)(6)(A)(i).

<sup>61</sup> After 9/11, the Department of Homeland Security (DHS) was established. It combined the functions of the former Immigration and Naturalization Service (INS) and the former US Customs Service. Currently, several agencies within DHS perform the duties of border patrol and interior enforcement. The US Customs and Border Protection (CBP) is the largest uniformed federal law enforcement agency in the country. CBP agents have the authority to safeguard America’s borders at officially designated ports of entry in the United States as well as a growing number of pre-clearance locations outside the country. See *Preclearance Locations: Preclearance Overview*, U.S. CUSTOMS & BORDER PROTECTION (June 22, 2017), <https://www.cbp.gov/border-security/ports-entry/operations/preclearance>. The US Border Patrol (BP) is part of CBP, which is responsible for patrolling the areas at and around the US international borders, namely, the one hundred-mile zone in



procedures regularly take place in foreign transit hubs that are sometimes located tens, hundreds, or even thousands of miles away from the homeland territory.<sup>62</sup>

This reinvention of the border and the kind of legal framework it relies upon—allowing the United States to exercise sovereign control over its border, far away from its territory, on the home turf of *another* nation-State—is “a really big deal,” explained the former Secretary of the Department of Homeland Security in an interview with *The New York Times*.<sup>63</sup> “[I]t would be like us saying you can have a foreign law enforcement operating in a U.S. facility with all the privileges given to law enforcement, but we are going to do it on your territory and on our rules ... So you flip it around, and you realize it is a big deal for [another] country to agree to that.”<sup>64</sup> Currently, more than 600 American customs and border control and agricultural specialists are deployed in airports around the world, processing over 18 million US-bound passengers per year *before* they embark on their air travel journeys to the United States. An ambitious expansion program for such preclearance and pre-inspection procedures launched in 2015 with the goal of pre-clearing, on foreign soil, at least a third of all US-bound air travelers by 2040. The official publication of America’s border protection agency simply and elegantly summarizes the thinking behind this manifestation of the shifting border, highlighting its outwards expansion.<sup>65</sup> Such expansion is expected to promote America’s interests by facilitating international trade and travel, while at the same time countering global security threats by allowing the “United States and our international partners to jointly identify and address threats at the earliest possible point.”<sup>66</sup> Such conflation of priority in time with location and distance is made possible by and is a manifestation of the shifting border paradigm. Strikingly, such pre-inspection decisions bear the full weight of US law as though their determinations were made “at the border,” even though the territory of the United States is very far from sight. The border has instead been replanted as a legal construct on non-US soil.

While no other country operates its immigration control on American soil, the United States has now entered into advanced negotiations to build more preclearance capacity at airports overseas, seeking to further expand its reach into

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which expedited removal takes places, where BP agents have the jurisdiction to detect, apprehend, investigate, and detain “illegal aliens and smugglers of aliens at or near the land [and coastal] border.” Lastly, US Immigration and Customs Enforcement (ICE) is responsible for locating persons who are within the remaining areas of the United States without authorization and removing them where relevant. The combined budget of these immigration enforcement agencies is larger than all other federal enforcement agencies combined.

<sup>62</sup> *Preclearance Locations: Preclearance Overview*, U.S. CUSTOMS AND BORDER PROTECTION (June 22, 2017), <https://www.cbp.gov/border-security/ports-entry/operations/preclearance>.

<sup>63</sup> Michael S. Schmidt, *U.S. Security Expands Presence at Foreign Airports*, N.Y. TIMES (July 13, 2012), <http://www.nytimes.com/2012/06/14/world/europe/us-security-has-beachhead-at-foreign-airports.html> (quoting Janet Napolitano, then Secretary of the Department of Homeland Security).

<sup>64</sup> *Id.*

<sup>65</sup> Press Release, U.S. Customs & Border Prot., CBP Releases Fiscal Year 2015 Trade and Travel Numbers (March 4, 2016).

<sup>66</sup> *Id.*

new regions and continents.<sup>67</sup> The rationale for such expansion is drawn straight from the playbook of the shifting border. As the government's highest officials readily pronounce, the intent is to "take every opportunity we have to push our [operations] out beyond our borders so that we are not defending the homeland from the one-yard line."<sup>68</sup>

Critics, for their part, have decried such developments, arguing that coupled with increasingly intrusive reporting and monitoring requirements for international travel, the heightened risk of privacy violations reflects a "dystopian vision of a 'transatlantic security space' involving an exchange of [passenger] records, fingerprints and personal data."<sup>69</sup> Despite initial skepticism and concerns about compliance with the European Convention on Human Rights, key European countries such as Belgium, the Netherlands, Norway, Spain, Sweden, and the United Kingdom now permit, or are in the process of finalizing, approval for US officials to obtain "quasi-operative competences at European airports" so as to perform security checks on passengers before embarking on transatlantic flights.<sup>70</sup> Iceland and Italy are the latest countries to have joined this list.<sup>71</sup>

Such measures for screening individuals before their arrival at a desired destination may well prove to be the wave of the future; they are arguably a regulator's dream tool for deterring unwanted admission. As the International Organization for Migration (IOM) noted in a recent report, "[m]any States which have the ability to do so find that intercepting migrants before they reach their territories is one of the most effective measures to enforce their domestic immigration laws and policies."<sup>72</sup> This insight has not been lost on the architects of the shifting border. The governing legislation in the United States, the Immigration and Nationality Act, now authorizes US customs and immigration protection officers to examine and inspect the passengers and crew of "any aircraft, vessel, or train proceeding directly, without stopping, from a port or place

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<sup>67</sup> In addition to extending migration control aboard for air travel, the United States also has a long history of interdiction at sea, which has engendered the controversial US Supreme Court *Sale* precedent, according to which summary return of migrants, including asylum seekers, interdicted on the high seas does not engage the *non-refoulement* obligation to which the United States, like other rich democracies, has committed through both its domestic and international law obligations. *Haitian Ctrs. Council, Inc. v. McNary*, 807 F. Supp. 928 (E.D.N.Y. 1992), *cert. granted sub nom Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 918 (1993).

<sup>68</sup> Press Release, Dep't of Homeland Sec. Press Office, DHS Announces Intent to Expand Preclearance to 10 New Airports (May 29, 2015) (quoting Jen Johnson, then Secretary of Homeland Security); *see also* Ron Dixon, *Homeland Security Goes Abroad. Not Everyone is Grateful*, N.Y. TIMES, December 26, 2017 (estimating that over 2,000 Homeland Security employees, including immigration and customs enforcement special agents, are now deployed to more than 70 countries around the world).

<sup>69</sup> Philip Oltermann, *UK May Allow the U.S. Security Checks on Passengers before Transatlantic Travel*, GUARDIAN, Sept. 11, 2014.

<sup>70</sup> Department of Homeland Security, *supra* note 68.

<sup>71</sup> Press Release, Dep't of Homeland Sec. Press Office, DHS Announces 11 New Airports Selected for Possible Preclearance Expansion Following Second Open Season (Nov. 4, 2016).

<sup>72</sup> Human Rights Watch et al., *NGO Background Paper on the Refugee and Migration Interface*, HUMAN RIGHTS WATCH (June 28, 2001), [http://www.hrw.org/campaigns/refugees/ngo-document/ngo\\_refugee.pdf](http://www.hrw.org/campaigns/refugees/ngo-document/ngo_refugee.pdf).

in foreign territory to a port-of-entry in the United States” at its point of origin.<sup>73</sup> Such decisions made by US officers stationed at these non-US locations are *final* determinations of admissibility. A fine example is found in the arid, bureaucratic words of US immigration law, which hold that inspection made “at the port or place in the foreign territory ... shall have the same effect under the Act as though made at the destined port-of-entry in the United States.”<sup>74</sup> This radical “re-location” of the border—placing it in a foreign territory’s jurisdiction—is made possible through a combination of domestic authorization and transnational cooperation (typically bilateral agreements with the countries on whose territory US agents are permitted to conduct the preclearance). Taking the logic of the shifting border a step further, the United States recently signed its first-ever regional compact, known as the Memorandum of Cooperation, facilitating multilateral border security cooperation in Central America.<sup>75</sup> Officials at the Department of Homeland Security clarified that such collaboration with national governments in transit countries gives the United States room to “stem the flood of irregular migration and develop [a] regional approach to addressing the ongoing humanitarian and security emergency at our Southern Border.”<sup>76</sup>

The United States’ shifting border is part of a larger transformation to which other leading destination countries have contributed through the legislative and regulatory actions they have undertaken. The Canadian government, for example, proclaims itself a “world leader in developing interdiction strategies against illegal migration.”<sup>77</sup> Apart from Canada’s massive shared land border with the United States, it is otherwise surrounded by large bodies of water and ice. Given its geopolitical location, Canada relies heavily on overseas interdiction.<sup>78</sup> Over the years, it has perfected the technique of interdiction abroad, effectively relocating much of its migration regulation activities to overseas gateways, located primarily in Europe and Asia.<sup>79</sup> There, migration integrity officers, or liaison officers (as they are called now), conduct border control activities as a matter of course even though they are nowhere near the formal edge or frontier of Canadian territory. Instead, as a key component of the shifting border strategy, these government officials are strategically located in “key foreign embarkation, transit and immigration points around the world.”<sup>80</sup> As official documents put it,

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<sup>73</sup> 8 C.F.R. § 235.5(b) (2019).

<sup>74</sup> *Id.*

<sup>75</sup> Press Release, U.S. Dep’t of Homeland Sec., Secretary Nielsen Signs Historic Regional Compact with Central America to Stem Irregular Migration at Source, Confront U.S. Border Crisis (March 28, 2019), <https://www.dhs.gov/news/2019/03/28/secretary-nielsen-signs-historic-regional-compact-central-america-stem-irregular>

<sup>76</sup> *Id.*

<sup>77</sup> Janet Dench, *Controlling the Borders: C-31 and Interdiction*, 19 REFUGE 34, 34–37 (2001).

<sup>78</sup> House of Commons, Standing Committee on Citizenship and Immigration, “Evidence” in *Standing on Guard for Thee: Ensuring that Canada’s Immigration System is Secure*, No 021 (14 February 2012) (Chair: Mr. David Tilson) at 1–4.

<sup>79</sup> *Id.* at 3. (Canada has 63 liaison officers in 49 locations around the globe.).

<sup>80</sup> CAN. BORDER SERV. AGENCY, FACT SHEET (2009), <https://www.cbsa-asfc.gc.ca/media/facts-faits/030-eng.html>.

this part of Canada's border strategy strives to "push [the] borders out' . . . as far away from our [territorial] borders as possible."<sup>81</sup> In the words of the Statement of Mutual Understanding on Information Sharing, "moving the focus of control of movement of people away from [the territorial] border to overseas, where potential violators of citizenship and immigration laws are interdicted prior to their arrival" has become a core feature of the country's "Multiple Borders Strategy," as Canada has branded its extensive variant of the shifting border strategy.<sup>82</sup> For further details, see *Figure 2: Canada: The Shifting Border—Stretching Outward*, located in the Appendix.

As is traditionally the case in the United States, in Canada the act of "touching base" on the territory has significant legal consequences for the scope of rights and protections granted to asylum seekers, according to domestic and international legal obligations.<sup>83</sup> In 1985, one of the earliest and most revered cases of the Supreme Court of Canada in the Charter era dealt with the rights of refugees. In that case, *Singh v. Minister of Employment and Immigration*, the court held that if undocumented or irregular migrants reach Canadian territory, they are entitled to the protection of the Charter of Rights and Freedoms.<sup>84</sup> Those who have managed to physically reach Canada have a consecrated right to a refugee status hearing before facing potential removal from the country. Similar substantive protections and procedural guarantees are not automatically triggered if one is interdicted or intercepted *before* reaching Canada's border. As part of a comprehensive study on immigration-triggered detention and removal, Canada's Senate Standing Committee on Citizenship and Immigration concluded that the "interdiction abroad of people who are inadmissible to Canada is the most efficient manner of reducing the need for costly, lengthy removal processes."<sup>85</sup> Under this scheme, Canada can avoid triggering the constitutional provisions that it had previously established to apply to protect the rights of non-citizens landing on Canadian territory.<sup>86</sup> Investing such legal meaning in the distinction between "inside" and "outside" had the unintended consequence of incentivizing policymakers to introduce a slew of measures "to push out the border" in order to avert both the arrival of unauthorized migrants and the engagement of

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<sup>81</sup> GOV'T OF CAN., *supra* note 8.

<sup>82</sup> SMU, *supra* note 2 (reflecting the premise that "border security and border management are based upon cooperation and collaboration").

<sup>83</sup> The 1951 Refugee Convention "does not deal with the question of admission, and neither does it oblige a state of refuge to accord asylum as such." Guy S. Goodwin-Gill, *The International Law of Refugee Protection*, in THE OXFORD HANDBOOK OF REFUGEE AND FORCED MIGRATION STUDIES (Elena Fiddian-Qasmiyeh et al. eds., 2014). Today, the common State practice is that physical presence on the territory is required for claiming asylum there. See MATTHEW J. GIBNEY, THE ETHICS AND POLITICS OF ASYLUM: LIBERAL DEMOCRACY AND THE RESPONSE TO REFUGEES (2004).

<sup>84</sup> *Singh v. Canada* (Minister of Emp't & Immigr.), [1985] 1 S.C.R. 177, para. 81 (Can.).

<sup>85</sup> S. OF CAN., S. REP. OF THE STANDING COMM. ON CITIZENSHIP AND IMMIGRATION, IMMIGRATION DETENTION AND REMOVAL, at recommendation no. 18 (1998) (Can.), <http://cmte.parl.gc.ca/Content/HOC/committee/361/citi/reports/rp1031513/citirp01/09-rec-e.h>.

<sup>86</sup> *Singh*, *supra* note 86.

constitutionally-protected rights and procedures.<sup>87</sup> Asylum seekers caught in the wide net of Canada's interdiction and the shifting border strategy of enforcement are prevented from presenting their full cases to State authorities.<sup>88</sup>

Being turned away *before* reaching Canadian territory is crucially important for defining the scope of the constitutional and international protections to which these non-citizens are entitled. For if the very same individuals were to land on Canadian soil, by virtue of *Singh*, they would have been entitled to a full oral hearing to determine the merits of their claims to stay, even if they were carrying improper documents. No similar rights apply to them if they are interdicted prior to reaching Canada. Here again, we see an example of the tension between human rights protections and the border control measures established beyond national territory, purportedly to “combat global irregular migration” (as official government documents state). From a human rights perspective, measures to outwardly “relocate” the border in order to skirt legal obligations are objectionable, as they reveal governmental attempts to evade and confine rights protections to the classic boundaries of the *static* Westphalian interpretation of territory in a world where mobility is increasingly regulated across time and space without constraint.<sup>89</sup> The dynamism of the shifting border—its flexible and alternating inward and outward mobility—thus actively contributes to the *immobility* of those who seek to cross it. By barring certain bodies and populations from territorial arrival to well-off countries, the shifting border not only redraws the geography of power but also exacerbates the influence inequality and accidents of birthplace have on access to life-saving protection regimes.<sup>90</sup> At-a-distance control measures play a vital role in the process as they prevent would-be immigrants and asylum seekers from activating the range of legal entitlements that they are owed in the destinations they seek to reach, while shielding affluent law-abiding countries from otherwise binding human rights obligations towards those escaping persecution. Nevertheless, it is not difficult to appreciate why such legal fictions, and the idea of a shifting border more broadly, are so attractive to policymakers who are under increasing pressures to act decisively in the face of growing voter anxiety over immigration, ever more frequently finding themselves in “crisis-control” mode.

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<sup>87</sup> See, e.g., Efrat Arbel, *Bordering the Constitution, Constituting the Border*, 53 OSGOODE HALL L. J. 824, 826-27 (2016).

<sup>88</sup> See generally François Crépeau & Delphine Nakache, *Controlling Irregular Migration in Canada: Reconciling Security Concerns with Human Rights Protection*, 12 IRPP CHOICES 3 (2006).

<sup>89</sup> In response to shifting border techniques, the scope and application of international refugee and human rights laws should not be determined, from a moral and legal point of view, by the question of *where* the encounter with State officials (or their delegates) has occurred. What matters is that such an encounter took place and effective control was exercised, a point to which I return later in the analysis, in the final part of the discussion. See *infra* notes 200-220.

<sup>90</sup> INTER-PARLIAMENTARY UNION & UNHCR, A GUIDE TO INTERNATIONAL REFUGEE PROTECTION AND BUILDING STATE ASYLUM SYSTEMS 6 (2017) (“Providing protection to people fleeing in search of refuge is one of humanity’s most long-standing traditions—a shared value embedded in many religious and cultural traditions, and now part of international law.”).

Canada, along with many other wealthy nations, also relies heavily on private sector third-party actors, in particular airline carriers, as “enforcers” of its immigration regulations and border control provisions.<sup>91</sup> As many seasoned travelers will know, it is usually airline personnel who verify that the required documents and visas are valid prior to permitting embarkation on international flights.<sup>92</sup> They do so, at least in part, because their companies face steep financial penalties from the receiving countries if they transport improperly documented persons into their territories. Canadian law permits the government to seek reimbursement from airline carriers for “costs of detention, return, and, in some cases, medical care” associated with irregular migrants that arrive aboard their flights.<sup>93</sup> Likewise, the Schengen Implementation Agreement obliges all members of the European Union to implement similar carrier sanctions.<sup>94</sup> Allowing airline personnel to perform such passport control activities contributes to the growing role of private sector intermediaries in conducting what is arguably a central plank of sovereign authority: deciding whom to admit and whom to keep at bay.

In the same vein, the United Kingdom, New Zealand, and Australia have also developed comparable mechanisms of migration regulation and control abroad, working in close cooperation with U.S. and Canadian overseas migration integrity and liaison officers. This partnership resembles the collaborative model of the “five-eyes” alliance (FVEY, as it is known), which is a wide ranging intelligence and data-sharing network with extensive surveillance capabilities that focuses, among other activities, on “remote control” border and migration control.<sup>95</sup> Since the early 2000s, Member States of the European Union have followed suit and created an expanded transnational network of immigration liaison officers operating under an overarching EU directive framework. As a result, these interdiction programs have proliferated into a massive information-gathering “network of contacts with host-country officials, officials from other governments

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<sup>91</sup> See generally Thomas Gammeltoft-Hansen, *Private Actor Involvement in Migration Management*, in *THE PRACTICE OF SHARED RESPONSIBILITY IN INTERNATIONAL LAW* 527, 542 (André Nollkaemper et al. eds., 2017); Michael Samers, *An Emerging Geopolitics of ‘Illegal’ Immigration in the European Union*, 6 *EUR. J. MIGRATION & L.* 27 (2004).

<sup>92</sup> Canada as well as other countries have also signed memoranda of understanding with airline carriers that permit immigration officials abroad to refuse permission to individual passengers to board flights in return for indemnity from the administrative fines these airline carriers would have been obliged to pay if found carrying inadmissible passengers. See, e.g., *KLM Royal Dutch Airlines v. Canada* (Solicitor General), [2004] F.C. 308 (Can.).

<sup>93</sup> Andrew Brouwer & Judith Kumin, *Interception and Asylum: When Migration Control and Human Rights Collide*, 21 *REFUGE* 6, 10 (2003).

<sup>94</sup> In the same vein, the 1990 Schengen Implementation Agreement obliges all members of the European Union to implement carrier sanctions. This mandate was further enhanced in 2001 by a European Council Directive that aims to harmonize these financial sanctions as a powerful regulatory tool, used here by member-States in concert, to diminish the prospects of arrival to their shores of unauthorized migrants.

<sup>95</sup> Aristide R. Zolberg, *Matters of State: Theorizing Immigration Policy*, in *THE HANDBOOK OF INTERNATIONAL MIGRATION: THE AMERICAN EXPERIENCE* 70, 71 (Charles Hirschman et al. eds., 1999) (using “remote control” to refer to unilateral visa control and related measures). Here, the term is used to relate to translational, multilateral measures that extend far beyond that term’s original definition.

in the designated region, airline personnel and law-enforcement agents.” Operating along the travel continuum, the network of trusted partners identifies and interdicts improperly-documented travelers at the earliest point at which their identity can be verified and as remotely as possible from the actual border.<sup>96</sup>

No less significant for our discussion, these overseas government agents operate under the recommended guidelines developed by the International Air Transport Association (IATA).<sup>97</sup> The existence of this *non-state* organization representing the global airline industry reveals not only the shifting *location* of the border but also the increased collaboration between private *and* public actors in regulating de-territorialized “edges” of well-off polities seeking to prevent admission of persons they deem unwanted.<sup>98</sup>

### C. Erasing Territory

Australia has *relocated* its border more explicitly than Canada or the United States by creating a legal distinction between the country’s “migration zone” and the “Australia” that is recognizable on the map.<sup>99</sup> The Migration Amendment Act of 2001 created this “excision” policy, which was expanded in 2005 and then again in 2013.<sup>100</sup> This legislation authorizes Australia’s immigration officials to remove asylum seekers that have reached its “excised” territory as though they had *never reached* Australia, despite having physically landed on its shores.<sup>101</sup> Put differently, those who reach the excision zone cannot make a valid asylum claim in Australia because they have never entered it in a legally cognizable way. The territory they reached is no longer “Australia” for immigration law purposes. This legal fiction further limits the procedural and substantive rights to which asylum seekers and other irregular migrants are entitled under domestic and international law.<sup>102</sup> The excision policy also eliminates the possibility of judicial review; thus it not only redraws the territorial border but also attenuates legality in the

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<sup>96</sup> TREAS. BD. OF CAN. SECRETARIAT, CAN. BORDER SERV. AGENCY, 2008-09 REP. ON PLAN AND PRIORITIES, <http://www.tbs-sct.gc.ca/rpp/2008-2009/inst/bsf/bsf02-eng.asp>; *see also* CITIZENSHIP AND IMMIGRATION CAN., REV. OF THE IMMIGRATION CONTROL OFFICE NETWORK: FINAL REPORT, APPENDIX A: COMPARABLE ICO NETWORK MODELS.

<sup>97</sup> *See generally* WCO, IATA, and ICAO Guidelines on Advance Passenger Information (API) (2014).

<sup>98</sup> UNHCR, *Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach*, 10, U.N. Doc. EC/50/SC/CPR.17 (June 9, 2000).

<sup>99</sup> Migration Amendment (Excision from Migration Zone) Act 2001 (Act No. 127/2001) (Austl.).

<sup>100</sup> *Id.*; Press Release, Minister for Immigration & Multicultural Affairs, Joint Statement with Minister for Justice & Customs: Government Strengthens Border Integrity, MPS 161/2001 (Sept. 17, 2001); PARLIAMENT OF AUSTL., DEP’T OF PARLIAMENTARY SERVS., EXCISING AUSTRALIA: ARE WE REALLY SHRINKING? Research Note no. 5, 2005-2006 (2005).

<sup>101</sup> Instead, they are immediately directed to third countries declared safe, such as Nauru and Papua New Guinea (until the latter’s court ruled the practice unconstitutional according to PNG law) where Australia has funded detention centers. Even if found to be refugees, such unauthorized arrivals cannot be settled in Australia, and must remain in Nauru or PNG, or be resettled elsewhere. *See* U.S. Committee for Refugees and Immigrants, *World Refugee Survey* (2002).

<sup>102</sup> Even before the creation of the excision zone, Australia introduced a mandatory detention policy for all arrivals without valid visas. *See* Migration Act 1958 (Act No. 62/1958) (Austl.).

process.<sup>103</sup> In 2013, the excision zone was expanded through legislation to include the entire Australian mainland.<sup>104</sup> In effect, this means that the border applies *everywhere* and *nowhere* at the same time. For further details, see *Figure 3: The Shifting Border—Australia's "Excision" Map*, located in the Appendix.

The legal consequences of arrival to Australia's "erased" territory are both far-reaching and irreversible; those falling under the spell of excision are denied the opportunity to secure refugee status in Australia even *after* their claims are adjudicated. Excision provides a hocus-locus-pocus way to keep out those who were never wanted or invited. Under this legal fiction, asylum seekers who arrived by boat and without permission are ineligible to claim protection under Australian immigration laws. By erecting a limitless line-of-defense against unauthorized maritime arrivals, excision creates a legal barrier that makes the possibility of passing through the proverbial entry gates illusory, even for those who have managed to reach the country's physical territory. This logic is reminiscent of the "seeping" of the U.S. border into the interior and the resulting restriction of rights, but with a unique Australian twist of "erasing," with the stroke of a pen, certain segments of its own territory off the map for migration regulation purposes.<sup>105</sup>

More limited versions of "excision" also once operated in high-traffic airports in European capitals, which declared certain areas physically located in their national territories as extraterritorial "international zones" or "transit zones" where the standard protections of domestic and international law did not apply.<sup>106</sup> These transit zones functioned as legal "grey zones" in a limbo space, "in which officials '[we]re not obliged to provide asylum seekers or foreign individuals with some or all of the protections available to those officially on State territory.'" This practice was eventually challenged in the European Court of Human Rights, which concluded that "[d]espite its name, the international zone does not have extraterritorial status."<sup>107</sup> As a result, border-control actions in these transit zones were brought back into the fold of legality.<sup>108</sup>

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<sup>103</sup> The terms legality and rule of law are notoriously difficult to define and are used interchangeably in my discussion. Martin Krygier, *Transformations of the Rule of Law: Legal, Liberal and Neo-*, in *THE POLITICS OF LEGALITY IN A NEOLIBERAL AGE* 19–20 (Ben Golder & Daniel McLoughlin eds., 2018) (referring to "a number of ideas, among them constitutionalism, due process, legality, justice, that make claims for the proper character and role of law in well-ordered States and societies... Appeal to the rule of law [or legality] signals the hope that law might contribute to articulating, channeling, disciplining, constraining and informing—rather than merely serving—the exercise of power. I[t] refers collectively to such contributions as *tempering* power.").

<sup>104</sup> Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013 (Act. No. 35/2013) (Austl.).

<sup>105</sup> This unprecedented act was prefaced by a governmental clarification that the excised zones were not altogether removed from Australian sovereign territory. See PARLIAMENT OF AUSTL., *supra* note 91; Anthea Vogl, *Over the Borderline: A Critical Inquiry into the Geography of Territorial Excision and the Securitisation of the Australian Border*, 38 U. OF NEW SOUTH WALES L.J. 114, 137 (2015).

<sup>106</sup> See generally Mark B. Salter, *Governmentalities of an Airport: Heterotopia and Confession*, 1 INT'L POL. SOCIOLOGY 49 (2007) (discussing airports, seaports, and train stations as what I call "gray zones").

<sup>107</sup> *Amuur v. France*, App. No 19776/92, Eur. Ct. H.R., 1, 25 (1996).

<sup>108</sup> See *id.*



The creation of these legal “gray zones” is not entirely new. The United States once used its navy base in Guantanamo Bay as a repository for asylum seekers, particularly Haitians, whose shattered boats were intercepted on the high seas to prevent those onboard from claiming refuge at “our gates.”<sup>109</sup> Again, we witness the craftsmanship of using legal definitions and categories to interdict unwanted entrants *before* they can reach the actual border (unless, as in Australia’s extreme variant of the shifting border, that territory itself is “excised”).

Along with the spatial expansion of the zone of excision, Australia has adopted another means of border-shifting. Since 2013, *all* “asylum seekers who unlawfully arrive *anywhere* in Australia” must be transferred to third countries for offshore processing.<sup>110</sup> The Australian government calls this policy “regional processing,” which in practice has meant that those who reach the excision zone are transferred to offshore locations.<sup>111</sup> The offshore locations are remote islands in the Pacific, such as Nauru, a tiny microstate island-nation that is 4,500 kilometers away from Australia, or Manus Island in Papua New Guinea.<sup>112</sup> There, asylum seekers may languish for years while the immigration authorities process and assess the asylum claims.<sup>113</sup> Australia is the only country in the world that uses *other* countries to process asylum claims. Close to eighty percent of those transferred to such offshore processing centers have proven they have credible claims.<sup>114</sup> These asylum seekers were on average detained for 450 days, and almost one quarter of the detained/incarcerated population spent more than two

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<sup>109</sup> These strategies of “containment” of irregular mobility through foreign maritime enforcement have long been employed by the United States, which has entered bilateral agreements with the Bahamas, the Dominican Republic and other countries in the Caribbean; these signatory countries regularly interdict boats and summarily return unauthorized travelers heading toward the United States to their place of embarkation. For an exposition of the governmental practice of detention without trial of Haitian refugees at Guantanamo in the 1990s, and the legal challenges that followed, *see generally* Harold Hongju Koh, *The Haitian Refugee Litigation: A Case Study in Transnational Public Law Litigation*, 18 MD. J. INT’L L. 1 (1994).

<sup>110</sup> Migration Amendment, *supra* note 99. For a concise overview of these legislative changes, *see Australia’s Offshore Processing Regime*, REFUGEE COUNCIL OF AUSTL., <https://www.refugeecouncil.org.au/getfacts/seekingsafety/asylum/offshore-processing/briefing/> (last visited Nov. 24, 2017).

<sup>111</sup> 31 Oct. 2012, Parl Deb HR (2012) (Can.) at 12738-12740, (Chris Bowen, Minister of Immigration and Citizenship, discussing the Migration Amendment).

<sup>112</sup> *Offshore Processing: An Overview*, KALDOR CENTRE, <https://www.kaldorcentre.unsw.edu.au/publication/offshore-processing-overview> (last visited Jan. 13, 2019).

<sup>113</sup> Stefanie Anderson, *Immigration Detention Times on Nauru and Manus Island Blow Out to 450-day Average Under Liberals*, ABC NEWS (Jan. 13, 2016), <https://www.abc.net.au/news/2016-01-13/immigration-detention-times-blow-out-to-almost-450-days/7085264>.

<sup>114</sup> Elibritt Karlsen, *Australia’s Offshore Processing of Asylum Seekers in Nauru and PNG: A Quick Guide to Statistics and Resources*, PARLIAMENT OF AUSTL. (DEC. 19, 2016), [https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp1617/Quick\\_Guides/Offshore](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/Offshore). *See also* Amanda Erickson, *Here’s What the Dumb Deal On Refugees With Australia Actually Says*, WASH. POST (Feb. 2, 2017), [https://www.washingtonpost.com/news/worldviews/wp/2017/02/02/heres-what-the-dumb-deal-on-refugees-with-australia-actually-says/?noredirect=on&utm\\_term=.c36955d2c59e](https://www.washingtonpost.com/news/worldviews/wp/2017/02/02/heres-what-the-dumb-deal-on-refugees-with-australia-actually-says/?noredirect=on&utm_term=.c36955d2c59e).

years in the facilities.<sup>115</sup> Even those recognized as refugees are forbidden for life from settlement in Australia, alas, due to the “original sin” of arriving on its excised territory. The erased territory thus becomes a legal black hole, a gravitational field so intense that no unauthorized migrant can ever escape it. This ironclad policy—the one-way ticket *away* from Australia—has recently attracted the interest of European policymakers desperately seeking answers to their respective challenges of responding to uninvited migration flows and has fueled discussion of building migrant “reception” centers in North Africa and deeper in the heart of the continent.<sup>116</sup>

Australia has invented one of the most striking manifestations of the shifting border by legally redefining the area of Australian territory upon which asylum claims can be made, and by removing and “emplacing” any intercepted irregular migrants to offshore processing centers in remote locations in poorer and less stable third countries. Australia’s restrictive policy offers a remarkable attestation to the willingness of countries to deter unauthorized migration flows, even at the cost of blatantly breaching domestic and international rights-protection obligations to which they have committed themselves. To complicate the picture even further, there are some early indications that Australia’s highly problematic interpretation of its refugee protection obligations is proving effective in advancing its stated policy mission: to stop unauthorized boat arrivals.<sup>117</sup> As a representative of the UN High Commissioner for Refugees in Indonesia—a major transit hub in the region for asylum seekers and human smugglers heading toward Australia—noted: “[w]ord that the prospects of reaching Australia by boat ... are now virtually zero appears to have reached smugglers and would-be asylum seekers in countries of origin.”<sup>118</sup> Such focus on deterrence and “reclaiming” border protection is in turn used politically to justify the tough policies Australia adopted in the first place. Despite domestic contestation and international condemnation, the major political parties in Australia have refused to reverse the policy of offshore processing.<sup>119</sup> This refusal raises a host of pressing queries

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<sup>115</sup> *Id.*

<sup>116</sup> On treating the Australian model as a potential blueprint for Europe, see “*In Deutschland ist sehr viel Bewegung in die richtige Richtung*”, WELT, Mar. 24, 2018, <https://www.welt.de/politik/ausland/article174864314/Oesterreichs-Kanzler-Sebastian-Kurz-In-Deutschland-ist-sehr-viel-Bewegung-in-die-richtige-Richtung.html> (interviewing Austrian Chancellor Sebastian Kurz).

<sup>117</sup> AUSTRALIAN GOV’T, AUSTRALIA BY BOAT? NO ADVANTAGE (2012). In the case of Australia, “concerns over ‘unauthorised’ boat arrivals or ‘boat people’ (also referred to as ‘irregular maritime arrivals’) have occupied successive governments since the 1970s.” PARLIAMENT OF AUSTL., BOAT ARRIVALS IN AUSTRALIA SINCE 1976 (2013), [https://www.aph.gov.au/about\\_parliament/parliamentary\\_departments/parliamentary\\_library/pubs/bn/2012-2013/boatarrivals](https://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/bn/2012-2013/boatarrivals).

<sup>118</sup> *Asylum Seekers left High and Dry in Indonesia*, IRIN NEWS (Apr. 9, 2014), <http://www.irinnews.org/report/99908/asylum-seekers-left-high-and-dry-indonesia> (quoting UNHCR country representative in Indonesia, Manuel Jordano).

<sup>119</sup> For an overview of these positions, see Robert Manne, *This Pains Me, but It’s Time to Compromise on Australia’s Cruel Asylum Seeker Policy*, THE GUARDIAN (Sept. 22, 2018), <https://www.theguardian.com/australia-news/2018/sep/23/this-pains-me-but-its-time-to->

about how to avert the denial of constitutional and human rights by the very institutions and processes designed to protect them and whose voices and interests ought to be considered when challenging such policies. Australia is not alone in facing such quandaries. From Europe to North America, incumbent leaders and their contenders are trying to appease the anxieties of voters fearing “loss of control” over borders and membership boundaries. The lethal combination of the perceived loss of control and the apparent deterrence effect of a restrictive policy forces us to rethink the complex relationships between official and unofficial routes of passage, as well as the uneasy interactions among countries of origin, transit, destination, offshoring locations, and the activities of human smugglers—a dynamic constellation that the literature has largely overlooked.

#### D. Who Guards the (Legal) Guards?

If we conceptualize borders as “crucial sites from which the nation-state is narrated and constituted,”<sup>120</sup> Australia’s heavy-handed approach brings into sharp relief several important quandaries. Key among them is: who guards our legal guards? Australia’s High Court has on several occasions reviewed various aspects of Australia’s excision policy and offshore processing framework. In several landmark decisions, the High Court favored the claims of those in excised territories. These decisions include the cases known as *Plaintiff M61/2010* and *Plaintiff M69/2010*, in which the High Court unanimously found that two Sri Lankan asylum seekers detained on Australia’s Christmas Island had been denied procedural fairness.<sup>121</sup> The Court’s decision led the government to amend certain aspects of the processing of claims beyond mainland Australia.<sup>122</sup> In another case, *Plaintiff M70/2011 v. Minister for Immigration and Citizenship*, the High Court struck down the government’s so-called “Malaysian solution,” which proposed that Australia swap 800 asylum seekers held in detention after they arrived by boat to the excision zone with 4,000 refugees waiting for resettlement from Malaysia.<sup>123</sup> The Court found that Malaysia is neither a signatory to the Refugee

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compromise-on-australias-cruel-asylum-seeker-policy.

<sup>120</sup> Vogl, *supra* note 105, at 117.

<sup>121</sup> *Plaintiff M61/2010E v. Commonwealth*; *Plaintiff M69 of 2010 v. Commonwealth* [2010] 243 CLR 319 (Austl.).

<sup>122</sup> *Id.*

<sup>123</sup> *Plaintiff M70/2011 v. Minister of Immigration and Citizenship* [2011] 244 CLR 144 (Austl.). Most recently, the High Court raised questions about the legality of maritime interception and turn-back operations, but in a tight 4:3 decision it eventually upheld the government’s policies. *CPCF v. Minister of Immigration and Border Protection* [2015] HCA 1 (Austl.). Human rights lawyers have argued that despite this High Court decision, which focused on domestic law, Australia is still in breach of its non-refoulement international obligations. In a previous decision, *Plaintiff S156/2013 v. Minister for Immigration and Border Protection* [2014] HCA 22 (Austl.), the High Court unanimously rejected a challenge to the constitutional validity of sections 198AB and 198 AD of the Migration Act 1958, as amended by the Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 (Cth) (Austl.), which gives the immigration minister the power to designate regional (offshore) processing countries. These amendments were introduced into law in response to a previous ruling of the High Court, *Plaintiff M70*, a decision in which the Court struck down the government’s “Malaysian solution.”

Convention nor does it recognize the status of refugees under its domestic law.<sup>124</sup> However, the very same justice system that protects all refugees *but* those arriving without authorization by boat, ultimately upheld some of the most controversial aspects of the country's excision and offshoring tactics. As Robert Cover observed in his now-classic *Justice Accused*, judges may feel compelled to uphold "neutral" legal rules despite perceiving them as unjust, in the process causing violence through the words and acts of law.<sup>125</sup> For asylum seekers who are excised and offshored, the law failed to provide solace or safety and imposed violence instead.

An unexpected twist in this saga occurred when the Supreme Court of Papua New Guinea, unlike the High Court of Australia, ruled that the practice of transferring and detaining asylum seekers on Manus Island was both illegal and in violation of the constitutional right to personal liberty.<sup>126</sup> The Court held that because the "asylum seekers held [on Manus Island] did not arrive...of their own volition, they had not broken any immigration law," and "keeping them in indefinite detention, where they face frequent acts of violence and suffer from poor health care, therefore, violated their constitutional protections."<sup>127</sup> The Court ordered immediate steps to end the detention, and the government of Papua New Guinea requested that Australia make alternative arrangements.<sup>128</sup> Asylum seekers remaining at Manus Island are currently in a state of limbo. In the wake of the center's closure, they have lost access to running water, electricity, medicine, and working toilets, and their food supplies are dwindling.<sup>129</sup> Yet many have refused relocation to other sites in Papua New Guinea out of fear for their safety. Some were forcibly removed by local police forces from the (now decommissioned) Australian facility. The UNHCR has warned of an "unfolding humanitarian crisis" and has called on Australian authorities to act based on their responsibility in the original offshore transfer and eventual internment.<sup>130</sup> New Zealand offered to resettle some of the refugees remaining in Manus Island, but the Australian government has yet to accept this proposal.<sup>131</sup> Litigation has

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<sup>124</sup> *Id.*

<sup>125</sup> See generally ROBERT M. COVER, *JUSTICE ACCUSED* (1975) (exploring critically the behavior of anti-slavery judges who nevertheless issued pro-slavery decisions according to "neutral" rules); see also Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

<sup>126</sup> *Namah v. Pato* [2016] PGSC 13, S.C. 1497 (Papua N.G.).

<sup>127</sup> *Id.*; Mark Isaacs, *The Intolerable Cruelty of Australia's Refugee Deterrence Strategy*, FOREIGN POLICY (May 2, 2016), <http://foreignpolicy.com/2016/05/02/australia-papua-new-guinea-refugee-manus-nauru/>.

<sup>128</sup> *Namah v. Pato* [2016] PGSC 13, S.C. 1497 (Papua N.G.).

<sup>129</sup> Imran Mohammad, *Closing Manus Island: An Inside Perspective*, AMNESTY INTERNATIONAL (Nov. 1, 2017), <https://www.amnesty.org.au/closing-manus-island-inside-perspective/>.

<sup>130</sup> Office of the Spokesperson for the UN Secretary-General, Highlights of the Noon Briefing by Stéphanie Dujarric, Spokesman for Secretary-General António Guterres (Nov. 3, 2017), <https://www.un.org/sg/en/content/highlight/2017-11-03.html>.

<sup>131</sup> Michael Koziol, *Scott Morrison prepared to accept New Zealand refugee offer 'if lifetime ban law passed'*, SYDNEY MORNING HERALD (Oct. 16, 2018), <https://www.smh.com.au/politics/federal/scott-morrison-prepared-to-accept-new-zealand-refugee-offer-if-lifetime-ban-law-passed-20181016->

commenced before the High Court of Australia and in Papua New Guinea to require that these offshore refugees and asylum seekers be brought back to Australia, but neither country's courts have ruled on the matter. A growing choir of voices from civil society and human rights organizations, both local and global, has called on the Australian government to take accountability for the escalating situation, demanding "an end to this cruelty."<sup>132</sup> Such democratic protests have made a dent in the past, for example by pressuring the government to bring back to Australia some of the detained on Nauru and Manus Island who required medical attention.<sup>133</sup> The jury is still out on the impact of such contestation and protest on finding a resolution to the current deadlock.

#### E. Big Data and iBorder Control

In disrupting the Mondrian-like precision of clearly delineated and jurisdictionally exclusive territorial States that has undergirded the Westphalian international system of States (at least in principle), the shifting border tacitly and covertly redefines the relationship between membership, territory, and sovereignty. As such, it provides a rare opportunity to reflect on the distributive implications of *selectively* opening and closing the border.

For the bulk of the twentieth century, the mobility of those relegated by birth to the wrong side of the tracks of prosperity and opportunity was manifestly controlled at official checkpoints by "guards [that] have guns," as Joseph Carens memorably put it.<sup>134</sup> Alternatively, today's restrictions against unwanted and uninvited entrants rely on ultra-sophisticated, high-tech, partly invisible but always present transportable legal walls, aided by ever-expanding surveillance systems and remote control border regulation activities. As the Canadian Border Service Agency explains, the ubiquitous shifting border can, in principle, operate at "*any* point at which the identity of the traveler can be verified," giving full meaning to the notion of a border that is simultaneously nowhere and everywhere.<sup>135</sup>

In Europe, for example, the European Union devised the integrated border management strategy. This strategy relies on a multi-tiered control model that seeks to track the movement of non-EU citizens, known as third-country nationals, "from the point of departure in countries of origin, all throughout transit, and up to their arrival in the EU."<sup>136</sup> Within the Union, inland control

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p509zu.html.

<sup>132</sup> *Turnbull and Dutton must guarantee the safety of the men they have kept trapped on Manus*, REFUGEE COUNCIL OF AUSTL. (Nov. 23, 2017), <https://www.refugeecouncil.org.au/media/turnbull-dutton-must-guarantee-safety-men-keep-trapped-manus/>.

<sup>133</sup> *Operation Sovereign Borders and offshore processing statistics*, REFUGEE COUNCIL OF AUSTL. (Nov. 5, 2018), <https://www.refugeecouncil.org.au/getfacts/statistics/operation-sovereign-borders-offshore-detention-statistics/>.

<sup>134</sup> Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251, 251 (1987).

<sup>135</sup> CAN. BORDER SERVS. AGENCY, *supra* note 2.

<sup>136</sup> VIOLETA MORENO-LAX, *ACCESSING ASYLUM IN EUROPE: EXTRATERRITORIAL BORDER CONTROLS AND REFUGEE RIGHTS UNDER EU LAW 3* (2017); *see also* Council of the European Union

measures, including detection, investigation, and return, are applicable to third-country nationals deemed to lack status (regularly referred to as “illegal immigrants”), as are futuristic iBorder control strategies that “re-engineer” the system of border crossing and migration control.<sup>137</sup>

Pilot projects funded by the European Union will enable “automatic control” procedures, involving pre-registration, whereby “[t]ravelers perform a short, automated, non-invasive interview with an avatar, undergo a lie detection and are linked to any pre-existing authority data.” This data will then be stored in large databases and connected with “portable, wireless connected iBorderCtrl units that can be used inside buses, trains or any other point” to verify the identity of the travelers and “calculat[e] a cumulative risk factor for each [individual].”<sup>138</sup> Here, the once-fixed territorial border is not only shifting, but also evolving into an operational individualized-control system, where each person “carries” the border with her as she moves across space and place. The border attaches to her pre-arrival, at crossing stations, and wherever and whenever she travels within the protected and surveilled territorial space—today within the area of free movement in Europe, tomorrow (potentially) the world.<sup>139</sup>

Here, the underlying objective of ensuring that entrants meet all legal requirements takes on a new social, political, and technological meaning. Such individualized control systems transform and blur the regulation of pre- and post-arrival movement and risk morphing into a “society of control,” where *everyone* (non-citizen and citizen alike) is tracked and encoded.<sup>140</sup> Furthermore, while these new surveillance techniques that utilize a combination of algorithmic machine learning and human vetting are neutral in theory, they may produce divergent and discriminatory results by reaffirming and intensifying practices of racial and geographic profiling.<sup>141</sup>

Such global ID systems have long been the dream of law enforcers, but they are now ever-closer to becoming a reality. Even the United Nations has teamed up with leading technology firms to explore plans for creating a digital ID network

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Note 13926/3/06, Integrated Border Management: Strategy Deliberations (Nov. 21, 2006).

<sup>137</sup> See, e.g., Directive 2008/115 of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally-staying third-country nationals, 2008 O.J. (L 348) 98.

<sup>138</sup> *iBorderCtrl, Description*, L3S RESEARCH CENTER, <https://www.l3s.de/en/node/1127>.

<sup>139</sup> I am indebted to Irene Bloemraad for suggesting that I explore the imagery of the shifting border as “transported” to individual bodies.

<sup>140</sup> I draw the term “society of control” from the work of Gilles Deleuze, but it has since been applied more broadly in the literature. See, e.g., Shamir, *supra* note 24. The loss of civil liberties is not restricted to non-citizens. In the United Kingdom, for example, draconian “control orders” that provided the State with legal authority to indefinitely detain non-citizens without trial if a trial risked secret or sensitive intelligence information was challenged before the courts as discriminatory. In response, the UK government did not rescind such powers. Instead, it equally applied them to citizens. For related examples whereby the deprivation of rights of non-citizens foreshadows a similar deprivation of the liberties of citizens, see generally Eric A. Ormsby, *The Refugee Crisis as Civil Liberties Crisis*, 117 COLUM. L. REV. 1191 (2017).

<sup>141</sup> See, e.g., Margaret Hu, *Algorithmic Jim Crow*, 86 FORDHAM L. REV. 633 (2017); Karen Yeung, *Algorithmic regulation: A critical interrogation*, 12 REG. & GOVERNANCE 505 (2017).

using blockchain technology to provide tamper-resistant legal documents for refugees and other displaced persons who lack official documents. Such a digital ID would create a “‘stamp’—a unique identifier between the refugee and the data on the servers—that proves they have been authenticated for each service they receive” at refugee camps or by official aid organizations.<sup>142</sup> While informed by benevolent intentions, such initiatives may violate bearers’ privacy and restrict their international mobility, especially if their “stamp” indicates passage through a third-country deemed safe. As a result, digital ID may potentially prohibit onward travel or trigger return if the migrant’s intended country of destination has signed readmission agreements with these transit locations.

#### F. Tracking and Stratifying Mobility

Beyond reinventing the “moveable” border while selectively opening and closing its gates of admission, destination countries are developing and implementing new surveillance technologies that cross time and space. These technologies are implicated in bilateral and multilateral agreements with countries of origin and transit that treat the latter as migration “buffer zones” for wealthier nations. This new conception of the shifting border has coincided with the rise of “big data” and propagated the creation of enormous databases that store biometric information and electronic passenger name records.<sup>143</sup> Sharing these records prior to travel has replaced traditional interactions between the individual and State officials at the actual territorial border, because, as the UK Home Office revealingly put it, this border encounter “can be too late—they [unauthorized entrants] have achieved their goal in reaching our shores.”<sup>144</sup> For governments to achieve this ambitious yet Orwellian vision, the location, operation, and logic of the border must be redefined through a complex conceptual and operational framework that allows state officials or their delegates (increasingly operating transnationally and in collaboration with third parties and private sector actors) to screen and intercept travelers *en route* to their desired destinations, and long before the travelers are within their territories. Pre-travel electronic clearance is now required as a matter of course, even for those in possession of “high-value” passports, including travelers hailing from EU member States.<sup>145</sup> The government of the destination country must approve such electronic travel authority *before* the traveler embarks on his or her journey, and it is linked electronically to the traveler’s passport.<sup>146</sup> Without such authorization, it is impossible to board a plane

<sup>142</sup> *Accenture and Microsoft plan digital IDs for millions of refugees*, BBC TECHNOLOGY (June 20, 2017), <http://www.bbc.com/news/technology-40341511>.

<sup>143</sup> Following a protracted political and legal battle between Brussels and Washington about levels of data protection, the U.S. and the E.U. signed an agreement on the transfer of passenger name records (PNR) to the U.S. Department of Homeland Security in 2011. The European Parliament approved and adopted it in 2012. In 2016, after years of debate, the European Parliament approved the PNR Directive. Council Directive 2016/681, 2016 O.J. (L 119/132) 1 (EU).

<sup>144</sup> HOME OFFICE, SECURING THE UK BORDER: OUR VISION AND STRATEGY FOR THE FUTURE 3 (2007).

<sup>145</sup> On high value passports and migrants, see Shachar, *supra* note 13.

<sup>146</sup> As Australia’s Department of Immigration and Border Control explains, the next generation of

heading to the United States, Canada, or Australia or to enter these countries. European countries are expected to follow suit by implementing the European Travel Information and Authorization System (ETIAS) in 2021.<sup>147</sup> This additional layer of preclearance and information-gathering creates a powerful yet invisible electronic border that applies everywhere, adjusting to the location and risk profile of the traveler. The electronic authorization process is intentionally detached from and precedes the act of territorial admission, facilitating mobility for approved or trusted travelers while denying access to all others.

While these high-tech borders are designed to keep out unwanted and uninvited entrants, even trusted travelers—those who benefit from the highest level of flexibility and mobility in crossing borders—must now have their identities verified before embarking on international travel at airports and at other regulation points. “Smart” and automated-entry gates have iris scans or other biometric readers that run through multiple national and global databases that cross-reference and authenticate the trusted-traveler’s identity, low-risk status, and un-flagged profile. In an increasing number of airports, the initial decision regarding whether the golden gates of admission will open or shut is determined not by a human agent, but by EasyPASS or other automated systems of immigration clearance and border control.<sup>148</sup> These automated systems authenticate digital data and are coded to identify risk factors based on sophisticated algorithms (themselves hardly ever subject to open, democratic review).<sup>149</sup> In the age of big data and shifting borders, Ali Baba’s “open sesame!” incantation assumes a new magic and mythos.

For those lacking the requisite credentials, the unending technological innovation and preemptive mobility review encoded into the shifting border strategy makes it ever-harder to lawfully set foot in the more affluent polities they desperately seek to enter.<sup>150</sup> This asymmetry raises serious questions of justice in not only the initial allocation of membership affiliations but also the enduring inequality of mobility opportunities.<sup>151</sup> Those who lack privileged biometric

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border security will require further developing analytics-based capabilities, including “a state-of-the-art risk scoring engine developed by departmental analysts uses complex statistical models to process large amounts of data in real time, to identify higher than acceptable levels of risk” as well as “a real-time risk identification system that scans information collected through the department’s advance passenger processing system.” All inbound travelers are screened and travelers representing potential risk are more closely examined. *See* AUSTL. HUMAN RIGHTS COMM., ANNUAL REPORT 2012–2013 (2013).

<sup>147</sup> SCHENGEN VISA INFO, ETIAS: EUROPEAN TRAVEL INFORMATION AND AUTHORIZATION SYSTEM (Oct. 29, 2018), <https://www.schengenvisa.info.com/etias/>.

<sup>148</sup> For more information on the automation of such decisions, *see generally* Ruggero Donida Labati et al., *Biometric Recognition in Automated Border Control: A Survey*, 49 ACM COMPUTER SURVEYS 24:1 (2016).

<sup>149</sup> Such regulation is more intertwined and partly dependent upon private-sector providers and developers of sophisticated biometric data collection and verification technologies.

<sup>150</sup> *See generally* AYELET SHACHAR, *THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY* (2009). For commentary on how to “lawyer citizenship,” *see* Muneer I. Ahmad, *Developing Citizenship*, 9 ISSUES IN LEGAL SCHOLARSHIP, NO. 1, 2011, at 1.

<sup>151</sup> *See, e.g.,* Eric Neumayer, *Unequal access to foreign spaces: how States use visa restrictions to*



indicators and the required documentation have little if any option to lawfully cross international borders.<sup>152</sup> Coupled with restrictive immigration categories and limited travel visas for those entering from poorer and less stable countries, the shifting border may have the unintended effect of pushing unauthorized mobility further underground. This in turn triggers policy concerns about the rise of a lucrative black market for increasingly sophisticated human-trafficking and smuggling networks. These concerns breed political pressures that help explain (although they do not justify) why and how governments seek to sever the knot that has traditionally tied a fixed territorial border to migration control. By attempting to cover the globe with “transportable” regulation and surveillance, they may head off uninvited entrants before they begin their journey.<sup>153</sup>

By identifying the shifting border as an alternative to the established theoretical poles of “static” and “disappearing” boundaries, I hope to have shown that neither of those visions captures the dynamics of the new regulatory regime of mobility and migration control. Affluent countries’ ability to flexibly redraw the border for migration control and admission regulation is a key new tool to reassert control over their allegedly “broken borders.” At the same time, these policies belie the demise-and-fall predictions of those who have declared the “erasing of the world of spaces,” meaning the abolition of States and borders as primary organizational units of the current world system.

For those locked outside the prosperous core of developed countries, border and migration control is anything but a relic of the past. For the vast majority of the global population who have received the shorter stick in the birthright lottery, barriers to international mobility have not disappeared but have instead been retooled and reinvented.<sup>154</sup> When a non-citizen is stopped before she can ever reach our entry gates, the likelihood of her being able to embark on lawful admission and gain eventual access to citizenship is close to nil. By redefining the core liberty interests of those residing in countries of origin, transit, and destination, today’s extensive “re-bordering” efforts contribute to enforcing and sustaining a global mobility divide.<sup>155</sup>

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*regulate mobility in a globalized world*, 31 TRANSACTIONS INST. OF BRITISH GEOGRAPHERS 72 (2006).

<sup>152</sup> See, e.g., Noora A. Lori, *Statelessness, ‘In-Between’ Statuses, and Precarious Citizenship*, in THE OXFORD HANDBOOK OF CITIZENSHIP 743 (Ayelet Shachar et al. eds., 2017).

<sup>153</sup> Migration scholars and international agencies readily acknowledge that the existing categorical definitions, such as voluntary versus forced migration fail to recognize the more complex reality of human mobility across borders, which is better captured by liminal terms such as “mixed migration” or “people out of place” that aim to highlight the mixed motives and multiplying drivers of mobility and displacement (escaping persecution, political instability, hunger, dire poverty, extreme environmental conditions, and so on). See e.g., PEOPLE OUT OF PLACE: GLOBALIZATION, HUMAN RIGHTS AND THE CITIZENSHIP GAP (Alison Brysk & Gershon Shafir eds., 2004). Legally, only some of these causes are recognized as bases for seeking international protection. The Migration Observatory, *Mixed Migration: Policy Challenges* (Mar. 24, 2011), <https://migrationobservatory.ox.ac.uk/resources/primers/mixed-migration-policy-challenges/>

<sup>154</sup> See, e.g., Peter Andreas, *Redrawing the Line: Borders and Security in the Twenty-First Century*, 28 INT’L SECURITY 78 (2003).

<sup>155</sup> Mau et al., *supra* note 13.

### G. Transit Countries as Border Enforcers

If we turn our gaze to Europe, we find a continent scrambling to find coherent responses to the major ethical and political conflicts that the 2015 migration crisis has unleashed. When it comes to devising new measures to regulate mobility, the European Union and its Member States have borrowed more than one page from the shifting-border book. Much like the United States maintaining a hundred-mile interior border zone, the Court of Justice for the European Union (CJEU) has ruled that border and migration enforcement activities can stretch inward *beyond* the actual, territorial border of members States.<sup>156</sup> Specifically, it authorized border “officials responsible for border surveillance and the monitoring of foreign nationals” to carry out their activities within twenty kilometers of the border, crafting a European variant of the United States’ “constitution-free” zone, here translated to the denser continental geography.<sup>157</sup> In 2017, the CJEU reviewed the matter again, holding that “random” and “baseless identification checks” cannot be used as a way to circumvent free mobility within Europe.<sup>158</sup> However, so long as such checks are proportional and done “to prevent unauthorized entry,” identity checks can take place not just within the twenty-kilometer zone, as previously ruled, but within a broader territorial range: within thirty kilometers of the land border and within a radius of fifty kilometers of the sea border, as well as in train stations nationwide and onboard trains *anywhere*.<sup>159</sup> Again, we find the same inland “stretching” dynamic already witnessed elsewhere. What is perplexing in this context, however, is that such shifting border measures are now exercised *within* Europe’s free movement zone.<sup>160</sup>

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<sup>156</sup> Joined cases C-188/10 and C-189/10, *Melki and Abdeli*, 2010 E.C.R. I-5667; Case C-278/12 PPU, *Adil v Minister voor Immigratie, Integratie en Asiel* 2012 E.C.R. See also: Evelien Brouwer, Migration Flows and the Reintroduction of Internal Border Controls, *EU IMMIGR. & ASYLUM LAW & POL’Y*, (Nov. 12, 2015), <http://eumigrationlawblog.eu/migration-flows-and-the-reintroduction-of-internal-border-controls-assessing-necessity-and-proportionality/>.

<sup>157</sup> *Melki and Abdeli*, 2010 E.C.R. I-5667.

<sup>158</sup> Case C-9/16, *Staatsanwaltschaft Offenburg* 2017 E.C.R. (reference on preliminary ruling). This case challenged the intra-Schengen border checks practice by the German Bundespolizei under Articles 20 and 21 of Regulation 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), 2006 O.J. (L 105) 1 (EU), and Article 2 of the German Bundespolizeigesetz [BPolG] [Federal Police Law], Oct. 19, 1994, BGBl. I at 2987, § 2, last amended by Art. 3 of Gesetz, July 26, 2016, BGBl. I at 1818 (Ger.).

<sup>159</sup> *Id.*

<sup>160</sup> Beyond such invisible, moving borders, several Schengen member States also temporarily re-erected their marked and visible border controls at Europe’s internal borders in the wake of the migration crisis, pursuant to the requirements of Article 25 of the Schengen Border Code. The reintroduction of border controls within the Schengen area is a measure of last resort prerogative of the member States, which is subject to the requirement of proportionality and must be limited in time. See EUR. COMMISSION, MIGRATION & HOME AFF., *Member States’ notifications of temporary reintroduction of border control at internal borders pursuant to Article 25 et seq. of the Schengen Borders Code*, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/docs/ms\\_notifications\\_-\\_reintroduction\\_of\\_border\\_control\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/docs/ms_notifications_-_reintroduction_of_border_control_en.pdf).

In addition to the above-mentioned measures of tightening *inland* control and shifting responsibility and accountability (as well as finger pointing) among European countries, the European Union and its member States have adopted an extensive outward-looking bordering strategy, known as “externalization,” which extends beyond the boundaries of the continent and shifts focus to migrants’ countries of origins or transit.<sup>161</sup> This has led the European Union to establish one of the world’s most complex, interagency, multi-tiered visions of the shifting border, comprised of *pre-entry* controls at countries of origin and transit all the way through to removal of irregular migrants *after* they have reached EU territory.<sup>162</sup> This removal procedure is facilitated by the shared European Return Directive and a growing list of bilateral and multilateral “readmission agreements” negotiated with poorer and less stable non-EU countries to which irregular migrants can be returned, even if they merely passed through such countries *en route* to Europe.<sup>163</sup>

Europe’s externalization policy creates a ring of protection outside the EU. It involves a “close partnership” with non-EU States from near and far through programs such as the Neighborhood Policy, Euro-Mediterranean Partnership, the Balkan Stability Pact (which was later formalized in to the Regional Cooperation Council), the Africa-EU Partnership, the Valletta Action Plan, the Global Approach to Migration and Mobility, and so on.<sup>164</sup> These policies are designed to enforce migration control in collaboration with countries of origin or “at the earliest possible stage”; they combine readmission agreements with development

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<sup>161</sup> HUMAN RIGHTS WATCH, TOWARDS AN EFFECTIVE AND PRINCIPLED EU MIGRATION POLICY: RECOMMENDATIONS FOR REFORM 1 (2018).

<sup>162</sup> Moreno-Lax, *supra* note 138, at 33-40.

<sup>163</sup> See Directive 2008/115/EC, *supra* note 137 and a list of readmission agreements, *available at* EUR. COMMISSION, MIGRATION & HOME AFF., *Return & Readmission*, <https://ec.europa.eu/home-affairs/what-we-do/policies/irregular-migration-return-policy/return-readmission> (last updated Nov. 16, 2018). These agreements have been criticized for failing to provide sufficient human rights safeguards and for the unfair bartering tactics used by the EU to achieve such agreements with third countries that effectively become Europe’s “dumping” ground in exchange for promises of development aid, eased procedures for visa processing, and the like. *Evaluation of the European Union’s Trade Defence Instruments*, (Feb. 27, 2012), [http://trade.ec.europa.eu/doclib/docs/2012/august/tradoc\\_149882.pdf](http://trade.ec.europa.eu/doclib/docs/2012/august/tradoc_149882.pdf).

<sup>164</sup> See *European Neighbourhood Policy (ENP)*, (Dec. 21, 2016), [https://eeas.europa.eu/diplomatic-network/european-neighbourhood-policy-enp/330/european-neighbourhood-policy-enp\\_en](https://eeas.europa.eu/diplomatic-network/european-neighbourhood-policy-enp/330/european-neighbourhood-policy-enp_en); *Euro-Mediterranean Partnership* (May 25, 2018), <http://ec.europa.eu/trade/policy/countries-and-regions/regions/euro-mediterranean-partnership/>; *Barcelona Declaration adopted at the Euro-Mediterranean Conference* 27-28/11/95, [http://trade.ec.europa.eu/doclib/docs/2005/july/tradoc\\_124236.pdf](http://trade.ec.europa.eu/doclib/docs/2005/july/tradoc_124236.pdf); Regional Cooperation Council (RCC), *About Us*, <https://www.rcc.int/pages/2/about-us> (last visited Nov. 16, 2018); RCC Board, *Statute of the Regional Cooperation Council* (Apr. 25, 2013), <https://www.rcc.int/pages/95/statute>; *Partnership & Joint Africa-EU Strategy*, <https://www.africa-eu-partnership.org/en/partnership-and-joint-africa-eu-strategy> (last visited Nov. 16, 2018); Council of the European Union Press Release, *Africa-EU Strategic Partnership: A Joint Africa-EU Strategy* (Dec. 9, 2007), [https://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/er/97496.pdf](https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/97496.pdf); *Valletta Summit, 11-12 November 2015 Action Plan*, [https://www.consilium.europa.eu/media/21839/action\\_plan\\_en.pdf](https://www.consilium.europa.eu/media/21839/action_plan_en.pdf).

incentives and capacity-building of asylum systems in the region concerned.<sup>165</sup> They also contain incentives for countries to agree to readmit refused asylum seekers from Europe that “transited” through their territories, such as promises for easier visa processing for the citizens of the signatory third-countries.<sup>166</sup> Such an incentive structure highlights the unequal bargaining power of member states of the European Union and the Union as a whole vis-à-vis transit countries, although it also reveals how the latter may gain concessions in exchange for promises to “stem the flow.”<sup>167</sup> The controversial agreement between the European Union and Turkey, which involves the transfer of 3.2 billion euros and other inducements in return for Turkey’s assistance with “‘keep[ing] people in the region’ and out of Europe,” is a classic example of outsourcing migration and border control.<sup>168</sup>

Earlier bilateral and multilateral agreements have been criticized as absolving EU-countries of their otherwise binding human rights obligations. These agreements have insisted upon concessions and collaboration from non-EU States, pressuring them to take responsibility for providing protection to forced migrants, including asylum seekers, as soon as possible after the initial displacement and as close as possible to countries of origin or transit. Such agreements recast countries of origin or transit as “gatekeepers to the developed world” and, in the process, allow wealthier countries to insulate themselves from

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<sup>165</sup> For example, the Valletta Action Plan reads “[t]he EU, its Member States and associated countries will step up efforts to mainstream migration into their development cooperation.” *Valletta Summit, 11-12 November 2015 Action Plan*. The Africa-EU Joint Strategy states that: “[p]artners will foster the linkages between migration and development, maximise the development impact of remittances, facilitate the involvement of diasporas/migrant communities in development processes . . . and help countries of origin, transit and destination in Africa build capacity to better manage migration.” Press Release, Africa-EU Strategic Partnership, ¶ 69.

<sup>166</sup> See Valletta Action Plan; Africa-EU Joint Strategy, ¶ 109. See also Regional Cooperation Council Report, REPORT ON GAP ANALYSIS ON REGIONAL COOPERATION IN THE AREA OF MIGRATION MANAGEMENT AND FIGHT AGAINST SERIOUS AND ORGANISED CRIME (Apr. 22, 2016), <https://www.rcc.int/docs/366/report-on-gap-analysis-on-regional-cooperation-in-the-area-of-migration-management-and-fight-against-serious-and-organised-crime> (agreeing to Migration Cooperation to influence the implementation of the policies of Migration Management, “in order to assist governments in implementing their development strategies and EU accession-related goals”).

<sup>167</sup> See JEAN-PIERRE CASSARINO, READMISSION POLICY IN THE EUROPEAN UNION 13 (2010); RED CROSS, SHIFTING BORDERS: EXTERNALISING MIGRANT VULNERABILITIES AND RIGHTS 28 (2013). The external dimension of EU asylum and migration policy dates back to 2005. See COUNCIL OF EUROPEAN UNION, A STRATEGY FOR THE EXTERNAL DIMENSION OF JHF: GLOBAL FREEDOM, SECURITY AND JUSTICE 14366/1/05 (24 Nov. 2005).

<sup>168</sup> James Kanter & Andrew Higgins, *E.U. to Offer Turkey 3 Billion Euros to Stem Migrant Flow*, N.Y. TIMES, Nov. 29, 2015 (quoting Chancellor Angela Merkel of Germany). The most far reaching variant of the externalization policy, which has been proposed but not implemented, would involve “outsourcing” the processing of asylum claims of those who attempt to reach the territory of the European Union to non-EU countries, along the lines of Australia’s controversial regional offshore-processing practice. On treating the Australian model as a potential blueprint for Europe, see Interview with Austrian Chancellor Sebastian Kurz, *In Deutschland ist sehr viel Bewegung in die richtige Richtung*, WELT, (Mar. 24, 2018), <https://www.welt.de/politik/ausland/article174864314/Oesterreichs-Kanzler-Sebastian-Kurz-In-Deutschland-ist-sehr-viel-Bewegung-in-die-richtige-Richtung.html>.

legal responsibility towards refugees and other persons entitled to international protection.

The shifting border is difficult to contain and confine. Now that nations have escaped the once-fixed territorial boundaries and legal restraints that were inherent to the old, static border regime, we must explore potential remedies and reforms. Before I turn to elaborate on such ideas, and how they might be put into action, I wish to locate the shifting border in the context of recent discussions about the diffusion or “migration” of constitutional and human rights norms and practices. I argue that an understanding of borders as mobile constructs provides an important corrective to prevalent theoretical accounts.

### III.

#### TRANSNATIONAL BORROWING AND THE DIFFUSION OF RESTRICTIVE POLICIES

In academic circles, the idea of policy diffusion has now become almost synonymous with the *expansion* of human rights. Here, however, we are faced with a pattern of *circumventing* and *narrowing* such rights and protections as they apply to a particularly vulnerable category of irregular migrants. The bulk of legal literature on the “borrowing” of constitutional ideas across borders has focused on comparative and international (or where relevant, regional) influences on domestic norms and structures. Studies of such processes have led to the conclusion that the effects of such borrowing practices are “nothing short of transformative.”<sup>169</sup> In the same vein, a growing number of empirical studies have emphasized the importance of policy diffusion in explaining the spread of democratization, liberalism, and human rights.<sup>170</sup> The emergent consensus is that when policies “travel”—across national borders, organizational domains, or multiple levels of governance regimes (global to local), the results have frequently been a favorable *increase* in rights protection, both *de jure* and *de facto*.<sup>171</sup> The

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<sup>169</sup> Kim Lane Scheppele, *The Migration of Anti-Constitutional Ideas: the Post 9/11 Globalization of Public Law and the International State of Emergency*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 350 (Sujit Choudhry ed., 2011).

<sup>170</sup> Of this rich body of literature, see, e.g., KATERINA LINOS, *THE DEMOCRATIC FOUNDATIONS OF POLICY DIFFUSION: HOW HEALTH, FAMILY, AND EMPLOYMENT LAWS SPREAD ACROSS COUNTRIES* (2013); Zachary Elkins, Tom Ginsburg, and Beth Ann Simmons, *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 HARV. INT’L L. J. 61 (2013).

<sup>171</sup> See, e.g., LINOS, *supra* note 170; Beth A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009); Elkins, Ginsburg, and Simmons, *supra* note 168; Galit Sarfaty, *International Norm Diffusion in the Pimicikamak Cree Nation: A Model of Legal Mediation*, 48 HARV. INT’L L. J. 441 (2007). There is also a growing literature in law and international relations that explores the impact of transnational advocacy networks and international legal processes on “socializing” States in compliance with international human rights standards, which goes beyond the scope of this Article. See Thomas Risse and Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction*, in *THE POWER OF INTERNATIONAL HUMAN RIGHTS AND DOMESTIC CHANGE* 1–38 (Thomas Risse, Stephen Ropp, & Kathryn Sikkink, eds., 1999); Hans Peter Schmitz, *Transnational Human Rights Networks: Significance and Challenges*, [http://www.isacompss.com/info/samples/transnationalhumanrightsnetworks\\_sample.pdf](http://www.isacompss.com/info/samples/transnationalhumanrightsnetworks_sample.pdf); David Gartner, *Transnational Rights Enforcement*, 31 BERKELEY J. INT’L L. 1 (2013); Ryan Goodman

argument is that apex courts in the world of new constitutionalism now regularly “borrow” progressive ideas from one another by, for example, citing precedents from comparable countries as a source of persuasive authority.<sup>172</sup> Through this transnational dialogue, judges are advancing a new and expanded catalogue of rights protections for citizens and non-citizens alike. But there is another, darker, side to this increased cross-border dialogue. Just as progressive ideas about the scope and extent of rights protections can travel quickly, so can restrictive policies. Call this the *constrictive precedent* problem: emulating the “worst case” rather than following the “best case” precedent.

Just as human rights and constitutional ideas can travel across borders and organizational terrain, so may restrictive immigration measures, anti-constitutional or abusive constitutional measures travel just as easily and effectively, if not faster, across borders and organizational terrain.<sup>173</sup> A powerful example of this pattern of restrictive policy emulation emerged following 9/11 with the global spread of anti-terrorism laws.<sup>174</sup> Despite a degree of local variation, these policies reveal several overarching convergence features, including the concentration of power in the hands of executives, increased ease of surveillance of the public, restriction of due process protections, breach of privacy and other potential limitations on protected rights and liberties as part of an ever-fragile search for a new balance between the competing demands of security and freedom.<sup>175</sup> A similar trend has emerged in many parts of the world with the surge of “unconstitutional constitutional amendments.”<sup>176</sup> The structure and logic of the shifting border have helped germinate this pattern of *restrictive* (rather than rights-enhancing) policy diffusion. This is demonstrated, for example, by inter-jurisdictional emulation (subject to adjustment in response to specific country conditions) and the leveraging of cooperation by other actors to enforce “non-entrée” to prosperous jurisdictions.<sup>177</sup> These patterns are particularly visible, as we saw earlier, in processes that involve transferring responsibility and, in effect,

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& Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004); Margaret E. Keck & Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*, in EXPLORING INTERNATIONAL HUMAN RIGHTS 98 (Rhonda L. Callaway & Julie Harrelson-Stephens eds., 1998) [hereinafter Keck & Sikkink, *Activists Beyond Borders*]; Margaret E. Keck & Kathryn Sikkink, *Transnational Advocacy Networks in International and Regional Politics*, 159 INT’L SOC. SCI. J. 8.

<sup>172</sup> H. Patrick Glenn, *Persuasive Authority*, 32 MCGILL L. J. 261 (1987). See also Ran Hirschl, *Judicial Review and the Politics of Comparative Citations: Evidence and Methodological Challenges*, in COMPARATIVE JUDICIAL REVIEW 403 (Erin Delaney & Rosalind Dixon, eds., 2018).

<sup>173</sup> Scheppele, *The Migration of Anti-Constitutional Ideas*, *supra* note 169. See also Tom Ginsburg, Aziz Z. Huq, and Mila Versteeg, *The Coming Demise of Liberal Constitutionalism*, 85 U. CHI. L. REV. 239 (2018).

<sup>174</sup> KENT ROACH, *THE 9/11 EFFECT: COMPARATIVE COUNTER TERRORISM* (2011).

<sup>175</sup> Scheppele, *The Migration of Anti-Constitutional Ideas*, *supra* note 110., at 351.

<sup>176</sup> See, e.g., Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT’L J. CONST. L. 206 (2015).

<sup>177</sup> On “non-entrée,” see generally James C. Hathaway, *The Emerging Politics of Non-Entrée*, 91 REFUGEES 40 (1992); see also B. S. Chimni, *The Geopolitics of Refugee Studies: A View from the South*, 11 J. REFUGEE STUD. 350 (1998).

“outsourcing migration and asylum policy by subcontracting controls” to regional partners or migrants’ countries of origin and transit.<sup>178</sup>

Once a reputable court or government adopts a highly restrictive policy towards unauthorized migrants, other governments facing similar predicaments may decide to follow that earlier restrictive decision or policy (even if legally and morally contentious) as a persuasive precedent or “model” to justify *their* own subsequent choices limiting the substantive rights or procedural protections accorded to vulnerable migrant populations such as refugees, asylum seekers, and other humanitarian causes. Tellingly, when Australia initiated and then expanded its divisive “stop the boats” operations in the Pacific, advocates of these policies argued that, contrary to the sober objections raised by human rights groups and other non-governmental organizations, such operations were both permissible and unexceptional. In a classic manifestation of the impact of the constrictive precedent, Australian officials readily drew on the U.S. experience, stating publicly in defense of Australian tow-backs that the “U.S. Coast Guard has been turning boats around in the Caribbean for years.”<sup>179</sup> “If the United States (or any other affluent, rule-of-law democracy) can do it, so can we,” seems to be the operative rationale that guides such restrictive-policy-migration emulation.

The global influence of the US Supreme Court decision in *Sale* offers a classic example of this pattern at work. In that decision, the Supreme Court held that summary return of migrants, including asylum seekers, interdicted on the high seas does not engage the *non-refoulement* obligation to which the United States has committed through both its domestic and international law obligations.<sup>180</sup> On this account, *non-refoulement* obligations do not apply extraterritorially.<sup>181</sup> The *Sale* Court upheld an image of the border as static and fixed, standing at the territorial edges of the country. The interdiction of Haitian boats by US Coast Guard ships, which operated far away from the protected territory, was not “visible” to a Court that examined it under the classic Westphalian lens.<sup>182</sup> The United States’ continued commitment to this legal position is clear from its response to UNHCR’s Advisory Opinion on Extraterritorial Application of Non-Refoulement Obligations, released in 2007.<sup>183</sup>

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<sup>178</sup> RED CROSS, *supra* note 169, at 7.

<sup>179</sup> Douglas Guilfoyle, *Could Australia Follow a U.S. Lead on Maritime Interdiction of Migrants?*, EJIL-TALK! (Aug. 19, 2013), <http://www.ejiltalk.org/could-australia-follow-a-us-lead-on-maritime-interdiction-of-migrants/> (quoting Tony Abbott, then leader of the coalition opposition and subsequently prime minister of Australia).

<sup>180</sup> *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993).

<sup>181</sup> The presumption against extraterritoriality is deeply ingrained well beyond the context of mobility and migration. See, e.g., *Kiobel v. Royal Dutch Petroleum*, 568 U.S. 12 (2013). For a critical account, see generally Philip Liste, *Transnational Human Rights Litigation and Territorialized Knowledge: Kiobel and the “Politics of Space,”* 5 TRANS. LEGAL THEORY 1 (2014).

<sup>182</sup> For an original account of how the functional equivalent of the border argument could have been applied in the *Sale* case, see Motomura, *supra* note 12.

<sup>183</sup> U.S. DEP’T OF STATE, OBSERVATIONS OF THE UNITED STATES ON THE ADVISORY OPINION OF THE UN HIGH COMMISSIONER FOR REFUGEES ON THE EXTRATERRITORIAL APPLICATION OF NON-REFOULEMENT OBLIGATIONS UNDER THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES

The *Sale* ruling and the United States' permissive stance on preemptive interdiction has received critical rebuke. The English Court of Appeals, for example, broke the semi-sacred principle of international comity among courts when it referred to the case as "wrongly decided." Going a step further, the Inter-American Commission on Human Rights held that, contrary to *Sale*, the *non-refoulement* provision in the Refugee Convention "has no geographical limitations," thus interpreting legal responsibility and jurisdiction in a more robust fashion than ever before, no longer focusing solely on territorial location (as under the static model) but also on situations whereby a state exercises "effective control" or "public power" beyond its borders. A growing number of international law and migration scholars echo this judgement call. However, these statements are non-binding and *Sale* has proven more resilient than some have predicted. It has provided indirect guidance and legitimacy for comparable jurisdictions to adopt similarly obstructive interdiction policies that "align in a control continuum...at several stages of the migrant's journey."<sup>184</sup> These policies currently escape the reach of legal responsibility and accountability by claiming that *non-refoulement* does not apply extraterritorially.<sup>185</sup> Australian courts, for example, have interpreted the fact that the United States has already provided justification for such a rights-restricting approach as "license" to follow suit.<sup>186</sup>

In a similar vein, the European Union's invention of the "safe third country" concept has travelled widely and globally, inspiring, among other examples, the safe third country agreement between the United States and Canada.<sup>187</sup> Norway's recent designation of Russia as a "safe third country" to which asylum seekers can be returned, thus denying them access to Norway's—and by extension, Europe's—asylum procedures, is another example.<sup>188</sup> In turn, the Australian policy of declaring maritime arrivals unauthorized by virtue of reaching the excision zone has inspired Canadian legislation to declare those arriving without authorization by boat as "irregular arrivals," thereby restricting their substantive

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AND ITS 1967 PROTOCOL (2007), <https://2001-2009.State.gov/s/l/2007/112631.htm>.

<sup>184</sup> MORENO-LAX, *supra* note 136, at 2.

<sup>185</sup> *Id.*

<sup>186</sup> As in the United States, Australian courts have determined that practices of interdicting migrants and asylum seekers on the high sea does not violate non-refoulement. See *Ruddock v. Vadarlis* (2001) FCA 1329 (Federal Court) (Austl.).

<sup>187</sup> AGREEMENT BETWEEN THE GOVERNMENT OF CANADA AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA FOR COOPERATION IN THE EXAMINATION OF REFUGEE STATUS CLAIMS FROM NATIONALS OF THIRD COUNTRIES, CTS 2004/2, 29 December 2004. For a history of the safe third country concept, see María-Teresa Gil-Bazo, *The Safe Third Country Concept In International Agreements On Refugee Protection: Assessing State Practice*, 33 NETHERLANDS QUARTERLY OF HUMAN RIGHTS 42 (2015).

<sup>188</sup> Press Release, Gov't of Norway, Ministry of Justice and Public Security, Proposed tightening of rules on asylum, No: 102 – 2015, Nov. 13, 2015. See also PARLIAMENT OF NORWAY (STORTINGET), Written question from Helga Pedersen (A) to the Minister for Immigration and Integration, Document No. 15: 414 (2015-2016), Posted 8 January 2016, Answered 12 January 2016, <https://www.stortinget.no/no/Saker-og-publikasjoner/Sporsmal/Skriftlige-sporsmal-og-svar/Skriftlig-sporsmal/?qid=64309>.



and procedural rights and protections.<sup>189</sup> Even if eventually recognized as refugees, such arrivals face a freeze period of five years before they can apply for permanent residence.<sup>190</sup> In short, ideas travel quickly and furiously across borders, especially when policymakers feel pressure to demonstrate action to counter the public perception of loss of control. For those *en route* or escaping from harm's way the result is further restrictions and tightening of rights by precisely those premium democratic destinations that are globally perceived to be beacons of the rule-of-law. With such behavior advanced by the leaders of the so-called "free world," there is real room for concern that further restrictions and tightening of controls from countries that formally adhere to the values of human rights, freedom and democracy will justify infringement on protected rights by partner States that may have less than dazzling records on human rights.<sup>191</sup>

The sheer reach and magnitude of the shifting border also invites revisiting the age-old question of how to tame menacing governmental authority. As the shifting border has now become almost boundless in its conceptual framing and spatial manifestation, it has become increasingly difficult to challenge with traditional legal tools and conceptions of constitutionalism and human rights, both of which still rely on territoriality as their core grounding principle. If we seek to develop fresh legal responses to tame the rights-restricting consequences of the shifting border, we must rethink the relationship between law and territory, space and political organization—a task to which I now turn.

#### IV.

##### A NEW APPROACH

Taking into account the gravity of the problems addressed, I now turn to explore strategies by which these pervasive patterns might be challenged or changed. Because it engages the basic building blocks of the modern state—territoriality, sovereignty, and legal spatiality—this transformation entails some of the core legal and normative questions of our time.

##### A. *On Space and Political Organization: Hannah Arendt's Intervention*

Writing after the atrocities of WWII and the Holocaust, Hannah Arendt astutely observed the following: "[s]uddenly, there was no place on earth where migrants could go without the severest restrictions, no country where they would be assimilated, no territory where they could found a new community of their

<sup>189</sup> GOV'T OF CANADA, BACKGROUNDER – DESIGNATED HUMAN SMUGGLING EVENTS (June 29, 2012), <https://www.canada.ca/en/immigration-refugees-citizenship/news/archives/backgrounders-2012/designating-human-smuggling-events-1.html>.

<sup>190</sup> PUBLIC SAFETY CANADA, MINISTER OF PUBLIC SAFETY MAKES FIRST DESIGNATION OF IRREGULAR ARRIVAL UNDER *PROTECTING CANADA'S IMMIGRATION SYSTEM* ACT, (Dec. 5, 2012), <https://www.publicsafety.gc.ca/cnt/nws/nws-rlss/2012/20121205-1-en.aspx>.

<sup>191</sup> Indeed, it may lead to claims of upholding double standard when "weaker countries [are expected] to live up to their humanitarian obligations when major powers did not do so." Andy Lamey, *A Liberal Theory of Asylum*, 11 POL., PHILOSOPHY & ECON. 235, 250 (2011).

own. This moreover, had nothing to do with any material problem of overpopulation; it was a problem not of space but of political organization.”<sup>192</sup> While the world has changed dramatically since the publication of *The Origins of Totalitarianism* in 1955, the plight of refugees and displaced persons still remains one of the biggest and most pressing human rights issues of our time. For Arendt, the “right to have rights” could only be realized in the context of a political community in which we are political equals who are judged “through our actions and opinions, by what we do and say,” not on account of ascriptive factors such as ethnic lineage or descent.<sup>193</sup> No less significant, for Arendt the tragedy of the migrants and refugees was that they had “no place on earth where [they] could go without the severest restrictions.”<sup>194</sup> This is a problem wholly entrenched in the Westphalian system that accords exclusive sovereignty to national jurisdictions over every habitable space on earth. For Arendt, the fulfillment of political equality could only take place within a particular kind of territorially-demarcated political community: the modern state. Despite her radicalism and groundbreaking ideas, Arendt’s writing, a product of her own historical period, manifests a rather fixed and rigid vision of territoriality, corresponding to the static view of the border.

Today, paradoxically, States themselves are reinventing sovereignty and territoriality, showing a remarkable capacity to adapt to new environments. For States to do nothing in the face of large-scale global mobility pressures would counter the basic sovereign instinct to control the border. Governments and growing sectors of their populations perceive the irregular movement of people as risking the stability of the international order, and view border control as “either or both a security imperative and a life-saving humanitarian endeavor.”<sup>195</sup> Such perceptions inform discussions of contemporary migration as a “crisis” for a multitude of actors: those seeking mobility but denied access to legal channels of entry; for neighboring countries on the brink of insolvency and political instability; for transit countries endowed with growing responsibilities to stop the flow of migration; for governmental and non-governmental humanitarian agencies carrying the brunt of meeting the fundamental needs of migrants and refugees stranded in “temporary” situations which seem to never end; and for destination countries and supranational bodies fearing “loss of control.” Ultimately, the debate over the effect of irregular movements of people also leads to conclusions of a crisis for the Westphalian order itself, since sovereignty is (unrealistically) expected to generate unbridled control over cross-border movement. In Europe, the failure to offer adequate responses to the sharp increase of asylum applications in the summer of 2015 under a common framework led to

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<sup>192</sup> HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 373 (2004).

<sup>193</sup> Seyla Benhabib, *Political Geographies in a Global World: Arendtian Reflections*, 69 *SOCIAL RESEARCH* 539, 557 (2002).

<sup>194</sup> ARENDT, *supra* note 194, at 373.

<sup>195</sup> Bill Frelick et al., *The Impact of Externalization of Migrant Controls on the Rights of Asylum Seekers and Other Migrants*, 4 *J. MIGRATION & HUMAN SECURITY* 190, 193 (2016).

the return of internal borders.<sup>196</sup> These re-erected borders combine visible and invisible elements of migration control as States attempt to regain and display their potent sovereign authority.

### B. Restraining Government Authority

Today's harsh realities reveal the inadequacy of seeking legal cover under the static conception of the border while persistently breaching it by devising far more dynamic, multifaceted and de-territorialized techniques of governance that rely largely on the flexible variability of the shifting border. In the tension between States' skirting their constitutional and human rights obligations and their declared commitment to upholding them, an opening might be found to challenge the unresolved contradictions embedded in the shifting border.<sup>197</sup>

Refuting the predictions of globalists and others about the imminent demise of borders and the waning of sovereignty, the relaxing of the linkage between territory and authority has given *greater* latitude for governments and regulatory agencies to develop a whole new way to decouple the sovereign act of migration regulation and control from the site of territory. What are the implications of this massive, yet still under-theorized, change of the *locus* of the exercise of migration control? Does the new shifting-border reality introduce not only greater restrictions but also a new range of possibilities for resistance and creative openings for action (whether by States, individuals, non-governmental actors, or the international community at large) that were impossible to imagine under the classic, static view of the border? I believe the answer is affirmative and it need not fall back on the horns of the competing yet no longer stable poles of the static-border and disappearing-border narratives.

To overcome the current impasse, we need to return to the basics—to the conceptions of sovereignty, territory, and legal spatiality—which, like Arendt's analysis, still rely heavily on the static conception of borders in which access to territory is the crucial component.

### C. Closing the Accountability Gap

We have already seen the manifold ways in which the shifting border disrupts traditional notions of sovereignty and territoriality. Instead of ignoring this reality (as is done by most accounts of migration, whether positive or normative), I wish to take the argument a step further and argue that it is more promising to borrow a page from the shifting border book, albeit subversively. The basic idea, currently more aspirational than applied, is to take advantage of the shifting border's advanced techniques of spatial and temporal expansion in order to *counter* its stated goals of restriction. Thus, where a country intentionally

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<sup>196</sup> Annalisa Lendaro, *A 'European Migrant Crisis'? Some Thoughts on Mediterranean Borders*, 16 STUDIES IN ETHNICITY AND NATIONALISM 148, 149–50 (2016).

<sup>197</sup> Constitutionality and the rule of law are the foundations of legitimate government. They both empower and limit the exercise of authority by the institutions of the State.

de-links migration control activities from its geographical borders, a correlated expansion of rights and protections for the individual must follow. Three inter-related strategies would help to achieve this result: (i) expanding the extraterritorial reach of human rights, and (ii) placing the burden on destination states to deploy border representatives on intake missions to countries of origin and transit, effectively mobilizing the machinery of the shifting border in service of mobility and rights-protection; and (iii) rethinking legal spatiality to view it as a resource for rights-protection rather than a tool for exclusion. These three changes in law and thought would relax the outdated fixation on territorial access as a precondition for refuge and protection, a shift that is necessary if we are to respond to the reality of borders that move. All three components of this new approach warrant further elaboration.

*a. Human Rights Follow the Shifting Border*

The first method, expanding the extraterritorial reach of human rights, would function to reign in the shifting border by ensuring that core human rights and constitutional provisions that regulate and constrain the exercise of executive power would apply *irrespective* of the location where border control activities are exercised, whether on land, sea, or in the air. The goal is to act *as if* power exercised at the shifting border had been exercised within the domain of the territorial State or its actual, physical frontiers, activating the range of legal instruments and norms that constrain the state and its agents in the presence of exercising governmental authority.<sup>198</sup> This does not mean that migration regulation would “resettle” at the fixed border. Rather, it may spell no less important a shift in enforcing restraint on such exercise of power, according to the basic constitutional principle that the “presence of authority does not entail the absence of constraint.”<sup>199</sup>

Policymakers accept this restraining principle in most other fields of law.<sup>200</sup> Furthermore, there is no inherent reason why the sovereign authority to control borders ought to entail that the “government must have virtually unrestricted power over immigration—power largely immune from constitutional constraint,

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<sup>198</sup> This approach has grounding in the jurisprudence of national and supranational courts as well as human rights tribunals. The European Court of Human Rights has articulated the basic principle according to which the European Convention on Human Rights “cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of the other State which it could not perpetrate on its own territory.” *Case of Issa and Others v. Turkey*, App. No. 31821/96, Judgment, Eur. Ct. H.R. ¶ 71 (Nov. 16, 2004), <http://hudoc.echr.coe.int/eng?i=001-67460>. This principle originally focused on military action but was gradually expanded to other contexts as well.

<sup>199</sup> Adam B. Cox, *Three Mistakes in Open Borders Debates*, in NOMOS: IMMIGRATION, EMIGRATION, AND MIGRATION 51, 54 (Jack Knight ed., 2017).

<sup>200</sup> For a comprehensive analysis of the limits the Constitution places on the political branches’ “plenary power” to control immigration, see generally Shawn E. Fields, *From Guantanamo to Syria: The Extraterritorial Constitution in the age of “Extreme Vetting”*, 39 CARDOZO L. REV. 1123 (2018) (analyzing the limits the Constitution places on the political branches’ “plenary power” to control immigration).

judicial oversight and even moral objection.”<sup>201</sup> From the perspective of the individual, bringing constitutional and human rights constraints to bear on the exercise of authority at the shifting border would entail that basic procedural and substantive protections that would have applied to the encounter with a border agent at the territorial edges of the country should analogously apply if equivalent movement-control authority is exercised in a remote location.<sup>202</sup> This first line of response is based on the rationale underlying the shifting border, namely the call to switch from the merely *territorial* to the *jurisdictional* and the *functional*. This proposed framework rests on human rights arguments in favor of treating effective control as the relevant basis for legal responsibility in such extraterritorial or grey-zone situations.

There are important precedents pushing in this direction. In its recent case law, the European Court of Human Rights (ECtHR) imposed juridical limits on extraterritorial migration control on the high sea. In the early 2000s, facing a tide of irregular migrants from Libya headed to the Italian coast, Italy began to conceptualize the space of the Mediterranean sea as an expanded “border zone” that could act as a buffer to mainland Italy.<sup>203</sup> To achieve this vision, Italy and Libya signed the innocently named Treaty of Friendship, Partnership and Cooperation, which stipulated a grandiose migration control project whereby Italy would provide ships and staff to patrol the 2,000 kilometers of Libyan coastline.<sup>204</sup> The treaty addressed neither the interdiction nor the push back of irregular migrants intercepted on the high seas, nor did it specify any human rights provisions or protections for asylum seekers. In the landmark *Hirsi* case, decided in 2012, the ECtHR held that Italy had breached its protection obligations when it stopped a vessel with about 200 passengers and sent the intercepted migrants back to Libya without providing them with a chance to make protection claims. To establish whether Italy had a protective responsibility, the ECtHR had to determine whether the group of irregular migrants who filed the claim (24 of the estimated 200 migrants who were onboard the interdicted boat) were at any stage under Italy’s jurisdiction. Although the European Convention of Human Rights does not apply globally, in *Hirsi* the Grand Chamber held that human rights

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<sup>201</sup> *Id.*, at 53. In practice, such regulation is hard to achieve even within the domestic sphere, let alone at the transnational level.

<sup>202</sup> The implementation of such an edict is of course highly complex as the border itself has frequently been a special region of potentially less extensive rights protections. As with other fields of law in which law applies extraterritorially, important procedural and substantive details need to be worked out, but the principle remains clear: the exercise of legal authority cannot be free from review and accountability by virtue of operating from a distance.

<sup>203</sup> Valentina Aronica, Italy, the Mediterranean as a Political Space, and Implications for Maritime Migration Governance (2016) (unpublished MSc dissertation, University of Oxford).

<sup>204</sup> The Treaty of Friendship, Partnership and Cooperation Between the Italian Republic and Great Socialist People’s Libyan Arab Jamahiriya, Aug. 30, 2008, <https://www.perfar.eu/policies/treaty-friendship-partnership-and-cooperation-between-italian-republic-and-great-0> (specifically Articles 8, 9, 19 and 20). See Natalino Ronzitti, *The Treaty on Friendship, Partnership and Cooperation between Italy and Libya: New Prospects for Cooperation in the Mediterranean?*, 1 BULLETIN OF ITALIAN POLITICS 125, 130 (2009) (commenting on the bilateral treaty).

obligations do *not* necessarily stop at the traditional, territoriality-fixed “Westphalian” border. Instead, such obligations can follow state action and thus become applicable beyond a state’s borders if and when state officials exercise “continuous and exclusive *de jure* and *de facto* control.”<sup>205</sup> By focusing on the exercise of effective control, rather than asking *where* the act took place, the ECtHR expanded Italy’s legal liability beyond its territorial border. Moreover, it held that Italy’s failure to offer the interdicted-at-sea migrants an opportunity to make an asylum claim or challenge their removal—procedures they would have been entitled to had they actually “made it” to Italy’s shores—amounted to a breach of the Convention.

As evidenced in *Hirsi*, the ECtHR has rejected the rights-restricting approach adopted by the U.S. Supreme Court in *Sale*, in which the Court held that, under domestic or international law, the U.S. Coast Guard is not obliged to *non-refoulement* if irregular migrants are interdicted on the high seas and then turned back. By contrast, the ECtHR adopted a more expansive interpretation of jurisdiction, responsibility, and effective control. We saw earlier that the ability to repeatedly change the locus of migration control and act through multiple levels of governance and with various actors, both public and private, gives the shifting border its edge. Refocusing on the *content*, not the *location*, of the shifting border techniques adopted by States—which are either acting alone, in concert, or under the auspices of supranational entities such as Frontex—helps close the accountability gap, extend rights, and apply regulatory controls on otherwise “unruly” practices.

In another recent case, *N.D. and N.T.*, which dealt with attempts by Spain to stop migrants from reaching the cities of Ceuta and Melilla (enclaves of Spain in Morocco), the ECtHR again emphasized that what matters is not how a member State defines its “operational border”, but whether those affected by such exercise of migration control were given basic procedural protections. Whereas the *Hirsi* case dealt with a policy of stretching the border outwards, *N.D. and N.T.* concerns the tendency to pull the border inward, as we have seen in the U.S. example of expedited removal. Guarding against uninvited entry, Spain erected an 11.5-kilometer barrier around Melilla by building three massive fences of barbed wire, fitted with sensors and cameras, and thus separating the European Union from Africa. The three fences were located on Spanish territory, not outside it. Reminiscent, too, of the Australian concept of excised territory, Spain carved out a zone of Spanish territory in Melilla that was “non-Spain” for the purposes migration control. In this so-called operational border zone, the principle of *non-refoulement* did not apply.<sup>206</sup>

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<sup>205</sup> *Hirsi Jamaa v. Italy*, App. No. 27765/09, Judgment, Eur. Ct. H.R. ¶ 81 (Feb. 23, 2012).

<sup>206</sup> Anyone caught trying to climb the fences, crossing the area between the fences, or sitting on top of the third fence closest to the city of Melilla, was subject to a practice of “summary returns” to Morocco. These summary returns applied to third-country nationals that were “detected on the border line of the territorial demarcation of Ceuta or Melilla while trying to cross the border’s contentive elements (fences) to irregularly cross the border.” Aliens Act art. 10 (B.O.E. 2009, 10) (Spain).

A human rights group represented N.D. and N.T., Malian and Ivorian nationals who were part of a group of migrants who attempted to enter Spain via the Melilla barrier, in a challenge to Spain's practice before the ECtHR.<sup>207</sup> While there was some confusion about the precise chronology of the events at the enclosures, the basic facts were that N.D. and N.T. had succeeded in scaling the first two fences and had climbed on to the top of the third fence. After several hours, they had climbed down the third fence with the assistance of the Spanish police. Members of Spain's *Guardia Civil* had immediately arrested them, and without affording them procedural treatment or opportunities to explain their identities and circumstances, had transferred them back to Morocco, where they were subsequently deported.<sup>208</sup> By Spain's account, N.D. and N.T. were stopped at the operational border and thus never reached Spain. By extension, they never entered the region and "realm" of European human rights conventions and protections. The Strasburg court flatly rejected this claim. Interestingly, however, the ECtHR avoided a determination on whether the applicants succeeded in entering Spain, sidestepping a confrontation with a national Member State on a matter as sensitive as defining its own geographic and cartographic boundaries. Instead, it switched the jurisdictional basis altogether: *from the territorial to the functional*. The court held that once the applicants climbed down the third fence, they were under the "continuous and exclusive control of the Spanish authorities."<sup>209</sup> By virtue of this exercise of effective control by uniformed State officials, jurisdiction had arisen.

These legal precedents offer a glimpse into how effective control—as a functional rather than territoriality-bounded interpretation of jurisdiction—can expand the spatial reach of human rights in ways that begin to mimic the creativity and flexibility of the shifting border itself. If governments seek the "gain" of excision and the creation and fortification of constitution-free or human-rights-free zones, they cannot do so without constraints. The "pain" of judicial review and the strictures of separation of powers are the foundation of rule of law democracies. Without them, there is no check on executive power, no bulwark against arbitrary government. The extraterritorial application of constitutional and human rights protections is an indispensable mechanism to ensure that when a government acts "outside its borders, its powers are not 'absolute and unlimited.'"<sup>210</sup> While still nascent and evolving, the jurisprudence is slowly catching up with the dynamic reinvention of territorially-unbounded border control.<sup>211</sup> The basic idea of having legal responsibility "follow" the versatile

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<sup>207</sup> *N.D. and N.T. v. Spain*, App. Nos. 8675/15, 8697/15, Judgment, Eur. Ct. H.R. (2017).

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Boumediene v. Bush*, 553 U.S. 723, 765 (2008).

<sup>211</sup> In theory, we can imagine a legal regime establishing such responsibility *wherever* and *whenever* border migration controls take place. In practice, the case law to date is more circumscribed. It holds that when the facts clearly establish that border guards or other official agents of the State exercise effective control and explicitly breach a basic norm of human rights such as *non-refoulement* or fail to offer core procedural protections, legal responsibility will follow. *Hirsi Jamaa v. Italy*, App. No.

actions and locations of migration control is one promising path to begin to close the gap between a mobile exercise of the shifting border and an outdated system of constraints on the exercise of authority that is imagined as immobile under the confines of a static vision of territoriality.

No solution is a panacea, however. In the cat-and-mouse game that has governments extending the reach of the shifting border both inward and outward while seeking to skirt their constitutional and human rights responsibilities, these governments may again prove more adaptive and savvy than the disappearing border or demise-of-the-state globalization theories would predict. Post-*Hirsi*, Italy no longer sends its ships and personnel to interdict unwanted migrants in the high seas. Instead, with generous EU funding, it has trained Libyan coast guard officials to do Europe's dirty job of closing the border.<sup>212</sup> Such "outsourcing" of migration control to third countries makes it difficult to establish legal responsibility; the requisite jurisdictional link with an EU Member State is technically broken.<sup>213</sup> The question of whether Italy has "proxy responsibility" under these circumstances is now the subject of litigation before the ECtHR. A coalition of human rights organizations commenced legal action against Italy on behalf of survivors of a sinking dingy carrying migrants off the coast of Libya.<sup>214</sup> The legal action alleges that the Italian authorities collaborated with Libyan Coast Guard to stop the migrants from reaching Europe by engaging in pull back operations. The core legal question at issue is whether the Italian authorities are flouting their human rights obligations by "outsourcing to Libya what they are prohibited from doing themselves."<sup>215</sup>

Additional concerns arise with the growing reliance on carrier sanctions. A series of bilateral and multilateral agreements oblige airline companies and other private for-profit actors to engage in what is essentially a quintessential act of

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27765/09, Judgment, Eur. Ct. H.R. (Feb. 23, 2012). See also Seunghwan Kim, *Non-Refoulement and Extraterritorial Jurisdiction: State Sovereignty and Migration Controls at Sea in European Context*, 30 Leiden J. Int'l L. 49 (2017), <https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/nonrefoulement-and-extraterritorial-jurisdiction-state-sovereignty-and-migration-controls-at-sea-in-the-european-context/DEB19084E3229F6950496F3F8044CAC6/core-reader>.

<sup>212</sup> The reports from Libya that migrants from west Africa are bought and sold in a modern-day slave trade is only exacerbating these concerns of complicity and unspeakable abuse of human rights. *African Migrants Reportedly Being Sold in 'Slave Markets' in Libya, UN Agency Warns*, Réfugiés Et Migrants, (Apr. 11, 2017), <https://www.un.org/press/en/2017/sc13105.doc.htm>; <https://refugeesmigrants.un.org/fr/node/100043193>.

<sup>213</sup> Such concerns were raised in the Report of the Special Rapporteur on the human rights of migrants by François Crépeau. See François Crépeau (Special Rapporteur on the Human Rights of Migrants), *Regional study: management of the external borders of the European Union and its impact on the human rights of migrants* ¶ 56, U.N. Doc. A/HRC/23/46 (Apr. 24, 2013).

<sup>214</sup> GLAN, *Legal Action Against Italy Over Its Coordination of Libyan Coast Guard Pull-Back Resulting in Migrant Deaths and Abuse* (May 18, 2018), <http://www.glanlaw.org/single-post/2018/05/08/Legal-action-against-Italy-over-its-coordination-of-Libyan-Coast-Guard-pull-backs-resulting-in-migrant-deaths-and-abuse>.

<sup>215</sup> Yale Law Sch., *Lowenstein Clinic Supports Lawsuit on Migrants in the Mediterranean* (May 8, 2018), <https://law.yale.edu/yls-today/news/lowenstein-clinic-supports-lawsuit-migrants-mediterranean> (quoting Dr. Violeta Moreno-Lax, GLAN legal advisor).



public exercise of migration-control authority: pre-entry clearance.<sup>216</sup> Frontline airline personnel or private security guards must check whether passengers have valid passports, visas, and any other required documentation prior to departure, operating as “surrogate border guards.”<sup>217</sup> In many parts of the world, these private actors are “often assisted by immigration liaison officers or officials from the destination state stationed in the departure State.”<sup>218</sup> This arrangement requires the cooperation of third countries, which must authorize the deployment on their territories of these foreign immigration or liaison officers. Remarkably, while stationed aboard and jointly implementing measures of migration control, these immigration liaison officers maintain only an advisory role with regard to the controls carried out by the airline staff, thus limiting the possibility of attaching liability to their home countries. As these examples illustrate, the more layers of discretion there are, and the greater the number and variation of actors involved (public and private, at home and abroad, official and semi-official), the more difficult it is to attribute legal responsibility, even under the more expansive interpretation of effective control.

*b. Shifting the Burden From the Individual to the State*

If mobility is to be protected in the age of the shifting border, it is not enough for destination states merely to affirm the human rights of those under their effective control. Rather, these countries should play an affirmative role in facilitating mobility. A rights-affirming response to the shifting border implores domestic, regional, and international courts, governments and engaged publics to dig new channels for migrants seeking protection, rather than leaving these migrants to rely exclusively on the act of “touching base.”

An example may help explain this second point. In 2015, Canada emerged as one of the global “good doers” in swiftly airlifting and resettling over 25,000 Syrian refugees.<sup>219</sup> How did Canada achieve this humanitarian feat? Unlike Europe, these refugees did not reach its shores. Instead, *the border came to them*, conceptually and functionally. The Canadian government dispatched Canadian immigration officials to refugee camps in Jordan, Turkey, and Lebanon, where they conducted pre-screening interviews with and identity verification of asylum seekers.<sup>220</sup> Within a matter of weeks, these reviews were completed, and Canada

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<sup>216</sup> Gammeltoft-Hansen, *Private Actor Involvement in Migration Management*, *supra* note 91.

<sup>217</sup> MORENO-LAX, *supra* note 136, at 6.

<sup>218</sup> Theodore Baird, *Carrier Sanctions in Europe: A Comparison of Trends in 10 Countries*, 19 EUROPEAN J. MIGRATION & LAW 307, 328 (2017).

<sup>219</sup> By 2017, the number of resettled Syrian refugees in Canada has almost doubled, reaching approximately 50,000, many of whom benefited from the country’s innovative private sponsorship resettlement program. GOV’T OF CANADA, 2017 ANNUAL REPORT TO PARLIAMENT ON IMMIGRATION (2017), <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/annual-report-parliament-immigration-2017.html>.

<sup>220</sup> Press Release, International Organization for Migration, IOM, Canada Open Processing Center in Amman, Jordan for Canada-bound Refugees (Jan. 12, 2015), <https://www.iom.int/news/iom-canada-open-processing-center-amman-jordan-canada-bound-refugees>; *see also* Gov’t of Canada,

issued not only temporary travel documents to its gates, but also permanent resident visas to successful claimants.<sup>221</sup> This road to citizenship provided an alternative to years of insecurity and limbo waiting for determination of their status in Europe, which would have only been possible if they were among the lucky ones who managed to reach its shores and comply with the requirements of the territoriality of asylum in order to be given such a chance in the first place.

Operating within a global paradigm of migration control, the Canadian initiative allowed the state to exercise powerful gatekeeping functions. However, it was revolutionary in deploying the shifting border “machinery” in the service of *enhancing* rights and securing mobility, rather than inhibiting both. This was done by shifting the burden of “touching base,” normally placed on asylum-seekers, to States and their authorized agents, moving the determination process closer to the asylum seekers *wherever* they are, so as to provide access-from-afar to opportunities that are otherwise open only to those who can afford to reach the actual border. Much like Canada’s reliance on the long arm of the shifting border when restricting mobility, this initiative allows decisions to occur prior to arrival and many thousands of miles away from the actual border.<sup>222</sup> Affording protection extraterritorially thus retains a statist logic, exerting sovereign control over admission and membership decisions,<sup>223</sup> although it is more amenable to regional and international cooperation efforts.<sup>224</sup> However, shifting the burden from the individual to the state here *bolsters*, rather than undermines, rights and protections for those who need them most. At the same time, for the individuals selected, it provides hope, dignity, and a ticket to a new, permanent home.<sup>225</sup> By completing

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*#WelcomeRefugees: How It Will Work* (Nov. 28, 2016), <http://www.cic.gc.ca/english/refugees/welcome/overview.asp>; Gov’t of Canada, *#WelcomeRefugees to Canada* (Nov. 24, 2015), <https://www.canada.ca/en/immigration-refugees-citizenship/news/2015/11/-welcomerefugees-to-canada.html>.

<sup>221</sup> Gov’t of Canada, *#WelcomeRefugees: Key figures*, <https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/welcome-syrian-refugees/key-figures.html#popup1>; *see also* Gov’t of Canada, *Syrian Refugee Resettlement Initiative – Looking to the Future*, <https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/welcome-syrian-refugees/looking-future.html>.

<sup>222</sup> Resettlement, voluntary repatriation, and local integration are the three durable solutions promoted by the UNHCR. Resettlement facilitates relocation from refugee camps in conflict zone, where the vast majority of the world’s displaced persons are presently hosted, to willing third countries that are typically far removed from the conflict zone. United Nations High Commissioner for Refugees, *UNHCR Resettlement Handbook* (2011), <http://www.unhcr.org/46f7c0ee2.pdf>.

<sup>223</sup> Pre-screening and admission from abroad also keeps the resettling government in the driver seat and allows it to combine international humanitarian assistance with a message of control communicated to the domestic population. As official documents put it: “protecting the safety, security and health of Canadians and refugees is a key factor guiding the Government of Canada’s actions throughout this initiative.” Compare this tone to the sense of loss of control and images of a mounting “invasion” manifested by leaders throughout Europe, and across the political spectrum, in the current refugee crisis. Needless to say, not all countries have the luxury of prescreening and resettlement.

<sup>224</sup> In the context of regional and global cooperation, countries would have to agree on how to allocate responsibilities among themselves for accepting refugees, according to what principles, and at what levels of absorption.

<sup>225</sup> Such resettlement determinations usually rely on UNHCR or country-specific priority criteria; they offer more immediate relief to those who are more vulnerable, according to priority criteria. In

the refugee determination and immigration screening process *without* demanding that asylum seekers first reach the territory of a state or its border, processing-at-a-distance creates possibilities for claiming asylum from “distant” places. By allowing for an expansion of the spaces of protection, people escaping from harm’s way who are unable to comply with the territorial arrival dictum will gain a chance to secure international protection according to priority criteria. Given the ingenuity of the shifting border architects, “touching base” should always remain an open venue for claiming protection. Moreover, vigilance is required to ensure that states and their delegates do not use—or rather, abuse—resettlement and related measures of processing-at-a-distance as substitutes for asylum procedures activated by territorial arrival, or as an additional pretext for preventing such arrival in the first place.

None of this will be easy to achieve in the current political climate, but the point I wish to emphasize is conceptual rather than applied. Although structurally resembling the shifting border, the severance of the linkage between territory and exercise of migration control in this context is a rights-enhancing, rather than rights-restricting, legal innovation. Contrary to expectations, geographically far-flung status-determination processing, complemented by the generous issuance of humanitarian visas that facilitate safe, dignified and legal entry channels for those facing exceptional circumstances provide greater control over who gets in and under what conditions, even in the context of an unfolding crisis, than the classic insistence on linking asylum claims to territorial access. The Canadian example thus shows us the potentially rights-enhancing possibilities buried underneath the restrictive tendencies of the shifting border.<sup>226</sup> The inversion of roles tasks States with the responsibility to reach out to the individual in need of international

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responding to natural disasters, other programs have now been established, either bilaterally and multilaterally, in different regions, with the Stated goal of providing greater protection for migrants by establishing mechanisms to acquire visas in countries of origin or transit. United Nations High Commissioner for Refugees, *UNCHR Resettlement Handbook*, *supra* note 222. In Brazil, for example, the government responded to a spike in human trafficking of Haitians seeking to escape the aftermath of the 2010 earthquake through a dangerous passage known as the “jungle route,” by opening in Port-au-Prince, Haiti, a visa processing facility, in cooperation with the International Organization of Migration (IOM). FATAL JOURNEYS: IMPROVING DATA ON MISSING MIGRANTS, VOL. 3, PART 2, 89–90 (Frank Laczko et al eds., 2007), <http://www.bristol.ac.uk/media-library/sites/sps/news/2017/fatal-journeys.pdf>. The aim of this initiative is to allow potential migrants to apply for special humanitarian permanent visas on location, rather than rely on smugglers to get them to Brazil without authorization via the deadly jungle route. The initial screening and processing in Port-au-Prince is conducted by the IOM and the ultimate visa decisions are made by Brazilian officials, offering another example of how a “humanitarian” shifting border that comes to the individual where and when she is in dire need may offer safety and security without requiring territorial arrival as a precondition. As with any such initiative, the intentions of the acting governments and related parties must be carefully scrutinized and kept in check.

<sup>226</sup> Current recommendations, developed in the context of discussion surrounding the global compact on refugees, have called the global community to commit to the goal of resettling ten percent of the world’s refugees per year. For a concise overview, see Kevin Appelby, *Strengthening the Global Refugee Protection System: Recommendations for the Global Compact on Refugees*, 5 J. MIGRATION & HUMAN SECURITY 780 (2017).

protection, and does not, as current law dictates, put the onus on them to reach the territory of a protection-granting state.

*c. Legal Spatiality as a Resource*

So, while Arendt is correct that political organization is at the heart of the predicament we face, I want to suggest that a productive response will reverse the order of operations; scholars and activist might think about place and space as part of the solution and then muster the political organization to follow.<sup>227</sup> More importantly still, treating space as a resource, not a problem, can help avert the plight that Arendt so powerfully identified of not having a place, *any* place, in the world in which the rightless, the stateless, or the displaced, can find refuge. Legal reliance on static, old-school, sovereigntist conceptions of “space” for relief and refuge prevents access to new worlds of opportunity for those who need them most. It condemns many of them to the Sisyphean fate of traversing and re-traversing terrains of shifting borders, at risk of being sent back to the country of origin or transit at any point along the continuum of checkpoints and legal portals that constitute today’s migration control apparatus.

Moving the border closer to the individual to offer her protection may take various configurations. It can be the result of unilateral decision-making, as in the Canadian initiative, or a result of bilateral and multilateral agreements. Either way, the discretion of a downstream country of resettlement to act outside its border is conditional upon the consent of the upstream, refugee-hosting country to hold the interviews and screening procedures on the latter’s territory.<sup>228</sup> Here we witness both the de-territorialization of legal space, as the process can, in principle, take place anywhere in the world, and its re-territorialization, as the interview must take place *somewhere* on the face of the earth. More comprehensive relief efforts would harness significant cooperation across national and regional borders, but so too will any feasible solution.<sup>229</sup> In terms of policy-making, such programs will likely embrace burden- and responsibility-sharing initiatives, in line with the recent UN Global Compact recommendations.<sup>230</sup> Future endeavors to break the exclusivity of the “touching

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<sup>227</sup> Governments themselves now routinely amend and challenge fixed conceptions of territoriality, for example, by creating special economic zones within their jurisdictions whereby distinctive legal regimes apply, or by the creation of jointly-governed border regions, in which cooperative governance is influenced by more than one set of legal norms emanating from multiple and multilevel sources.

<sup>228</sup> Where relevant, the cooperation of the UNHCR is also elicited. The condition of consent by the country of asylum where migrants and refugees reside is vital. Otherwise, the humanitarian variant of the shifting border might be abused by States seeking to aggrandize their power in the name of protecting the vulnerable.

<sup>229</sup> The goal is to undo or at least tame the current linkage between arbitrary geographical proximity and bearing the brunt of humanity’s dispossessed.

<sup>230</sup> In the 2016 New York Declaration for Refugees and Migrants, the world’s leaders emphasized “the centrality of international cooperation” and further committed “to a more equitable sharing of the burden and responsibility for hosting and supporting the world’s refugees, while taking account of existing contributions and the differing capacities and resources among [s]tates.” See G.A. Res. 71/1, New York Declaration for Refugees and Migrants, ¶¶ 7, 11 (Sept. 19, 2016). While no concrete

base” dicta will require daring political leadership that is currently in short supply; however, counter to populist and anti-immigrant rhetoric, it is in the *sovereigntist* interest of States to create a comprehensive action plan that will allow refugees to apply from afar, as well as to keep open routes for protection that are activated upon territorial arrival.

Observing the dangers of inaction by Europe prior to the refugee crisis of 2015, François Crépeau, the United Nation Special Rapporteur on the Human Rights of Migrants, proposed at the time that EU member States, along with other Global North countries, such as Canada, Australia, New Zealand, and the United States, as well as a number of immigration countries in the South, such as Brazil, make a commitment to a meaningful refugee resettlement program that States could put into operation with the help of the UNHCR and civil society organizations according to priority criteria.<sup>231</sup> Such a proposal was never adopted. However, its principled and prudential justification rests precisely on the logic that I have advanced here—namely, extending protection through relocation or resettlement to a wider class of people fleeing oppression and involving more non-geographically-proximate countries in the effort of relief. Such programs reach out to “people out of place” in the countries to which they have fled. In this way, they encompass those who have *not* been able to comply with the survival-of-the-fittest “ordinance” demanding that they enter the territory of the affluent countries that simultaneously do everything within their powers to keep them out.

In a world where eighty-five percent of the global population of refugees and displaced persons are hosted by already struggling, resource-strapped countries in close proximity to active conflict zones, there is much to gain in breaking the current gridlock.<sup>232</sup> Typically, when affluent States flex their legal muscles, the shifting border moves to avert uninvited entry. However, the very same techniques of reaching people before they encounter the territorial border, techniques that are currently rights-restricting, can also become rights-enhancing. Individuals in need of protection should be able to claim asylum or other forms of protection upon encountering the shifting border, which, given the logic of

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measures currently support this Declaration, it provides at least some aspirational commitment and the basic grammar for such a potential cooperation. Although the United States has pulled out the process, some initial progress is already under way at the global level. In 2017, the OECD International Migration Outlook has reported that “[i]n response to the growing demand for international protection, many OECD countries have increased their resettlements programmes.” OECD INTERNATIONAL MIGRATION OUTLOOK 2017, 1 (2017).

<sup>231</sup> François Crépeau, U.N. Human Rights Council, 29<sup>th</sup> Session, Geneva, Statement by Mr. François Crépeau, Special Rapporteur on the human rights of migrants 5 (June 15, 2015) (transcript available in the UN OHCHR database) <https://www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/AnnualReports.aspx>.

<sup>232</sup> The commitment to more equitable burden- and responsibility-sharing has long been pushed for by the world’s developing countries, where the vast majority of the world’s refugees are hosted. See Rebecca Dowd & Jane McAdam, *International Cooperation and Responsibility-Sharing to Protect Refugees: What, Why, and How?*, 66 INT’L & COMP. L.Q. 863 (2017).

pushing the border out, will likely occur far away from the territory they wish to enter.

It is important to note that the three-pronged strategy I have just described rests on the lexical priority of the first prong (human rights follow the border) over the latter two (both which aim at relocating protection operations to where vulnerable migrants are, rather than vice versa). The imperative of human rights protection at the border must take precedence to ensure that governmental authorities do not use outreach programs as fig leaves while extending the rights-restricting power of the shifting border under humanitarian guises.

#### CONCLUSION

The shifting border is one of the most dramatic developments currently unfolding in the world of migration and mobility control, yet it has received only scant attention. Today's brusque encounters of moving bodies and shifting borders provide concrete illustrations to broader and more fundamental tensions in law and ethics, such as those between sovereignty and human rights, local and global obligations, the right of the state to exclude and its duty to protect. Instead of rehearsing these influential debates, this Article has sought to disrupt some of these familiar dichotomies while simultaneously investigating the grounds on which they stand.

A new approach is required to decipher the emerging code of the shifting border in a world in which prosperous "islands" of high standards of human rights, affluence and democratic governance are increasingly protected through the repressive machinery of the shifting border and "de-territorialized" migration control. The sheer reach and magnitude of the shifting border also calls for revisiting the age-old question of how to tame menacing governmental authority. As this power is almost boundless in its conceptual framing and spatial manifestation, it has become increasingly difficult to challenge with traditional legal tools and conceptions of human rights, both of which still remain territorially centered.

The analysis I have offered—especially the emphasis on territory's malleability under the shifting border conception, now routinely and instrumentally used to help States control migration and admit the few but not the many—points to a previously unexplored path. Instead of a menacing obstacle and tool to restrict access to asylum, we can rethink the shifting border as a creative resource in the service of advancing human rights across borders. As we have seen, the shifting border is a powerful tool and States are unlikely to cede their authority over migration regulation any time soon, especially not in the current political environment.

Under such circumstances, the changes to policy and legal thinking that I have proposed offer a more promising future than the current alternatives on offer. The objective is to protect migrants' procedural and substantive rights wherever they encounter the border while simultaneously relaxing the linkage between territory and asylum. It would lay the foundation for a conceptual and paradigm

shift that is long overdue. The better we comprehend the new logic and codebook informing the shifting border's legal remit and its multifaceted policy instruments, the better positioned we will be to develop counter narratives and to carve out new theoretical and applied pathways to counter their deleterious effects.