Part I

Lead essay
From the Great Wall of China to the Berlin Wall, fortified manifestations of the border have long served as a powerful symbol of sovereignty, real and imagined. In 1989, the fall of the Berlin Wall led many to predict that barbed wire and sealed entry gates would become relics of a bygone era. Over a quarter of a century later, we find a very

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For a critical exploration of border walls, see Wendy Brown, Walled States, Waning Sovereignty (Cambridge: Zone Books, 2010). 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 (Cambridge: Polity Press, 2007), pp. ix, 1. In international law, Convention on the Rights and Duties of the State (Montevideo Convention) art. 1, 26 December 1933, 165 L.N.T.S. 19 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.” In international politics, the centrality of territory to sovereignty is acknowledged as a basic norm of the Westphalian order. See Michael Zürn, Martin Binder, and Matthias Ecker-Ehrhardt, ‘International Authority and Its Politicization,’ International Theory 4 (2012): pp. 69–106.
different reality. Today, new walls are erected at an unprecedented pace the world over.² Around Spanish enclaves in Morocco, between South Africa and Zimbabwe, India and Bangladesh, Hungary and Turkey, and along the US–Mexico border and Norway’s arctic border barrier with Russia, menacing border walls and steel fences continue to signal that even in a supposed post-Westphalian era physical barriers are still considered powerful measures to regulate migration and movement.

At the same time, a new and striking phenomenon—the shifting border—has emerged. The notion that legal circumstances affecting non-members change substantively only after they “pass through our gates” is well entrenched in both theoretical debates and regulatory practice.³ The remarkable development of recent years is that “our gates” no longer stand fixed at the country’s territorial edges. The border itself has become a moving barrier, an unmoored legal construct. As I will show in this essay, 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.⁴ Increasingly, prosperous countries utilize sophisticated legal tools to selectively restrict (or, conversely, accelerate) mobility and access by detaching the border and its migration-control functions from a fixed territorial marker, creating a new framework that I call the shifting border.

When it comes to migration control, the location of the border is shifting: at times penetrating deeply into the interior, at others extending well beyond the edge of the territory. And in other contexts, fixed territorial borders are “erased” or refortified. This is part of a shifting-border

⁴ This is so even as politicians frequently revert to images of a fixed legal spatiality when it comes to the rhetoric surrounding the exercise of sovereign authority, as in Donald Trump’s election promise to build an “impenetrable, physical, tall, powerful, beautiful . . . border wall.”
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.” 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 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.” The traditional static border is thus reimagined as the last point of encounter, rather than the first. In this way, the shifting-border strategy makes it harder and harder 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. The shifting border is the key pillar in a wholesale agenda to strategically and selectively sort and regulate mobility as prosperous countries seek to “regain” control over a crucial realm of their allegedly waning sovereign authority.

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

5 Canada Border Services Agency, Department Performance Report 2008–09, Section II: Analysis of Program Activities by Strategic Outcome (Ottawa: CBSA, 05 November 2009); Office of the Auditor General of Canada, Report of the Auditor General of Canada to the House of Commons, Ch. 5: Citizenship and Immigration Canada—Control and Enforcement (FA1-2003/1-5E, 2003), ch. 5.8.


7 My reference here is to the current legal situation which holds, in the words of the ECtHR, 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. (2008), sec. 64 (internal references omitted). Contemporary political theorists have, however, questioned the justice and legitimacy of this current legal situation. For this fast burgeoning literature, see, for example, Sarah Fine, ‘The Ethics of Immigration: Self-Determination and the Right to Exclude’, Philosophy Compass 8 (2013): pp. 254–268.

specific frontier location. Just as the shifting border extends the long arm of the state, ever more flexibly, to regulate mobility half the world away, it also stretches deeply into the interior, creating within liberal democracies what have been variably referred to as “constitution free” zones or “waiting zones” (zones d’attente), where ordinary constitutional rights are partially suspended or limited, especially in relation to those who do not have proper documentation or legal status. Each of these spatial and temporal contractions and protrusions bears dramatic implications for the scope of rights and protections that migrants and other non-citizens may enjoy, revealing the violence that may be deployed through legal acts that ascribe meaning to bodies in relation to (shifting) borders, prescribing or denying them access and setting people in new relations of power in political spaces of im/mobility. In a world of mounting inequality and migration pressures, governments frantically search for new ways to expand the reach of their remit, both conceptually and operationally, inward and outward, in the process reinventing one of the classic dimensions of sovereignty in the modern era: namely, territoriality.

Philosophers and jurists are only now beginning to come to terms with these deep currents, which are reshaping the terrain of law and mobility in ways we might not yet fully recognize or understand. When it comes to today’s shifting border, we are, to borrow a metaphor from Seyla Benhabib, like travelers navigating a new terrain with the help of old maps; while the terrain has radically changed, our maps have not. Thus, we stumble upon streams we did not know existed, and climb hills we have never imagined.

Despite its striking implications for human dignity, democratic accountability, and disparities in attaining access to territory and

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10 The theme of legal interpretation occasioning the imposition of violence upon others is central to the work of Robert Cover. See, for example, Robert M. Cover, ‘Violence and the Word’, Yale Law Journal 95 (1986): pp. 1601–1629.

membership, the “near obsession” of wealthier countries with reimagining migration and reinventing border control through sophisticated legal (not extralegal) shifting-border techniques and innovations, we currently lack the basic conceptual language to capture, describe, and critique these rapid changes.\textsuperscript{12} This book begins to fill this lacuna.

The theoretical landscape and the road ahead

The shift in perspective I propose—from the more familiar locus of studying the movement of people across borders to critically investigating the movement of borders to regulate the mobility of people—reveals a paradigmatic and paradoxical shift in the political imagination and implementation of the sovereign authority to screen and manage global migration flows in a world filled with multiple sources of law: formal and informal, hard and soft, local, national, supranational, transnational, and international. Scholars in multiple disciplines have creatively explored borders as processes or methods.\textsuperscript{13} My analysis builds on some of these insights but seeks to both deepen and sharpen them by emphasizing the core role of law and legal institutions in reconfiguring the border in the brazen exercise of governmental authority. I further explore whether


\textsuperscript{13} Borders-studies scholars have creatively explored borders as processes or methods. See, for example, Thomas Nail, A Theory of the Border (Oxford: Oxford University Press, 2016); Sandro Mezzadra and Brett Neilson, Border as Method, or, the Multiplication of Labor (Durham: Duke University Press, 2013). My analysis complements these accounts by emphasizing the legal dimension of the reinvention of the border and the key challenges posed by these developments. Placing greater emphasis on territoriality and borders is part of a broader spatial turn in the social sciences, humanities, and law, to which critical and progressive geographers have significantly contributed. See, for example, Stuart Elden, The Birth of Territory (Chicago: The University of Chicago Press, 2013); Edward W. Soja, Postmodern Geographies: The Reassertion of Space in Critical Social Theory (London: Verso, 1989).
there are limits on such authority, and if so, how to activate them and who should do so.\textsuperscript{14}

In a world where borders are transforming, but not dissolving, I will aim to show that the question of legal spatiality—\textit{where} a person is barred from onward mobility and by \textit{whom}—bears 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. And here lies the deep paradox of the shifting border: when it comes to controlling migration, states are will-fully \textit{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 the destination country’s soil is firmly under their feet, yet access to these territorial spaces of protection is increasingly unreachable. Those on the move are shut out long before they reach the gates of the promised lands of migration and asylum.\textsuperscript{15}

By charting the logic of a new cartography (or legal reconstruction) of borders and membership boundaries I seek to show both the

\textsuperscript{14} In legal and political theory, recent years have witnessed significant debates about whether—and if so, according to what grounds—states have the right to exclude. For influential accounts, see, for example, Arash Abizadeh, ‘Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders,’ \textit{Political Theory} 36 (2008): pp. 37–65; Fine, ‘The Ethics of Immigration’ (n 7); Joseph H. Carens, \textit{The Ethics of Immigration} (Oxford: Oxford University Press, 2013). For a wide-ranging and illuminating analysis, see Sarah Song, ‘Why Does the State have the Right to Control Immigration?’, in Jack Knight, ed., \textit{NOMOS: Immigration, Emigration, and Migration} (New York City: NYU Press, 2017), pp. 3–50.

\textsuperscript{15} There is some disagreement in the literature regarding whether the exclusion of asylum seekers is an indirect and unintended side effect of these new bordering techniques or one of its causes. Most scholars writing in the vein of human rights law and protection tend to express the latter view, as reflected in the work of Cathryn Costello, James Hathaway, Thomas Gammerltoft-Hansen, Matthew Gibney, Guy Goodwin-Gill, Jane McAdams, and Violeta Moreno-Lax, to name but a few. The contending view is articulated, among others, by legal academics and political theorists such as Kay Hailbronner and David Miller.
tremendous creativity and risk attached to these new legal innovations and the public powers they invigorate and propagate. I further seek to establish that debates about migration and globalization can no longer revolve around the dichotomy between open and 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, indicating, 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.”16

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 is also where the reformulation of basic democratic conceptions of membership boundaries become entangled with profound questions of justice and distribution about how, by whom, and according to what principles access to membership should be allocated, whether at birth or later in life. 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 ‘worthy’ to join us.”17 This idea of a border that is in flux—operating in a quantum-like fashion, simultaneously both fixed and fluid, stationary and portable, exerting influence over those coming under its kaleidoscopic dominion—is at the heart of my inquiry. This reinvention of the border facilitates unequal access to desired destinations and the life chances they offer. As such, it touches on some of the


most delicate and contentious issues that must be addressed by any membership regime that falls short of a global reach: defining who belongs (or ought to belong) and on what basis.

The shifting border is not a disappearing border, however. Although theorists and activists have prophesied the imminent demise of states and borders, the new reality explored in this study tests and challenges such conclusions. The examples I provide throughout the discussion show quite vividly that sovereign authority over migration is neither dissipating nor vanishing. Today’s brusque encounters of moving bodies and shifting borders provide concrete illustrations of both deeper and broader tensions, such as those between sovereignty and human rights, statists and cosmopolitanists, local and global obligations, and the right of the state to exclude and its duty to protect. Instead of rehearsing these influential debates, I wish to initiate a discussion that disrupts some of these familiar dichotomies while simultaneously investigating the grounds on which they stand, literally and conceptually. My intervention adds a crucial legal dimension to these pressing debates, focusing on the often neglected dimension of how the spatial and regulatory reinvention of borders matters dramatically to how we think about justice, equality, and the “crisis” of migration.18 In a rapidly changing system, freeing up sovereignty from a rigid and static “Westphalian” understanding of fixed territoriality is a powerful transformation.

This is the case because relaxing the relationship between law and territoriality and blurring the distinction between “inside” and “outside”

18 The term “crisis” is charged, but I have chosen to use it here to follow the current reference in most academic and public debates. Standard accounts in international migration point to the untenable life conditions in countries of origin as push factors, whereas the promise of a better life in destination countries is perceived as a pull factor, yet this analysis does not focus specifically on forced migration or the plight of refugees, who are entitled to international protection, whereas others fleeing dire circumstances, such as extreme poverty (as defined by the UN), for example, are not. Furthermore, it is not entirely clear what precisely is meant by the crux of the present “crisis” as it manifests in Europe: is it the very act of irregular entry by potential asylum seekers, which formally breaches states’ border controls and standard documentary requirements for international travel? The size and volume of the inflow? The failure of member states to devise and implement a shared policy, which can be seen as a governance crisis, or a value crisis (as some EU officials have labeled it)? Another interpretation is that we are witnessing a crisis of solidarity and governability. Depending on how the crisis is defined, both politically and legally, we can expect different interpretations of its best resolution.
The shifting border opens up a whole new purview for exercising power in the name of securing the integrity of the home territory and vigilantly protecting its membership boundaries. The sheer reach and magnitude of the shifting border thus calls for revisiting the age-old question of how to tame menacing governmental authority. Today, states, localities, and supranational entities such as Frontex (Europe’s border and coastguard agency) increasingly rely upon a complex web of national, subnational, supranational, transnational, and international instruments to profoundly reconceptualize and “de-territorialize” the classic Westphalian manifestation of sovereignty as an activity that may potentially take place anywhere in the world.\(^{19}\)

The shifting border is at once multidirectional and slippery, but not in the transnational, open, and tolerant variant that demise-of-the-state or post-Westphalian theories had foreseen. Instead, a darker, more restrictive, orientation has emerged. Far from the dream of a borderless world that emerged after the Berlin Wall came down, today we find not only more border walls erected on the global fault lines that divvy up the “have” and “have nots,” but also the rapid proliferation of moveable legal barriers, which may appear anywhere but are applied selectively and unevenly, with fluctuating degree, intensity, and frequency of regulation, as prosperous countries turn to increasingly sophisticated measures of pre-emption, containment, and control in their quest to prevent “spontaneous” migrants, including asylum seekers, from accessing their bounded legal spaces of rights protection and relative safety and stability.\(^{20}\)

The rise of the shifting border is contemporaneous with growing anxiety over immigration domestically and a surge in the numbers of


\(^{20}\) I owe the phrasing of this point regarding the fluctuating degree, intensity, and frequency of regulation to Derek Denman.
“people out of place” globally.21 This new constellation gives added impetus to addressing some of the most profound and arduous questions of our time. Is it legitimate for states to exclude non-members? If so, on what basis? Does the nascent multilevel architecture of global law assist, or paradoxically constrict, the protected rights available to people out of place? In a world of growing interdependence and strife, whose duty is it to assist those who are escaping harm’s way? Do such obligations extend to providing safe passage and temporary protection, or do they entail a right to resettlement and to embark on the road to citizenship? How much of a role should accidents of geography, such as a country’s proximity to war zones or regions of civil strife, play in determining which political communities are asked to shoulder the greatest responsibilities to “people out of place”? The arrival of the migration crisis (as it is known) at Europe’s borders has exposed the urgency of addressing these very questions, but this same crisis also immediately reveals the impossibility of formulating any easy answers.

21 I intentionally use the term “people out of place,” which is broader than the legal definition of asylum seekers and refugees. See Alison Brysk and Gershon Shafir, eds, People Out of Place: Globalization, Human Rights, and the Citizenship Gap (New York: Routledge, 2004). The legal definition of a “refugee” under the 1951 Convention Relating to the Status of Refugees, article 1, is a person who: “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion” is fleeing his or her country of nationality, or if stateless, is unwilling or unable to return to the country of his or her former habitual residence (UN General Assembly, Convention Relating to the Status of Refugees, July 28, 1951, United Nations, Treaty Series, vol. 189, p. 152, online www.refworld.org/docid/3be01b964.html). Today, migration scholars and international agencies readily acknowledge that the existing definitions, such as “voluntary” versus “forced migration” fail to recognize the more complex reality of human mobility across borders, which is better captured by terms such as “mixed migration” or “people out of place,” which 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). A debate is now brewing about whether the privileged legal protection granted to those fleeing a well-founded fear of persecution (the pinnacle of the internationally recognized definition of a refugee, emanating from the 1951 Refugee Convention) captures the full range of just claims for asylum, and whether additional instruments of international cooperation should be introduced in order to address the plight of displaced persons who do not meet the legal definition of refugee. For further elaboration, see Jill I. Goldenziel, ‘Displaced: A Proposal for an International Agreement to Protect Refugees, Migrants, and States,’ Berkeley Journal of International Law 35 (2017): pp. 47–89; Alexander Betts, Survival Migration: Failed Governance and the Crisis of Displacement (Ithaca: Cornell University Press, 2013); Matthew Price, Rethinking Asylum: History, Purpose, and Limits (Cambridge: Cambridge University Press, 2009).
A new road map 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 operation of “portable” legal walls that may appear, disappear, and reappear in variable coordinates of space and time. This shifting border changes form depending on how it is approached and by whom. The better we comprehend the new logic and codebook informing these conceptual changes and policy instruments, the better positioned we will be to develop counter narratives and to carve out new theoretical and applied pathways to oppose their deleterious effects. I seek to fill an important gap in the refined scholarly and policy discourse by offering a grounded analysis, a fine-grained inquiry into the causes and consequences, explanatory and interpretive resources required to grasp the constitutive features of this new paradigm. After exploring the core implications of these recent transformations, I will develop innovative, real-world democratic and institutional responses to counter the rights-restricting dimensions of the shifting border.

The discussion proceeds in three parts, and it operates on three interrelated levels: diagnostic, interpretive, and prescriptive. I begin by painting a picture of the complex, multilayered, and ever transforming border, one that is drawn and redrawn by the words of law. To comprehend the novelty of the shifting border, I will contrast it with contending models: the classic, clearly demarcated, territorial border that serves as the frontline for setting barriers to admission; 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. In combination with the sheer number of people on the move, this has led some scholars to argue that the grip of borders, or the even the fundamental principle of territoriality itself, is waning in a world “where agency (individual choice) takes precedence over structures (the laws and rules of territorial states).”22 As a corollary, it has been argued that in

the current age of globalization, sovereignty is waning and states are losing control over their authority to determine whom to include and whom to exclude. The actual legal practices 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. By locating 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. To substantiate these claims about the multidirectionality of the shifting border, I will focus on the legal innovations adopted by the world’s leading immigrant-receiving countries that have spearheaded the shifting border paradigm: the United States, Canada, and Australia. I will also demonstrate how the European Union and its member states have also rewritten pages—if not chapters—of the


24 While in some cases operating unilaterally, states are also devising increasingly complex and multilayered mobility-control regimes that require extensive interstate cooperation. For an excellent exploration of bilateral cooperation in the North American context, see Matthew Longo, The Politics of Borders: Sovereignty, Security, and the Citizen after 9/11 (Cambridge: Cambridge University Press, 2018).
shifting-border book in the context of re-bordering mobility through extensive “externalization” strategies. These case studies provide a rich empirical foundation upon which the rest of the discussion relies.

Next, I place the analysis within a broader range of pressing debates, from the recent “methodological turn” in political theory to revisiting the demise-of-the-state thesis to evaluating how the ability of major actors to “shift” the level and timing of regulation in the service of the everywhere-and-nowhere border strains earlier predictions that supranationalism and transnationalism will, almost necessarily, contribute to emancipatory developments. I further highlight the role of private third parties and the growing reliance on cooperation agreements with transit and host countries that create “buffer zones” around affluent democracies in exchange for material and infrastructure investments. Such processes of externalization are enthusiastically pursued by the European Union and its member states, raising real concerns about human rights abuses and “outsourcing” responsibility. Any attempt at theory building that seeks to move beyond idealized discussions of borders and membership boundaries must engage more directly with these empirical observations. This is vital if we want our non-ideal theories of migration, mobility, justice, multilevel governance, and democratic legitimacy to have relevance to the here and now.

Lastly, I revisit the relationship between law and territoriality, space and political responsibility, including the classic writings of Hannah Arendt, before engaging in the always perilous act of seeking pragmatically minded responses to seemingly intractable dilemmas. This part of the discussion brings together insights from law, political philosophy, and institutional design to explore innovative ways in which to “internalize” the costs of the extraterritorial dimensions of migration control. Moving from the interpretive to the aspirational, I will argue that the dramatic reconception of the border requires an equally radical reinvention of our responses to these new realities on the ground. To realign the almost boundless reach of migration control in the age of shifting borders with adherence to human rights norms by state actors (or their delegates, public and private), this final section will explore fresh ideas for crafting participatory and contestatory political responses to, as well as legal remedies for, today’s new paradoxes of border control. In order to
tame the rights-restricting tendencies documented in this study, we must not only decipher but also seek to “rewrite” the code of the everywhere-and-nowhere shifting border, infusing it with a migrant- and mobility-centered perspective that recognizes that states will continue to be key players in the current world order while at the same time de-centering them. One such promising direction for change is to amend the bases for attributing responsibility in a world of de-territorialized migration control. Instead of focusing on where the act of border regulation takes place, a more consistent and fair approach requires adopting a functional or jurisdictional test according to which obligations to protect are activated as soon as “effective control” occurs by official agents of states, acting alone or in concert, or their delegates. The idea is to acknowledge the restless agility and multi-scalar operations of the shifting border as eliciting 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 two prongs: expanding the extraterritorial reach of human rights and relaxing the fixation on territorial access. While 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.

1. Locating the shifting border: neither static, nor disappearing

To understand the tremendous resources and creativity invested in the shifting border in a world of conflicting demands of openness and

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25 This position is shared by many human rights organizations and is also the theory that guided the ECtHR in the landmark Hirsi v. Italy, [GC], App, No. 27765/09, Eur. Ct. H.R. (2012). For an early defense of the position that “[n]arrow territorial interpretation of human rights treaties is an 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’, American Journal of International Law 89 (1995): pp. 78–82, p. 82.
closure, we need to go back to basics, to revisit the dimension of territoriality, a core facet of the modern conception of sovereignty and its geography of power. In the world created in the image of the Westphalian system, “[s]overeignty is an idea of authority embodied in those bordered territorial organizations we refer to as ‘states’. . . [It] is one of the constituent ideas of the post-medieval world; it conveys a distinctive configuration of politics and law that sets the modern era apart from previous eras.”

In the post-Westphalian literature, by contrast, the core prognosis is that the relevance of borders is declining, sovereignty is diminishing, and states as territorially bounded “containers” of power and authority are dissipating. Neither of these perspectives captures the new paradigm shift we are witnessing.

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.” For many years, this concept permeated our thinking about mobility, borders, and sovereignty, pushing us into what political geographers refer to as the “territorial trap.” This trap, and the assumption undergirding it, reifies and naturalizes the global grid of lines demarcating states as

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29 John Agnew, ‘The Territorial Trap: The Geographical Assumptions of International Relations Theory,’ Review of International Political Economy 9 (1994): pp. 53–80. The term “territorial trap” seeks to raise otherwise buried assumptions that treat the state’s territory as if it were forever fixed and insulated—a “frozen geography” (a term also coined by Agnew)—camouflaging the fact that territory, in the context of sovereign exercise of power over it, is not natural or pre-political but rather constructed and reconstructed through law and politics. Another closely related image is that of states and borders operating as “containers.” See also Giddens, The Nation-State and Violence (n 27); Peter J. Taylor, “The State as Container: Territoriality in the Modern World-System,” Progress in Human Geography 18 (1994): pp. 151–162.
though they represent bounded territorial units with mutually exclusive borders. States are envisioned as having a monopoly over the legitimate exercise of power and authority in their clearly demarcated domains, thereby politicizing space and bringing it under juridical control.

Under the Westphalian lens and lexis, the modern state is a territorial state. Territoriality, or the territorial principle, here understood as the proposition that a legitimate government has ultimate authority over a defined territory and its population, is a central feature of the classic understanding of the current international world order. The territorial principle plays, on this familiar and "naturalized" account, a key role in constituting respect for international borders and justifying their operation to demarcate "places, territories, and categories," thereby producing a cartographic image of the world as a "jigsaw puzzle of solid color pieces fitting neatly together." Borders, according to this perspective, are the black lines we draw on 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 relations to these divvying lines. This process distinguishes between member and non-member, insider and outsider, the interior and the exterior, in the world’s jigsaw-puzzle map. Only citizens have a guaranteed right to enter and remain within the jurisdiction of the territorial state; all others require permission to gain such access. For the bulk of humanity, then,

32 Human rights provisions guarantee individuals a right to exit their home countries but do not provide them with a right to enter other countries. See, most famously, UN General Assembly, Universal Declaration of Human Rights, 217 [III] A, Paris, 1948, Article 13(b). The exceptional limitation to this otherwise “plenary power” (in the terminology of US law) or “royal prerogative” (as it is known in the United Kingdom) of states over borders and migration control is vested in individuals at risk who seek protection by claiming asylum, which in the “ordinary situation will require a state to suspend its rules of immigration control and undertake an asylum procedure or equivalent to determine if such a risk is present.” See Thomas Grammeltoft-Hansen, ‘Extraterritorial Immigration Control and the Reach of Human Rights’, in Vincent Chetail and Céline Bauloz, eds,
gaining lawful admission to desired destination countries remains “a privilege granted by the sovereign.” 33 This makes control of the border the liminal and legal linchpin of migration regulation.

Given the intricate connection between sovereign authority, territory, and legal spatiality, it was logically assumed, under the Westphalian model, that it is precisely at the border that agents of the state are permitted to exercise the utmost control over access, including the power to make the decision “to turn back from our gates any alien or class of aliens.” 34 US immigration and nationality law, for example, has long held that an alien who is stopped at the border enjoys far less protection than a person who is already within the country. 35 Such rights remain unavailable to would-be immigrants, so long as they remain outside the geographical borders of the United States. 36 The notion that legal circumstances affecting non-members substantively change after they cross “our gates” is a manifestation of the vision of a world order that imagines hermetically sealed legal spatiality alongside delineated and permanent borders. Yet these assumptions are increasingly strained. While continuing to formally rely on the fixed conception of the border, with rigid binary distinctions between the exterior and the interior, law-and-order agencies 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.

This spatial and operational aggrandizement of regulatory power has not yet been matched by a corresponding expansion of responsibilities beyond borders, especially in relation to those who are most


33 This is the classic formulation articulated by the United States Supreme Court in the case of United States ex. rel. Knauff v. Shaughnessy, 228 U.S. 537 (1950) (United States). 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.


35 This dates back to the early twentieth century. See, for example, Kaplan v. Tod, 267 U.S. 228 (1925) (United States).

directly and adversely affected by the shifting border of migration regulation: undocumented, unauthorized, smuggled, trafficked, or otherwise “irregular” migrants, including those seeking refuge and asylum.\textsuperscript{37}

Before I turn to a more detailed assessment of these new shifting-border measures, and how to potentially tame their sting, it is imperative to establish the foundation upon which the shifting border lies: the creation of a “moveable,” transportable legal wall that variably shrinks, expands, disappears, and reappears across space and time in the service of managed and selective migration and mobility regimes.

\textit{The shifting border in action: bleeding inward, stretching outward}

Consider the following examples, from near and far.\textsuperscript{38} As part of a major reform to US immigration regulation, a procedure called “expedited removal” was introduced into law.\textsuperscript{39} This legal provision permits frontline officers and border agents both to expeditiously return undocumented migrants at the border and to review the legal status of individuals detected up to 100 miles away from any US land or coastal border, in effect “moving” the border from its fixed location at the country’s territorial edges into the interior (Map 1.1).\textsuperscript{40}

\textsuperscript{37} I return to this point in the final part of the discussion. On these tensions, see, for example, Andrew Brouwer and Judith Kumin, ‘Interception and Asylum: When Migration Control and Human Rights Collide,’ \textit{Refuge} 21 (2003): pp. 6–24.

\textsuperscript{38} These examples were selected for illustrative purposes; they are not exhaustive. This section draws upon and adapts arguments developed in Ayelet Shachar, ‘Bordering Migration/Migrating Borders,’ \textit{Berkeley Journal of International Law} 37 (2019): pp. 93–147.

\textsuperscript{39} This procedure was ushered in as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (‘IIRIRA’), Pub. L. No. 104–208, 110 Stat. 3009-546. Expedited removal grants the Attorney General (now the Secretary of Homeland Security) “sole and unreviewable discretion” to apply expedited removal to any class of aliens who “[have] not been admitted or paroled into the United States.” See Immigration and Nationality Act, 8 USC. § 1225(b)(1)(A)(ii) (United States). The only exception to this rule is that an arriving non-citizen who indicates an intention to apply for asylum and establishes “credible fear” of persecution is detained and referred to an asylum officer who must determine whether the individual will be permitted access to the US asylum system. The spatial and temporal reach of expedited removal was further expanded in 2019.

\textsuperscript{40} As one scholar succinctly put it, this removal procedure “sharply redefined—downward—what process is due an individual who arrives at [the] border and is deemed not to have proper documents to enter.” See Stephen M. Knight, ‘Defining Due Process Down: Expedited Removal in the United States,’ \textit{Refuge} 19 (2001): pp. 41–47, p. 41.
Map 1.1 United States: the shifting border—bleeding into the interior (redrawn from ACLU: www.aclu.org/know-your-rights-constitution-free-zone-map)
This legal maneuver not only relocates the border but also creates what has been referred to as a “constitution free” 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. Such governmental surveillance of movement and mobility—traditionally restricted to the actual location of the border crossing—is now seeping into the interior. The most recent official US census data reveal that no less than two thirds of the US population lives in this 100-mile constitution-lite zone. That is, more than 200 million people live in the malleable or moveable border zone. The whole state of New York, for example, lies completely within 100 miles of the land and coastal borders of the United States, as does Florida, another migrant-magnet state. 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.”

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 statutory authorities to the greatest extent possible” has the potential to translate

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41 These current temporal and spatial specifications 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 100 miles of a US international border within 14 days of entry. See Department of Homeland Security, Designated Aliens for Expedited Removal (n 19).

42 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 border-patrol agents “have wide discretion” to refer motorists for additional questioning. See United States v. Martinez-Fuerte, 428 US 543 (1976) (United States). Such checkpoints are located on major US highways and secondary roads, usually 25 to 100 miles inland from the border. See Government Accountability Office, Border Patrol: Checkpoints Contribute to Border Patrol’s Mission, but More Consistent Data Collection and Performance Measurement Could Improve Effectiveness (Washington, DC: GAO 09-824, 2008) (United States), p. 7.

into a massive spatial and temporal expansion of expedited removal.\textsuperscript{44} Supplemented by multiple executive orders and accompanying memos, expedited removal could potentially reach “\textit{any} immigrant \textit{anywhere} in the United States who can’t prove that they’ve been in the country for two or more years.”\textsuperscript{45} A simple notice in the Federal Register is all that is required to make this sweeping augmentation of the border into a legal reality. With the strike of the pen, the “interior” could be recast as the “exterior” for the purposes of immigration control under the shifting-border paradigm. Turning the whole area of the United States into an expedited-removal zone sounds like science fiction. It is not. In 2019, the Trump administration issued a new rule authorizing just such massive, nationwide expansion.\textsuperscript{46}

In addition to conjuring mirror-house-like stretching and contracting movements, the shifting border also distinguishes between \textit{physical entry} into the country (which does not count for immigration purposes)

\textsuperscript{44} On January 25, 2017, President Donald Trump issued Executive Order 13767, Border Security and Immigration Enforcement Improvements, 82 Fed. Reg. Presidential Documents 8793, January 27, 2017 (United States) and Executive Order 13768, Enhancing Public Safety in the Interior of the United States, 82 Fed. Reg. Presidential Documents 8799, January 30, 2017 (United States), which cumulatively hold the potential to dramatically expand the reach of expedited removal. Subsequently, Department of Homeland Security 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 possible” and promised a new Notice Designating Aliens Subject to Expedited Removal to be published in the Federal Register. Based on the language of the executive orders and memos, some observers have concluded that the Secretary intends to utilize his discretion to the fullest extent authorized, both spatially (nationwide) and temporally (two years).


\textsuperscript{46} In July 2019, as this book was sent for publication, the US government authorized just such a nationwide expansion, enabling the Department of Homeland Security to apply expedited removal to aliens encountered \textit{anywhere} in the United States for up to two years after their arrival. See Department of Homeland Security, Designated Aliens for Expedited Removal, 84 Fed. Reg. 35409, 23 July 2019 (United States). A preliminary injunction issued by the courts prohibits the enforcement of this policy change, pending the outcome of litigation challenging it. I thank Alex Aleinikoff and Jaya Ramji-Nogales for helpful discussions regarding these developments and the various legal scenarios that may follow.
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). In this legal maneuver, 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.” This change in the meaning is formalized into 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 she (who is already present on the territory) had never really crossed the border into the country. This legal fiction has serious consequences for those aliens “present in the United States without being admitted.” For instance, their unlawful admission also 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. Moreover, the very act of crossing without inspection and permission (the otherwise unrecognized presence of the non-citizen in the territory) is turned into the “main substantive charge used to remove them.”

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47 The notion that legal circumstances affecting non-members change dramatically after the latter “pass through our gates” is well established, as canonical case law from *Shaughnessy* to *Zadvydas* attests. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) (United States); *Zadvydas v. Davis*, 533 U.S. 678 (2001) (United States). See also *Kaplan v. Tod*, 267 U.S. 228 (1925) (United States).


49 Immigration and Nationality Act, 8 U.S.C. § 1182(a)(6)(A)(i) (United States). These individuals will have certain constitutional protections while in the country.

50 Immigration and Nationality Act, codified as 8 U.S.C. § 1182(a)(6)(A)(i) and § 1227 (United States). See the waivers from removal specified in 8 C. § 1227(a)(1)(H), which are easier to establish than those appearing in 8 U.S.C. § 1182(i).

51 There is also a ten-year bar to readmission.
Another such ramification is that those on the “inside” deemed to be on the “outside,” including the hundreds of thousands of people expeditiously removed each year, find themselves in a parallel universe of “nonexistent procedural safeguards.”\(^\text{52}\) 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.”\(^\text{53}\) When such far-reaching denial of basic procedural fairness occurs in an established democracy such as the United States, 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.”\(^\text{54}\) The traditional constitutional and human rights arsenal of responses has proven toothless in the face of these new realities. To begin to counter this reality, 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.\(^\text{55}\) The exclusion–deportation line has become de-territorialized: the key factor for the legal analysis is

\(^\text{52}\) U.S. v. Peralta Sanchez, 868 F.3rd 852 (9th Cir. 2017) (United States), p. 35 (dissenting, Pregerson, J.).

\(^\text{53}\) Ibid., pp. 34–35.

\(^\text{54}\) Ibid., p. 35. 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.

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 without hesitation, are not territorially fixed but rather “designated” by the executive branch of government.56

Just as the shifting border bleeds into the interior, it extends the long arm of the state outward, ever more flexibly, to regulate mobility at a distance. To provide but one example, travelers who 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, and Abu Dhabi in the United Arab Emirates.57 Thanks to a legal carve-out known as the preclearance system, these procedures regularly take place in foreign transit hubs that are sometimes located tens, hundreds, or even thousands of miles away from the “homeland” territory.

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 Secretary of the

57 After 9/11, the Department of Homeland Security was established. It combined the functions of the former Immigration and Naturalization Service (INS) and the former US Customs Service. Currently, several agencies within the Department of Homeland Security 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. Its 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 preclearance locations outside the country. See US Customs and Border Protection, ‘Preclearance Locations,’ online 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 US international borders: namely, the 100-mile zone in which expedited removal takes place, 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.
Department of Homeland Security in an interview with the *New York Times*:

it would be like us saying you can have a foreign law enforcement operating in a US facility with all the privileges given to law enforcement, but we are going to do it on your territory and on our rules . . . So if you flip it around, you realize it is a big deal for [another] country to agree to that.58

Currently, more than 600 US 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 journey toward the United States. An ambitious expansion program for such preclearance and pre-inspection procedures was launched in 2015 with the goal of preclearing, on foreign soil, at least a third of all US-bound air travelers by 2040. Such expansion is expected to promote US 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” (conflating priority in time with location and distance), as the official publication of the US border-protection agency simply and elegantly summarizes the thinking behind this manifestation of the shifting border, highlighting its outward expansion.59 Strikingly, such pre-inspection decisions bear the full weight of US law, as though their determinations were made “at the border”—although 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 US soil, the United States has now entered advanced negotiations to build more preclearance capacity at airports overseas, seeking to further expand its reach


into new regions and continents.\textsuperscript{60} 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 mile.”\textsuperscript{61}

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.”\textsuperscript{62} 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 they embark on transatlantic flights.\textsuperscript{63} Iceland and Italy are the latest countries to have joined this list.\textsuperscript{64}

\textsuperscript{60} In addition to extending migration control for air travel, the United States also has a long history of interdiction at sea, which has engendered the controversial US Supreme Court\textsuperscript{Sale} precedent, according to which the summary return of migrants, including asylum seekers, interdicted on the high seas does not engage the\textsuperscript{non-refoulement} obligation to which the United States, like other rich democracies, has committed through both its domestic and international law obligations.\textsuperscript{Haitian Centers Council, Inc. v. McNary, 807 F. Supp. 928 (E.D.N.Y. 1992).} cert. granted,\textsuperscript{Haitian Centers Council v. McNary, 506 U.S. 814 (1992) (United States).}


\textsuperscript{63} Department of Homeland Security Press Office, ‘DHS Announces Intent to Expand’ (n 61).

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.”\textsuperscript{65} This insight has not been lost by 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 in foreign territory to a port-of-entry in the United States” at its point of origin.\textsuperscript{66} 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.” 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).

The United States’ shifting border is part of a larger transformation involving legislative and regulatory actions undertaken by other leading destination countries. The Canadian government, for example, proclaims itself a “world leader in developing interdiction strategies against illegal migration.”\textsuperscript{67} 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. 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, where migration-integrity officers, or liaison officers (as they are now called), conduct border-control activities as a matter of course, although 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.”68 As official documents put it, this part of Canada’s border strategy strives to “push the border out’ as far away from the actual [territorial] border as possible.”69 And as the Canadian Border Service Agency explains, “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 border strategy,” as Canada has branded its extensive variant of the shifting-border strategy (Figure 1.1).70

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.71 In 1985, one of the earliest and most revered cases of the Supreme Court of Canada during the era of the Charter of Rights and Freedoms dealt with the

68 CBSA, Department Performance Report (n 5).
70 The quotation is drawn from the preamble to the Canada–US Statement of Mutual Understanding (SMU) signed between Canada and the United States in the aftermath of 9/11 to enhance information sharing, reflecting the premise that “border security and border management are based upon cooperation and collaboration.”
71 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.” See Guy Goodwin-Gill, ‘The International Law of Refugee Protection,’ in Elena Fiddian-Qasmiyeh et al., eds, The Oxford Handbook of Refugee and Forced Migration Studies (Oxford: Oxford University Press, 2014), pp. 36–45, p. 45. Commentators have emphasized that the fact that there is
The shifting border

rights of refugees. In *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, and as such, have a consecrated right to a refugee-status hearing before facing potential removal from the country. No similar substantive protections and procedural guarantees are automatically triggered if one is interdicted or intercepted before reaching Canada’s shores. 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.”

Under this scheme, Canada can avoid triggering the constitutional provisions that it had previously limited legal guidance regarding access to protection is not accidental; states have discretionally left these questions open when drafting domestic and international protection regimes. 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* (Cambridge: Cambridge University Press, 2004).

established to protect the rights of non-citizens landing on Canadian territory.\textsuperscript{73} 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” to avert both the arrival of unauthorized migrants and the engagement of constitutionally protected rights and procedures. Asylum seekers caught in the wide net of Canada’s interdiction and the shifting-border strategy of enforcement are impeded from presenting their full cases to state authorities.\textsuperscript{74}

Being turned away \textit{before} reaching Canadian territory is crucially important for defining the scope of 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 \textit{Singh} they would be entitled to a full oral hearing to determine the merits of their claim to stay, even if they are 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 border-control measures that occur beyond the reach of the national territory, purportedly to “combat global irregular migration” (as official government documents put it). From a human rights perspective, measures to outwardly “relocate” the border to skirt legal obligations are deeply objectionable, as they reveal sophisticated governmental attempts to evade rights protections, confining them to the classic boundaries of the \textit{static} Westphalian vision of territory in a world where mobility is increasingly cross-border and international.\textsuperscript{75}

The dynamism of the shifting border—its flexible and alternating

\textsuperscript{73} \textit{Singh v. Minister of Employment and Immigration} [1985] 1 S.C.R 177 (Canada).


\textsuperscript{75} In response to the shifting-border technique, 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 \textit{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.
The shifting border

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 at the shores of 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. 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 well-off countries from otherwise binding human rights obligations toward 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 under increasing pressures to act decisively in the face of growing uncertainty, as they ever more frequently find themselves in “crisis control” mode.

Canada, along with many other wealthy nations, relies heavily on private-sector third-party actors, in particular airline carriers, as “enforcers” of its immigration-regulation and border-control provisions. As many seasoned travelers will know, it is usually airline personnel who take pains to verify that the required documents and visas are in place prior to permitting embarkation on international flights. They do so,

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76 If a legal duty to protect arises only when a potential refugee has reached the actual, territorial border, pre-entry controls that draw on the cooperation of countries of origin and transit, place migration agents abroad in major transit hubs, or rely on safe-third-country agreements block the activation of state responsibility toward those stopped en route, unless effective control has been established by the state or its agents. I elaborate this in Section 3.


78 Canada and 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 be obliged to pay if found carrying inadmissible passengers.
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 who arrived aboard their flights.\textsuperscript{79} Similarly, the Schengen Implementation Agreement obliges all members of the European Union to implement carrier sanctions.\textsuperscript{80} Allowing airline personnel to perform such passport-control activities in effect 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.

The United Kingdom, New Zealand, and Australia have developed comparable mechanisms of migration regulation and control abroad, working in close cooperation with US and Canadian overseas migration-integrity and liaison officers, resembling the collaborative model of the “five eyes” alliance (FVEY, as it is known), a wide-ranging intelligence and data-sharing network with extensive surveillance capabilities, which focuses, among other things, on “remote control” border and migration control.\textsuperscript{81} Since the early 2000s, member states of the European Union have followed suit, creating an expanded transnational network of immigration liaison officers operating under an EU directive framework that binds them all. As a result, today’s interdiction programs have proliferated into massive information-gathering operations among trusted partners in offshore locations through a “network of

\textsuperscript{79} Brouwer and Kumin, ’Interception and Asylum’ (n 37), p. 10.
\textsuperscript{80} 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 on their shores of unauthorized migrants.
\textsuperscript{81} The term “remote control” is drawn from Aristide R. Zolberg, ’Matters of State: Theorizing Immigration Policy’, in Charles Hirschman, Philip Kasinitz, and Josh DeWind, eds, The Handbook of International Migration: The American Experience (New York City: Russel Sage, 1999), pp. 71–93. However, it is here used to relate to translational, multilateral measures that extend far beyond that term’s original reference to unilateral visa control and related measures.
contacts with host-country officials, officials from other governments in the designated region, airline personnel and law-enforcement agents” along the travel continuum to identify and interdict improperly documented travelers at the earliest point at which their identity can be verified, as remotely as possible from the actual border, before they stand a chance of reaching their territorial boundaries.\textsuperscript{82}

No less significant for our discussion, these overseas government agents operate under the recommended guidelines developed by the International Air Transport Association (IATA). The existence of this \textit{non-state} organization representing the global airline industry reveals not only the shifting \textit{location} of the border but also the increased collaboration between private \textit{and} public actors in regulating the de-territorialized “edges” of well-off polities seeking to prevent admission of persons they deem unwanted.\textsuperscript{83} The ongoing expansion of the involvement of for-profit intermediaries in the task of regulating irregular migration blurs the line between state and market, providing yet another brick in the multidimensional re-bordering of access to territory and membership.\textsuperscript{84}

\textbf{Stretching and contracting space and time: the individualized border}

In disrupting the Mondrian-like precision of clearly delineated and jurisdictionally exclusive territorial states that has undergirded (at least in principle) the Westphalian international system of nation-states, the


\textsuperscript{84} New federal legislation in the United States, to provide but one example, now allows state and local government as well as the private sector to get involved in the funding of port-of-entry infrastructure and staffing, allowing the business community and non-governmental organizations to partake in advancing border security and efficiency. See Erik Lee and Christopher Wilson, eds, \textit{The US–Mexico Border Economy in Transition} (Washington, DC: Wilson Center, 2015), pp. 2–3. Other examples of semi-privatization of immigration enforcement and policymaking in the United States include the proliferation of detention centers, private prisons, and the like.
shifting border tacitly and covertly redefines the relationship between membership, territory, and sovereignty. Governments, for their part, are quick to assert that the core motivation for “dispatching” the shifting border outward is functional: to “identify and intercept illegal and undesirable travelers” as remotely as possible before they embark on their journey toward the lands of migration and prosperity. 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. The integrated border-management strategy, devised by the European Union, similarly 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 to arrival in the EU.” Within the European Union, inland control measures, including detection, investigation, and return, are applicable to third-country nationals deemed to lack status (they are regularly referred to as illegal immigrants), as are futuristic iBorder control strategies that “re-engineer” the system of border crossing and migration control. Pilot projects funded by the European Union will enable “automatic control” procedures, as they are known, which involve 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 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] calculate a cumulative risk factor for each individual.”88 Here, the once fixed territorial border is not only shifting but also multiplying and fracturing into an operational individual-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 she travels within the protected and surveilled territorial space—today, within the area of free movement in Europe; tomorrow, potentially the world.89

The underlying objective of ensuring that all legal requirements are met by entrants here takes on a new social, political, and technological meaning, transforming not only the regulation of movement prior- and post-arrival but also potentially sliding toward and morphing into a “society of control,” where everyone (non-citizen and citizen alike) is tracked and encoded.90 A further concern is that these new surveillance techniques, while in theory “blind” and universal, may end up producing divergent and discriminatory results—for example, by reaffirming and intensifying practices of racial profiling and uneven

88 L3 Research Center, ‘iBorderCtrl’, online www.l3s.de.
90 The term “society of control” is drawn from the work of Gilles Deleuze but has since been applied more broadly in the literature. See, for example, Shamir, ‘Without Borders?’ (n 23), p. 201ff. 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 put secret or sensitive intelligence information at risk, were 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 Eric A. Ormsby, ‘The Refugee Crisis as Civil Liberties Crisis’, Columbia Law Review 117 (2017): pp. 1191–1229.
geographies of policing, through a combination of algorithmic machine learning and human vetting.91

Such global ID systems have long been the dream of law enforcers, but they are now 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 running on blockchain technology to provide tamper-resistant legal documents for refugees and other displaced persons who lack them, creating 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 from official aid organizations.92 While informed by benevolent intentions, such initiatives may violate privacy and restrict the freedom of mobility of such global ID bearers, especially if their “stamp” indicates passage through a third country deemed safe but which may prohibit onward travel or trigger return if it signs readmission agreements with the ID bearers’ countries of origin.

Sought-after destination countries, then, beyond reinventing and replanting the “moveable” border while selectively opening and closing its multi-tiered gates of admission, are developing and implementing futuristic surveillance technologies that cross time and space as well as bilateral and multilateral agreements with countries of origin and transit that treat the latter as migration “buffer zones” (often in exchange for capacity building and material assistance in the form of development aid). 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—a treasure trove for artificial intelligence analytics.93 Sharing these records prior to...

93 Following a protracted political and legal battle between Brussels and Washington about levels of data protection, a new US–EU PNR agreement was signed in 2011 and approved...
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 encounter “can be too late—they [unauthorized entrants] have achieved their goal of reaching our shores.”

To achieve this ambitious yet Orwellian vision, the location, operation, and logic of the border has to be redefined through a complex conceptual and operational framework that allows government officials or their delegates (increasingly operating transnationally and in collaboration with third parties and private-sector actors) to screen and intercept travelers at continuous and multiple eBorders, iBorders, or “automated gates,” en route to their desired destinations and within their territories as well. 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. It must be applied for and approved by the government of the destination country before the traveler embarks on their journey, and it is linked electronically to the traveler’s passport.


Home Office, Securing the UK Border (n 19), point 1.4.

For a now classic article that observed some of these transformations, see Guiraudon and Lahav, ‘A Reappraisal of the State Sovereignty Debate’. A “network of state organizations for whom immigration enforcement is a central or defining part of their purpose” increasingly operates collaboratively at the local, national, or supranational levels. Third-party actors also play a role. Beyond the familiar example of airline carriers that have come to serve as “surrogates” for border control and migration screening, successive governments have further “deputized' third parties for immigration enforcement, such as trade unions, employers, landlords, school teachers, doctors, labor inspectors, police officers, universities and welfare service. Those actors do not have immigration control as defining purpose, but have increasingly been brought into the control matrix.” For further discussion, see Lea Sitkin, ‘Coordinating Internal Migration Control in the UK’, International Journal of Migration and Border Studies 1 (2014): pp. 39–56; Ana Aliverti, ‘Enlisting the Public in the Policing of Immigration’, British Journal of Criminology 55 (2015): pp. 215–230.

On high-value passports and migrants, see Shachar, ‘Citizenship for Sale?’ (n 8).

As Australia’s Department of Immigration and Border Control explains, the next generation of border security will require further analytics-based capabilities, including “a state-of-the-art risk scoring engine developed by departmental analysts [that] 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.
Without such authorization, it is impossible to board a plane heading to the United States, Canada, Australia, or to enter these countries. This additional layer of preclearance and information gathering creates a powerful yet invisible electronic border that applies everywhere (adjusting itself to the location and risk-profile of the traveler) and is intentionally detached from and sequentially 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 and again at airports and other regulation points. “Smart” and automated-entry gates have iris scans or other biometric readers that run through multiple national and global databases which 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 on whether the golden gates of admission will open wide or shut tight is determined not by a human agent but by “smart machines” and automated eGates that are coded to identify risk factors based on sophisticated algorithms (themselves hardly ever the subjects of open, democratic review).98 The “open sesame!” incantation in the age of big data and shifting borders has given Ali Baba’s phrase a new magic and mythos.

Yet only those with a golden key know this magic formula; the shifting-border strategy makes it increasingly hard for those disadvantaged by the birthright lottery to lawfully set foot in the more affluent polities.

All inbound travelers are screened and travelers representing potential risk are more closely examined.98 Such transformations are explored by Costica Dumbrava, ‘Citizenship and Technology’, in Shachar et al., eds, The Oxford Handbook of Citizenship (Oxford: Oxford University Press, 2017), pp. 767–788. The transfer of responsibility to machines in lieu of human border guards is extensively elaborated by Longo, The Politics of Borders (n 24). Such regulation is more intertwined with and partly dependent upon private-sector providers and developers of sophisticated biometric-data-collection and verification technologies.
The shifting border

they desperately seek to enter.99 This raises serious questions of justice in allocation, not only of membership affiliations but also mobility opportunities.100 Coupled with restrictive admission categories and limited travel visas, especially for those entering from poorer and less stable countries, the shifting border may have the unintended effect of pushing unauthorized mobility further “underground.” This, of course, triggers concerns about the rise of a lucrative black market for increasingly sophisticated human-trafficking and smuggling networks.101 These concerns may 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 asylum seekers, refugees, and other uninvited entrants before they begin their journey.102

“Erasing” territory

Australia, even more explicitly than Canada or the United States, has officially relocated its border through words of law, creating—as its

99 Ayelet Shachar, The Birthright Lottery: Citizenship and Global Inequality (Cambridge: Harvard University Press, 2009). Some have argued for open borders as the solution. For a classic account, see Joseph Carens, ‘Aliens and Citizens’ (n 23). As critics have noted, even adopting a policy of open borders (which is still a pipedream in most parts of the world) may not be sufficient to provide equal opportunity given structural and economic barriers to mobility that go beyond border controls. See, for example, Aweek Bhattacharya, ‘Does Justice Require a Migration Lottery?’, Global Justice 5 (2012): pp. 4–15.


102 It is part of broader suite of measures to “quarantine” wealthy countries from the quicksand of civil strife, disease, abject poverty, or environmental crises frequently associated with mass mobility from the world’s less developed countries. See Bimal Ghosh, ‘Toward a New International Regime for Orderly Movements of People’, in Bimal Ghosh, ed., Managing Migration: Time for a New International Regime? (Oxford: Oxford University Press, 2000), pp. 6–26, p. 10. This has led some commentators to suggest that we are
government readily admits—a distinction between the country’s “migration zone” and “Australia” as we know it on the map. This “excision” policy was created through the Migration Amendment Act of 2001, which was expanded in 2005 and then again in 2013.\textsuperscript{103} This legislation authorizes Australia’s immigration officials to remove asylum seekers that have managed to reach its now “excised” territory, as though they had never reached Australia, despite having physically landed on its shores.\textsuperscript{104} Put differently, those who reach the excision zone cannot make a valid asylum claim in Australia, because they never entered it in a legally cognizable way—the territory they reached is no longer “Australia” for immigration-law purposes.\textsuperscript{105} This legal fiction further limits the procedural and substantive rights that asylum seekers and other irregular migrants are entitled to under domestic and international law.\textsuperscript{106} It also eliminates the possibility of judicial review, thus not only redrawing the territorial border but also attenuating legality in the process.\textsuperscript{107} In 2013, the excision zone was expanded, through witnessing the creation of the building blocks of a global regime of human immobility precisely at the time when other trans-border flows, such as trade, knowledge, capital, and the like, are flourishing. See Shamir, ‘Without Borders?’ (n 23).\textsuperscript{103} Migration Amendment (Excision from Migration Zone) Act 2001 (Australia). For background, see Australian Government, \textit{Department of Immigration and Multicultural Affairs, Fact Sheet 71: Border Measures to Strengthen Border Control (Consequential Provisions Act)} (2001). See also Minister for Immigration and Multicultural Affairs, Press Release, \textit{Joint Statement with Minister for Justice and Customs: Government Strengthens Border Integrity} (MPS 161/2001, September 17, 2001); Parliament of Australia, Department of Parliamentary Services, \textit{Excising Australia: Are We Really Shrinking?} (Research Note No. 5, 2005–2006, August 31, 2005).\textsuperscript{104} 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 Papua New Guinea 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 Papua New Guinea, or be resettled elsewhere.\textsuperscript{105} We witness the almost incomprehensibly copious power of the words of law in this example.\textsuperscript{106} Even before the creation of the excision zone, Australia introduced a mandatory detention policy for all arrivals without valid visas. See Migration Act 1958 (Australia), s. 196.\textsuperscript{107} The terms “legality” and “rule of law” are notoriously difficult to define and are used interchangeably in my discussion, 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[1] refers
legislation, to include the entire Australian mainland. In effect, this means that the border applies everywhere and nowhere at the same time.

The legal consequences of arrival at Australia’s “erased” territory are both far-reaching and irreversible; those falling under the spell of excision are denied the opportunity to secure 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. This legal fiction makes them ineligible to claim protection under Australian immigration laws. By erecting an unlimitable line of defense against unauthorized maritime arrivals, excision creates a legal barrier that makes illusionary the possibility of passing through the proverbial entry gates, even for those who have managed to reach the country’s (actual) territory. This logic is reminiscent of the rights-restricting inward “bleeding” of the US border into the interior, but with the unique Australian twist of “erasing” from the map, with the stroke of a pen, certain segments of territory for migration-regulation purposes (Map 1.2).

Australia has gone further than any other country in the world in its quest to deter irregular migration. Creating “zones of exception,” as in the Australian practice of excision, whereby a country effectively erases certain parts and eventually all of its territory, as it were perforating itself geographically, may appear to undermine “the very elements of national sovereignty that immigration controls seek to bulwark.” But, as both critics and advocates of this extreme manifestation of the shifting border agree, redrawing the boundaries of inclusion and exclusion through the tools of public law with a clear intent to restrict and deter


108 This unprecedented act was prefaced by a governmental clarification that the excised zones were not altogether removed from Australian sovereign territory. This legal interpretation is widely accepted by constitutional lawyers and other relevant experts in Australia.

Map 1.2 Australia: the shifting border—“erasing” territory (redrawn from Parliament of Australia, Department of Parliamentary Services, *Excising Australia: Are We Really Shrinking?* Research Note, No. 5, 2005–2006)
unauthorized arrivals, including controversial policies to proactively “stop the boats” and turn back asylum seekers and other irregular migrants, can hardly be seen as a loss of control—although it may well be described as a glaring failure of both legality and morality. This process provides a textbook example of pressured governments seeking to regain control over cross-border movement in the age of globalization by exercising—upon securing the cooperation of third countries or private contractors—the naked power to determine whom to include and whom to exclude. As the Australian prime minister whose government initiated the excision policy, John Howard, famously declared: “We will decide who comes to this country and the circumstances in which they come.”

The act of self-erasure of territory is paradoxically expressed here as a manifestation of self-determination and resolve.

More limited versions of excision once operated in several high-traffic airports in European countries, which declared certain parts of these airports, 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. These transit zones were treated as legal “grey zones,” operating 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 (ECtHR), which concluded that

110 Critics have pointed out that this is not the first time such assertions of national sovereignty, asserted in stark “us/we versus them” terms, have been part of the political discourse in Australia. As early as 1934, just a few years before Jews, who faced annihilation by Nazi Germany, were forced to wander from port to port, as no country accepted them and they were forbidden disembarkment even after escaping the horrors of Europe, the grammar of the modern state’s control over immigration was expressed loud and clear in Australia (just as it was in the United States and elsewhere): “We have, as an independent country, a perfect right to indicate whether an alien shall or shall not be admitted within these shores.” See Anne McNevin and Klaus Neumann, Who Is Speaking? (quoting Australia’s Attorney-General Robert Menzies), paper presented at the 2017 APSA Annual Meeting, San Francisco.

111 When passing the excision legislation, the Australian government was careful to clarify that the excised zones were part of the country’s migration-control regime; they were not removed altogether from Australia’s sovereign territory.

“[d]espite its name, the international zone does not have extraterritorial status,” thus bringing border-control actions taking place in these transit zones back into the fold of legality.113

The creation of these legal “grey zones” is not entirely new, then; and the US navy base in Guantanamo Bay, before it became infamous for serving as the detention place for hundreds of foreign nationals suspected of terrorism links, was used as a repository for asylum seekers (particularly from Haiti) whose shattered boats were intercepted on the high seas by US navy ships in order to prevent those on-board from claiming refuge at “our gates.”114 Again, we witness the craftsmanship of 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 measure of shifting. Since 2013, all “asylum seekers who unlawfully arrive anywhere in Australia” must be transferred to third countries for offshoring processing.115 The latter refers to what the Australian government calls “regional processing,” which, in practice, means that those who have reached the excision zone are then transferred to offshore locations in remote islands in the Pacific, such as Nauru, a tiny microstate island nation 4,500 kilometers away from Australia, or Manus Island in Papua New Guinea, where asylum seekers may languish for years while their claims are being processed and assessed. Australia is currently the only country in the world that uses

114 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 Harold Hongju Koh, ‘The Haitian Refugee Litigation: A Case Study in Transnational Public Law Litigation’, Maryland Journal of International Law 18 (1994): pp. 1–20.
other countries to process asylum claims, although the United States may soon follow suit. Close to 80 percent of those transferred to such offshore processing centers have been proven to have credible claims and were on average detained in offshore centers for 450 days (almost one quarter spent more than two years in the facilities).\textsuperscript{116} Yet even those recognized as refugees are forbidden for life from settlement in Australia 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 \textit{away} from Australia—has recently attracted the interest of European policymakers desperately seeking answers to the challenges of responding to uninvited migration flows, and it has fueled discussion of building migrant “reception” centers in North Africa and deeper into the heart of the continent.

By legally re-charting 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 has invented one of the most striking manifestations of the shifting border. Australia’s restrictive policy offers remarkable testimony to the lengths to which otherwise international law-abiding countries are willing to travel in their quest to deter unauthorized migration flows, even at the cost of blatantly breaching basic rights-protection obligations to which they have committed, both domestically and internationally. To complicate the picture even further, there are some early indications that Australia’s wildly problematic interpretation of its refugee-protection obligations is proving effective in advancing in its stated policy mission: to stop the “boat people.”\textsuperscript{117} As a representative of the United Nations Human Rights Council (UNHRC) in Indonesia (a major transit hub in the region for asylum seekers and human smugglers heading for


Australia) has 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.” This focus on deterrence and “reclaiming” border protection is in turn used politically to justify the tough policies adopted by Australia 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. This raises a host of pressing democratic queries about how to avert the denial of constitutional and human rights by the very institutions and processes designed to protect them, and about whose voices and interests ought to be heard and counted when challenging such policies, just as it reveals the blurring lines between law and politics in the age of shifting borders. In the era of resurgent populism, Australia is not alone in facing such quandaries. The world over, incumbent leaders and their contenders try to appease the anxieties of voters fearing loss of control over borders and membership boundaries. The lethal combination of perceived loss of control and the apparent deterrence effect of restrictive policy forces us to rethink the complex relationship between agency and coercion, official and unofficial routes of passage, voice and power, as well as the uneasy interactions among countries of origin, transit, destination, and offshoring locations—a dynamic constellation that has largely been overlooked in the literature.

If we conceptualize borders as “crucial sites from which the nation state is narrated and constituted,” Australia’s all-out approach brings into sharp relief several important quandaries, not least who guards our legal guards? Australia’s High Court has been called upon on several occasions to review various aspects of Australia’s excision policy and offshore-processing framework. Importantly, in several landmark decisions, the High Court favored the claims of those in excised territories. These include the case known as Plaintiff M61/2010 and Plaintiff

118 There is a rich body of literature exploring these questions, which goes beyond the scope of my discussion here.
The shifting border

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 would have seen a “swap” of asylum seekers from Australia with refugees from Malaysia, reasoning that Malaysia is neither a signatory to the Refugee Convention nor recognizes the status of refugees under its domestic law. However, the very same justice system that protects all refugees but those arriving without authorization by boat has 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 operating under unjust regimes (his analysis focused on antebellum America, where anti-slavery judges nevertheless issued pro-slavery decisions according to “neutral” rules) do not always find the courage to speak out against the most salient breaches of the rights and dignity of individuals who are most in need of legal protection. For those excised and offshored, the words of law clearly failed to provide solace or safety; they imposed violence instead.

121 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 eventually upheld the government’s policies. See CPCF v Minister for Immigration and Border Protection [2015] 255 CLR 514 (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 198AD of the Migration Act 1958 (Australia), as amended by the Migration Legislation Amendment (Regional Processing and Other Measures), Act 2012 (Australia), 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, in which the Court struck down the government’s “Malaysian solution.”
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 right to personal liberty. The Court held that because the “asylum seekers held [on Papua New Guinea’s 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.”

The Court ordered that immediate steps be taken to end the detention, and the government of Papua New Guinea requested Australia make alternative arrangements. Those asylum seekers remaining on 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, but out of fear for their safety many have refused relocation to other sites in Papua New Guinea, such as Port Moresby, the country’s capital. The United Nations High Commissioner for Refugees (UNHCR) has warned of an “unfolding humanitarian crisis” and has called on Australian authorities to act, based on their responsibility for the original offshore transfer and eventual internment. The Australian government continues to refuse entry to the asylum seekers it has offshored, with the exception of those facing life-threatening medical circumstances. Litigation is before the High Court of Australia and in Papua New Guinea alleging a breach of the duty of care and requiring that these offshore refugees and asylum seekers be brought back to Australia or resettled in third countries such as the United States; the legal proceedings are expected to be lengthy. 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.”

Such democratic protests have had some effect in

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125 See, for example, Refugee Council of Australia, ‘Turnbull and Dutton Must Guarantee the Safety of the Men They Have Kept Trapped on Manus’, Relief Web, November 23, 2017,
the past—for example, by pressuring the government to bring back Australia some of the detained who required medical attention.\textsuperscript{126} The jury is still out determining the impact of such contestation and protest on finding a humane resolution to the current deadlock.

\textit{Europe selectively closing its (multiple) gates}

If we shift our gaze to Europe, we find that, unlike the situation in Australia, where national jurists have by and large approved the government’s hardline policies, the ECHR has on several occasions ruled against the creation of “black holes,” or “grey zones,” in which jurisdiction and European human rights provisions categorically do not apply. Arguably, “erasing territory” to avert rights protection would meet the definition of such areas.\textsuperscript{127} These legal precedents from the ECHR have drawn an important line in the quicksand of the shifting border. Europe, however, has its own multiple and ultra-sophisticated variants of the shifting border, stretching “both far beyond and deep inside the EU’s territory.”\textsuperscript{128}

One aspect of such shifting that has become acutely charged in the context of the migration crisis is the question of how to share and divide responsibility for the protection of refugees that reach Europe’s shores. The Dublin system allocates responsibility to the first country of entry to the European Union.\textsuperscript{129} Accordingly, a registered and finger-printed

\textsuperscript{126} In 2019, a new Australian law, the “medevac law,” entered into force. This legislation authorizes transfer from remote processing facilities back to Australia on the recommendations of two independent Australian doctors. However, the law has been subject to calls for repeal since its adoption, and its future remains unclear.


\textsuperscript{129} European asylum legislation applies to all who apply “at the border” or “on the territory.” For a concise overview of the Common European Asylum Policy and its impact on
“Dublin” asylum seeker engaged in onward mobility (or “secondary movement,” as it is technically known) will be barred from claiming refugee status in the country she has reached in her onward mobility, shifting the responsibility back to the frontline member state, unless her situation falls under a narrow set of exceptions. Critics have argued that, “due to the way the system is structured, the Dublin Regulation seems less about burden-sharing and more about externalization of responsibilities from the northern to the southern [and eastern] member states.” In 2015, when a record of over 1 million asylum applications were lodged in the European Union, the unequal-distribution implications of this protection system became blatantly clear. Italy and Greece in particular, already overwhelmed by the migrant influx, bore the brunt of responsibility for addressing the escalating European crisis. The European Commission eventually admitted as much, stating that “the current system is not sustainable. . . . [W]e have


130 A claim for family reunification is one such exception. Upon application for asylum, the Dublin procedure is used to determine “which country is responsible for making a decision on [the] application.” See Regulation (EU) 604/2013 of the European Parliament and of the Council, O.J. (L 80/31), June 29, 2013 (EU); Commission Implementation Regulation (EU) No 118/2014, O.J. (L 39/1), February 8, 2014 (EU). Each applicant’s fingerprints are taken and stored in a central European database (Eurodac), which helps identify the country responsible for the asylum application. The goal of the Dublin system is to establish clear, objective criteria for responsibility “to prevent and discourage forum shopping, to prevent and discourage secondary movements, and to avoid the phenomenon of asylum seekers ‘in orbit.’” Opinion of Advocate General Sharpston in A.S. v. Slovenia, Case C-490/16, EU:C:2017:585, Eur. Ct. Justice (2017), sec. 100. Member states are permitted to rely on the sovereignty clause under the Dublin regulation, which allows states to voluntarily assume responsibility for processing asylum applications for which they are not otherwise responsible, as was the case with Germany’s unilateral decision in summer 2015.


132 Despite cracks in the reach and implementation of this system in the wake of the mass influx of 2015, the European Court of Justice ruled in 2017 that the regulation still stands. See A.S. v. Slovenia (n 129). For analysis of the overall EU data and per-state numbers of registered first-time asylum seekers, see Eurostat, Record Number of over 1.2 Million First Time Asylum Seekers Registered in 2015 (Eurostat News Release 44/2016, March 4, 2016), online http://ec.europa.eu/eurostat/documents/2995521/7203832/3-04032016-AP-EN.pdf/790eba01-381c-4163-bcd2-a54959b99ed6.
seen in the ongoing crisis that the Dublin rules have placed too much responsibility on just a few Member States.” While an EU-wide relocation program was introduced to relieve some of these pressures, it could not quell nor erase the multifaceted tensions and political backlash that the mass influx has wrought in Europe. The relocation program, designed to express European solidarity by relieving the pressure from Greece and Italy, was met with stiff opposition by the Visegrad governments (Czech Republic, Hungary, Poland, and Slovakia) and lukewarm compliance by other member states, ultimately failing to achieve its goals. Today, immigration continues to top the list of voters’ concerns in Europe, fueling the sharp ballot-box success of populist anti-immigrant leaders and parties that galvanize the narrative of “loss of control.”

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. The Court of Justice for the European Union (CJEU) has recently ruled that border and migration enforcement activities can stretch inward beyond the actual, territorial border of members states; it has authorized “border officials responsible for border surveillance and the monitoring of foreign nationals” to

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134 This program refers to the “relocation” of 160,000 asylum seekers, based on a key that takes into account several features of the respective member states. The progress of the plan is reported by https://ec.europa.eu/home-affairs. The resistance of countries such as Hungary, Poland, and the Czech Republic to the terms of the relocation plan has led to the issuance of “letters of formal notice” against this failure to adhere to solidarity measures, and is seen as indicative not only of the refugee crisis but also a crisis of European Union’s political unity. It is less well known, however, that many other member states were foot-dragging its implementation.

135 Demonstrating a dramatic shift in rhetoric from the earlier emphasis on granting access for those who need international protection, Angela Merkel recently stated that Europe’s goal is to “replace illegal migration with legal migration” (emphasis added), thus accepting the “regaining control” narrative. This point was made even more explicitly by the President of the European Council, Donald Tusk, who insisted that, “Europe itself needed to do more to secure its borders,” and further warned that if the external borders of Europe are not protected, then the Schengen free-movement zone, which was established by the removal of internal borders, “will become history.” See James Kanter and Andrew Higgins, ‘EU to Offer Turkey 3 Billion Euros to Stem Migrant Flow’, The New York Times, November 29, 2015.
carry out their activities within an area of 20 kilometers away from the border, crafting a European variant of the United States’ “constitution free” zone, here translated to the denser continental geography. 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. However, so long as such checks are proportional and done “to prevent unauthorized entry,” identity checks can take place not just within in the 20-kilometer zone, as previously ruled, but within a broader territorial range: 30 kilometers of the land border and a radius of 50 kilometers of the sea border, as well as in train stations nationwide and on-board trains anywhere. Again, we find the same inland “stretching” dynamic that we have witnessed elsewhere. What is perplexing in this context, however, is that such shifting-border measures are exercised within Europe’s free-movement zone.

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 strategy, known as “externalization,” which extends beyond the boundaries of

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138 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 Borders Code (n 136), online 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. The reintroduction of border controls within the Schengen area is a last-resort prerogative of member states, which is subject to the requirement of proportionality and must be limited in time.

139 These agreements have been criticized for failing to provide sufficient human rights safeguards and for the unfair bartering tactics used by the European Union to achieve such agreements with third countries, which effectively become Europe’s “dumping” ground.
The shifting border

the continent and shifts focus to migrants’ countries of origin or transit. This has led the European Union to establish one of the world’s most complex, inter-agency, 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. 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.139

Europe’s externalization policy creates a “ring of protection” outside the European Union. 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, the Africa–EU Partnership, the Valletta Action Plan, the Global Approach to Migration and Mobility, and so on. These policies are designed to enforce migration control in collaboration with countries of origin or transit “at the earliest possible stage”; they combine readmission agreements with development incentives and asylum-system capacity building for the signatory third-countries, as well as enticements such as promises of easier visa processing for their citizens, highlighting the unequal bargaining power of the European Union and its member states.140 The controversial agreement between the European Union and Turkey, which involves the transfer of billions of euros and other inducements in return for Turkey’s assistance with “keep[ing] people

in exchange for promises of development aid, eased procedures for visa processing, and the like.

in the region’ and out of Europe” is a classic example of outsourcing migration and border control.\footnote{Kanter and Higgins (n 134), 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 offshore-processing practice.}

Earlier bilateral and multilateral agreements have been criticized as absolving EU countries of their otherwise binding human rights obligations by insisting that non-EU states provide 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,” in the process allowing wealthier countries to insulate themselves from legal responsibility toward refugees and other persons entitled to international protection.\footnote{Hathaway and Gammeltoft-Hansen, ‘Non-Refoulement’ (n 12), pp. 9, 17.} In the aftermath of 2015’s migration crisis and with the rise of populist, anti-immigrant sentiments, calls to establish regional disembarkation centers outside Europe have grown louder. Such proposals remain murky on the details, but it is crystal clear that they take a leaf out of Australia’s playbook: they are designed to offshore refugees and divert legal responsibility away from EU member states. While responding to political pressures to “regain” control and halt uninvited arrivals, such proposals do little or nothing to provide safe passage or lawful channels for EU entry for those identified as in need of protection, wherever they happen to have encountered the long arm of the mobility-inhibiting shifting border.

This need not be the case, however. I believe this shift in the “technology” of governance and spatiality of migration regulation must be matched by a reconceptualization of the relationship between law and territory, stratification and (im)mobility, space and political will, so as to facilitate rights protections and access options that begin to match the restless agility of the shifting border. I argue that an understanding of borders as mobile constructs provides an important
corrective to prevalent theoretical accounts. I return to elaborate these ideas, and how they might be put into action, in the final section of the discussion.\textsuperscript{143}

2. Some implications of the shifting border: thinking beyond the binary

Before turning to explore potential remedies and reforms, we must ask: why this flurry of activity, and why now? As Bimal Ghosh aptly observes, “no other source of tension and anxiety has been more powerful [in the global north] than the fear, both real and perceived, of huge waves of future emigration from poor and weak states in the years and decades to come.”\textsuperscript{144} Migration experts have persistently argued that these fears are inflated and remain empirically unfounded, emphasizing that the number of refugees that reach the greener pastures of the world’s more affluent countries is dwarfed by the share of burden borne by the countries in poorer and less stable regions that host approximately four fifths of the world’s refugees. In Europe, economists and others, adopting a bird’s eye perspective, have claimed that it should not be impossible for a union of 500 million people to successfully absorb 1 million asylum seekers. While such opinions that emphasize scale and capacity may be descriptively accurate, as a matter of political expediency they miss the

\textsuperscript{143} Theorists and activists concerned with the imbalance of power across borders and the complicity of actors in one political community in harms that are manifested in another (what economists would term negative externalities) have provided excellent arguments for moving beyond the current stalemate. In the political-theory literature, authors such as Iris Marion Young and Catherine Lu have advanced broader understandings of structural injustice that cover such situations. Related concerns are addressed in the vast literature on global justice and environmental justice. In the normative scholarship on migration, see, for example, Benhabib, \textit{The Rights of Others} (n 11); David Owen, ‘In Loco Civitatis: On the Normative Basis of Refugeehood and Responsibilities for Refugees’, in Sarah Fine and Lea Ypi, eds, \textit{Migration in Political Theory: The Ethics of Movement and Membership} (Oxford: Oxford University Press, 2016), pp. 269–289.

emotive mark: it is the public’s perception of threat or a looming crisis of loss of control over borders that matters.\textsuperscript{145}

In the wake of the refugee crisis, images of large waves of people desperately marching on foot or crossing the sea on dangerous dinghies—seeking any possible pathway to Europe—are now etched in our collective memory. These images feed into already protracted debates, accentuating positions in both the human rights camp and the need-to-“regain”-control constituency. The fear of loss of control, along with xenophobic and anti-immigrant sentiment, has proven powerful in unleashing a backlash and nourishing the rise of populist nationalism. Political opportunists have latched on to this perception of loss of control—the sense that governments are clueless, toothless, or both. Such sentiments have prevailed in the past but have become more pronounced following the sharp surge in global displacement due to protracted situations of civil strife, war, climate emergency, famine, and oppression amplifying forced migration and international protection pressures. All of this led the United Nations High Commissioner for Refugees to issue a stern warning that “the world is facing a staggering crisis” as the number of refugees and displaced people has reached “the highest level ever recorded” since the aftermath of World War II.\textsuperscript{146}

As member states continue to bicker about responsibility and burden-sharing, treating refugee-protection obligations as a “‘hot potato’...[for] which nobody wants to bear the costs,” the push to further restrict access

\textsuperscript{145} Even at the height of the refugee crisis in Europe, the vast majority of Syrian refugees were, and still are, hosted in neighboring Turkey, Lebanon, Jordan, Iraq, and Egypt. Together these latter countries carry the brunt of this refugee crisis: 4.8 million have now fled to them, according to 2017 UNHCR figures. About a quarter of the population of Lebanon now consists of displaced Syrians. More affluent parts of the world are not the major recipient-states for refugees; in fact, no country in Europe or North America has made the top-ten list of the UN High Commissioner for Refugees in recent years. The problem, however, is that simply reciting and relaying these facts and figures is unlikely to alleviate the deep sense of anxiety surrounding questions of migration, especially in countries facing the resurgence of populist nationalism, in no small part due to the politicization of the charged “loss of control” theme.

and to rely on ever more aggressive migration-management techniques increases. So does the human toll. Those who manage to pass through the cracks of the shifting border resort to the cavalier guidance of human smugglers who unscrupulously profit from their despair.\footnote{The “hot potato” quote is drawn from Didier Bigo, ‘Frontier Controls in the European Union’, in Didier Bigo and Elspeth Guild, eds, \textit{Controlling Frontiers: Free Movement into and within Europe} (Aldershot: Ashgate, 2005), pp. 48–98. See also Gallagher and David, \textit{International Law of Migrant Smuggling} (n 101).}

Data collected by the IOM reveal that since 2000, more than 45,000 migrants have drowned, mostly in the Mediterranean. As a recent report observes, “[t]his is despite the fact that this stretch of water is the most heavily surveyed and among the most tranquil in the world.”\footnote{Migrant deaths also occur along the Mexico–US border. The major reported causes of death are dehydration and hyperthermia. Civil society groups such as border angels seek to prevent unnecessary deaths by providing “border water drops”—plastic jugs of water that are placed by volunteers in the desert along high-traffic migrant paths. Border Angels, ‘Border Water Drop’, online www.borderangels.org/desert-water-drops/.

This glaring failure to provide safe passage is connected to, and indeed fueled by, the attempt to skirt responsibility in a global system whereby the standard interpretation of access to protection is tied to a fixed interpretation of territoriality: namely, it requires reaching the proverbial “gates.”

When it comes to the obligation to protect—the so-called “trump card” or “blank cheque” held by those refugees who reach the frontier of desired destinations—the shifting-border paradigm, with its malleable legal spatiality, provides the required flexibility for borders to operate in a quantum-like duality, simultaneously static and diffuse. To limit their liability to humanitarian claims, states retreat to the narrowest and strictest application of the classic Westphalian notion of the sovereignty, placing the burden of “getting here” on individuals who are already displaced and vulnerable. Multiple layers and sources of law—administrative and constitutional, immigration and refugee, regional and international—require that, to claim protection, individuals must be on the territory of the state in question. Thus, when it comes to refugees, the old, static, and fortified border appears in full glory: to launch an asylum claim, it is vital to reach the territorial border. Until
the target country’s soil is physically underfoot, which even then is sometimes insufficient (as in the case of excision or zones d’attente), a migrant’s right to protection remains abstracted and un-actionable vis-à-vis a specific jurisdiction.

When states seek to control migration, the spatial and temporal understandings of the border shift, seeping the border inward or extending it outward, just as the same borders may be shrunk and/or folded back to create constitution-free zones. These maneuvers allow affluent societies to continue to present themselves as global beacons of democracy and human rights while engaging in ever more frantic efforts to avert such arrival in the first place, or, as Canada now does, following the lead of Australia, declaring those who actually reach the territory as “inadmissible” upon arrival. Government policymakers and other stakeholders, public and private, thus simultaneously uphold a conception of fixed territoriality when it comes to extending rights and protections to non-citizens, while at the same time switching to an unmoored and increasingly mobile conception of the border (contracting and expanding to wherever the enforcement need arises) when it comes to the rights-restricting dimension of migration-control activities.

What theoretical and pragmatic insights can be drawn from the more grounded analysis of the shifting-border paradigm that I have offered above? There are at least five interrelated lessons which I would like to emphasize. First, in today’s world, understandings of mobility and globalization can no longer revolve around the dichotomy between open and closed borders. This binary misses the unique and perplexing features of the shifting-border landscape: states may simultaneously open and close their borders, depending on who is seeking passage, where the encounter takes place, and what security and identity credentials (or, conversely, algorithmic risks) the person is deemed to bear. Thus, we can no longer merely focus our debates on whether borders are, or should be, more porous or impermeable, as this misses the mark. The new paradigm rests on the logic of acquiring enhanced control over those passing through multiple checkpoints, fracturing the uniformity of impact of the border on those seeking to pass through its gates.
For some it offers a welcome mat, for others a locked barricade. Such selectivity is at heart of the shifting-border operations, fast-tracking desired entrants while at the same time erecting higher and higher legal walls, ever further away, to keep out the unwanted and uninvited migrants.\(^{149}\)

In lieu of idealized and abstracted discussions, the framework offered here begins from the ground up, allowing us to see the nuances and dark corners of the evolving legal cartography and geography of power and (im)mobility. It thus avoids the trap of overlooking troublesome realities by making unrealistic assumptions about how borders operate in the world around us. The “high resolution” investigation of the shifting border offered in this study therefore fits comfortably with the recent “methodological turn” in political theory, which calls for more grounded theorizing against the background of non-ideal conditions.\(^{150}\)

Second, the legal changes I have recounted in identifying and explaining the shifting-border phenomenon permit us to revisit the demise-of-the-state thesis, prevalent among humanists and activists, which engendered the influential “disappearing”-border and waning-sovereignty debate. The evidence shows that borders and migration control are not vanishing but are being reinvented. As we have seen, traditional Westphalian concepts of sovereignty and territoriality are being “reworked” and implemented in novel ways. Such revisions have contributed to the pressing and, as yet, unresolved tensions between these aggressive new measures of controlling mobility across ever shifting borders and rule-of-law countries’ declared commitments to human rights. Indeed, as we have seen in the examples above,

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\(^{149}\) On the selectivity of migration under the shifting border, see, for example, Shachar and Hirschl, ‘On Citizenship, States and Markets’ (n 16); Ayelet Shachar, ‘The Marketization of Citizenship in an Age of Restrictionism’ (n 48).

constitutional doctrine and human rights jurisprudence has yet to fully catch up with this new and far more creative exercise of plenary power in regulating access and control through the invention of the shifting border. There is thus a deep irony embedded in the current situation: the idea of de-territorialized space and action, initially vaunted as progressive and human-rights-enhancing, has been skillfully (and arguably repressively) “hijacked” by law-and-order agencies seeking to restrict and police mobility. What kind of normative and institutional implications does such capture entail, and how can it be countered or at least tamed?

With these concerns in mind, the final section of my discussion will advance the argument that, as part of a two-pronged response, the shifting-border technology and ideology must be matched by a reconceptualization of the relationship between law and territory that would entail that legal obligations become operative as soon as state agents (or their delegates) exercise “effective control.” In other words, if states exert their power in an extraterritorial fashion, then claims of law and justice must similarly extend beyond borders.

Third, shifting the locus of governance structures—for example, by moving from the national to the supranational, or from the unilateral to the multilateral—does not necessarily improve the human rights protections and mobility options afforded to those seeking entry or who have been stopped en route. We have already seen, for example,

151 Whereas typically we think of public law in the context of global constitutional or administrative law as focusing on rights and placing limits on the exercise of executive power, in the context of citizenship and immigration much of the work occurs through the regulatory side of law, with comparatively little judicial review involved. This is reflected, for example, in entrenched legal concepts such as the “plenary power doctrine” in US immigration law or the “royal prerogative” in the United Kingdom. The term “plenary power” itself comes to us from Latin, from the etymological root of “plenus,” meaning full power or full authority. While a perennial subject of scholarly critique, plenary power still holds a significant sway in law, and it allows a great degree of discretion to power holders in the realm of controlling a nation’s borders (real or imagined) and membership boundaries as expressions of sovereignty.

152 Some of this idealism is still reflected in the literature on the transnational promise of higher law beyond the state. For a detailed account, see Turkuler Isikel, Europe’s Functional Constitution: A Theory of Constitution beyond the State (Oxford: Oxford University Press, 2016).
the emphasis placed by the shifting-border architects on “policing at a distance.” In Europe, scholars have been fascinated with the multiple ways in which the “contemporary thought on visas developed in parallel to the reflection upon the abolition of border controls within the Schengen.” This juxtaposition of mobility and immobility, openness and closure, freedom in the interior and security threats from its exterior is part and parcel of the shifting-border paradigm as it finds expression at the transnational level. As official EU policy states, “the Union shall develop policy with a view to . . . the gradual introduction of an integrated management system for external borders.”

A key to fulfilling this mandate is the development and implementation of a common policy on visas, which was incorporated into consular instructions and manuals. Even more significantly, it has facilitated the establishment of so-called blacklists of countries, whose citizens must obtain visas to EU member states in advance of travel. Visa regulation of this kind is, of course, not new. It dates back to the nineteenth century, to the time of the “invention of the passport” (as John Torpey memorably put it), offering a prime example of unilateral national-generated and enforced techniques of “remote control.” Tracking the evolution of visa-free travel (or visa-waiver programs) from the 1950s onward, recent studies have documented a “global mobility divide,” whereby visa-free travel and ease of mobility has

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153 As explained earlier, such measures recast the timeline of migration control to pre-arrival and spatially push such regulation outward to the jurisdiction of countries of origin and transit. This is part and parcel of Europe’s ambitious, expansive, and multi-stakeholder integrated border-mobility strategy.


156 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2012/C 326/01 (EU) § 77(2)(a). For those hailing from the world’s less stable and poorer regions, securing a visa is a mandatory first step to gaining lawful admission to Europe—and it must take place outside the continent, prior to travel.

157 Qadim, ‘The Symbolic Meaning of International Mobility’ (n 154).

increased for citizens of well-off countries, while it has stagnated or even decreased for those hailing from poorer or less stable countries. The creation of regional “blocks” such as the European Union has added yet another twist to the story. Shared or harmonized visa policies have paradoxically generated greater, not lesser, restrictions for those seeking admission from the outside, as “each member state must exhibit solidarity with the other member states and respect the presence on the blacklist of a country whose nationals do not necessarily present a problem for it.”

The cumulative list is thus more extensive and robust. This pattern is repeated in other contexts: the power to enter into readmission agreements, once reserved to member states alone and now expanded to the European Union, provides another example of how the regional block can gain greater concessions from its bargaining partners (primarily countries of origin and transit in the world’s poorer regions) than individual member states may have been able to, leading some commentators to dub such agreements as “repressive measures of pre-frontier control.”

Fourth, one of the major themes of renewal in comparative constitutional law over the past few decades has been the celebration of the “migration of constitutional ideas.” The gist of the argument is that apex courts in the world of new constitutionalism now regularly “borrow” progressive ideas from one another—for example, by citing precedents from comparable countries as a source of persuasive authority. 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

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159 The term “global mobility divide” is drawn here from Steffen Mau.
164 See, for example, Anne-Marie Slaughter, A New World Order (Princeton: Princeton University Press, 2005).
dialogue. Just as progressive ideas about the scope and extent of rights protections can travel quickly, so can restrictive policies. We might call this the constrictive precedent problem, or 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, restrictive immigration measures, anti-constitutional or abusive constitutional measures can do so no less easily and effectively, if not faster. Once a reputable court or government adopts a highly restrictive policy toward 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. A classic example of this pattern at work is found in the global influence of the US Supreme Court decision in Sale, which held that US Coast Guard ships can “push back” Haitian asylum seekers if they are interdicted on the high seas, based on the argument that non-refoulement obligations (derived from the French word refouler (to “turn back” or “repel”)) do not apply extra-territorially. While criticized by migration scholars and legal experts, Sale stands for a restrictive interpretation of domestic and international refugee and human rights laws, according to which such obligations apply only at the border or within the territory. Here again we witness how the shifting paradigms, or competing conceptions of the border, matter dramatically when it comes the geography of human rights and their implementation. 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 by US Coast Guard ships, which arguably operated as a functional equivalent of the border, applied far away from the

protected territory and, accordingly, was not “visible” or legible to a court that examined it under the classic Westphalian lens.\textsuperscript{166} The United States still upholds this legal position, as it firmly made clear in response to the UNHCR’s Advisory Opinion on Extraterritorial Application of Non-Refoulement Obligations, released in 2007.\textsuperscript{167}

The \textit{Sale} ruling and the United States’ permissive stance on pre-emptive interdiction have been rebuked by some national and international courts and tribunals. 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 held, contra \textit{Sale}, that 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 \textit{Sale} has proven more resilient than some predicted. It is seen as providing 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,” appearing and reappearing “numerous times, in different guises”—while escaping the reach of their legal responsibility to offer access to international protection systems to those affected by these shifting-border measures by virtue of claiming that non-refoulement does not apply extraterritorially.\textsuperscript{168} Australia is a case in point. The fact that the United States has already provided


\textsuperscript{168} Moreno-Lax, \textit{Accessing Asylum in Europe} (n 86), p. 2.
justification for such a rights-restricting approach is seen as “license” to follow suit.\(^{169}\) In a similar vein, the European Union’s invention of the safe-third-country concept has traveled widely and globally, inspiring, among other examples, the safe-third-country agreement between the US and Canada, or 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.\(^{170}\) 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 and procedural rights and protections. Even if eventually recognized as refugees, such arrivals face a “freeze period” of five years before they can apply for permanent residency. This is quite a dramatic shift for Canada, which prides itself, perhaps in an overly self-congratulatory fashion, as maintaining one of the world’s most generous immigration systems. In short, ideas travel fast and furiously across borderlines, especially when policymakers feel pressured to demonstrate action to counter the public perception of “loss of control.” The result, for those en route or escaping harm’s way, is further restrictions and the tightening of rights by precisely those premium democratic destinations that are globally perceived to be beacons of the rule of law, not rogue or lawless states. There is real room for concern that such behavior advanced by the leaders of the “free world” will justify infringements on protected rights by partner states that may have less than dazzling records on human rights.

Fifth, the sheer reach and magnitude of the shifting border also invites revisiting the age-old question of how to tame menacing governmental

\(^{169}\) As in the United States, Australian courts have determined that practices of interdicting migrants and asylum seekers on the high seas does not violate non-refoulement. See Ruddock v. Vadarlis [2001] 110 FCR 491 (Austl).

\(^{170}\) The transnational emulation of the practices of detention in the context of return is another prime example, as is the more general trend toward adopting more restrictive immigration policies, which, outside the European Union, is not tamed by binding regional human rights courts or minimum agreed-upon standards. For an illuminating analysis, see Hélène Lambert, Jane McAdam, and Maryellen Fullerton, eds, The Global Reach of Europe’s Refugee Law (Cambridge: Cambridge University Press, 2013).
authority. As this power 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 human rights, both of which still rely on territoriality as their core grounding principle.\footnote{171} If we seek to develop fresh proposals 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 turn momentarily.

3. Normative considerations and institutional redesigns: on “place” and political obligation

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

\textit{Space and political organization: Hannah Arendt’s intervention}

Writing after the atrocities of World War II and the Holocaust, Hannah Arendt astutely observed:

\begin{quote}
[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 own. This
\end{quote}

\footnote{171} The presumption against extraterritoriality is deeply ingrained. In the United States, for example, even a federal act that explicitly permits non-nationals to sue in US courts against the breach of human rights in other countries was eventually construed narrowly by the United States Supreme Court on the basis of the presumption against extraterritoriality, which, the Court ruled, was not displaced in the case at stake, which involved a human rights violation that occurred outside the United States. See \textit{Kiobel v. Royal Dutch Petroleum}, 569 U.S. 108 (2013) (United States). For a critical account, see Philip Liste, “Transnational Human Rights Litigation and Territorialized Knowledge: \textit{Kiobel} and the ‘Knowledge of Space’”, \textit{Transnational Legal Theory} 5 (2014): pp. 1–16.
moreover, had nothing to do with any material problem of overpopulation; it was a problem not of space but of political organization.\textsuperscript{172}

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, explains Benhabib, 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.\textsuperscript{173} No less significant, for Arendt the tragedy of the migrants and refugees was that they had “no place on earth where [they] could go to without the severest restrictions,” a problem itself wholly entrenched in the Westphalian system, which 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.

As we have already seen, today it is paradoxically states themselves that are reinventing sovereignty and territoriality, showing a remarkable capacity to adapt to new environments. As border control is increasingly portrayed as “either or both a security imperative and a life-saving humanitarian endeavor,” doing nothing in the face of large-scale global mobility pressures counters the basic sovereign instinct to control the border, wherever it is placed and replaced through the words of law and the assistance of “big data” and sophisticated technocratic-biometric surveillance.\textsuperscript{174} Irregular movement of people is perceived by governments,


and by growing sectors of their populations, as risking the stability and security of the international order, informing discussions of contemporary migration as a “crisis” for a multitude of actors: those seeking mobility across borders 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,” for governmental and non-governmental humanitarian agencies bearing the brunt of meeting the fundamental needs of migrants and refugees stranded in “temporary” situations that seem to never end, for destination countries and supranational bodies fearing loss of control, and, ultimately, for the Westphalian order itself, if 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 also led to the return of internal borders, not as moveable and invisible, but as visible, physical barriers manifesting statist attempts to “regain” and display potent sovereign authority.

At present, established regimes of rights and protections help ensure that those who “make it”—those who manage to defy the shifting border and touch base on the soil of desired destination countries—will enjoy more vigorous protections. None of this, however, addresses the plight of those who do not arrive, who cannot gain access, who are not safe and who are unable to defeat the geopolitical rifts and global inequalities that make arrival in the vicinity of our admission gates a pipedream. They are the contemporary embodiment of the displaced and dispossessed that Arendt so powerfully places at the heart of her analysis. Recall that for Arendt the problem was “not of space, but of political organization.” I beg to differ. Based on the analysis of the shifting border and the reinvention of borders for the purposes of migration control by governments seeking to admit the few but not the many, selectively deterring or encouraging mobility, the challenges posed by current migration flows encompass both our notions of space and political organization, and, as a result, any new answers will require addressing these combined factors in tandem.
The shifting border

The overrated premium of territorial arrival

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. It is in this tension—between states’ skirting their constitutional and human rights obligations and their declared commitment to upholding them—that an opening might be found to challenge the darker corners and unresolved contradictions embedded in the shifting border.

What are the implications of this massive yet still under-theorized change of the locus of the exercise of the so-called last bastion of sovereignty—migration control—that no longer takes place exclusively or primarily in the confines of a bounded territory? Does it shed new light on the 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 that it need not fall back on the competing yet no longer stable poles of the “static” and “disappearing” narratives. Nor should we limit our imagination to another either/or choice: the confines of neo-refortification, as in the populist promise to erect impenetrable border walls, versus neoliberal concepts of a borderless world, whereby the lowest common denominator of rights and protections under a market economy may end up replacing whatever shred of solidarity and distribution is available under our current, imperfect political structures.175

Still, the skeptic might argue that despite the proliferation of new forms of law, identity, and transnational political activism, some fault lines persist: those seeking entry into Europe (or any other promised or imagined land of immigration) typically arrive from poorer and less stable regions of the world and are racialized, feared, and often

175 I discuss these concerns in Shachar, ‘Citizenship for Sale?’ (n 8).
stigmatized as security risks.\textsuperscript{176} For those subscribing to the “neo-imperialism” school of international relations, refugees’ desperation at home is seen, in part, as the result of larger geopolitical interests and armed conflicts that are the fallout of global power politics. Whatever the cause, it is undeniable that for the “huddled masses yearning to breathe free” the gates of orderly admission are increasingly bolted shut. Remarkably, the limit to this otherwise “plenary” power is vested in individuals at risk who seek protection by claiming asylum, which in the “ordinary situation will require a state to suspend its rules of immigration control and undertake an asylum procedure or equivalent to determine if such a risk is present.”\textsuperscript{177} Those refugees who reach the frontiers of affluent countries thus hold the unique legal capacity to “activate” the protection machinery of host states by virtue of territorial arrival. This grants both agency and protection to the lucky few who can overcome barbed wires or the equally powerful (though less visible) hurdles of the shifting border.

In a world marked by borders, the refugee thus stands in a special position: by reaching the frontier of a safe country (so long as its territory is not legally “erased” or “excised”), the almost unlimited power of states to install and enforce migration controls bows, at least in theory, to the individual. In practice, however, states are proving endlessly enterprising in trying to “release” themselves from the domestic, regional, and international legal protection obligations they have undertaken, without formally withdrawing from them. This disjuncture is vitally important, as it opens up a space for democratic resistance and contestation. It also supports the conclusion that recourse to territorial arrival must remain available to those seeking safety who have somehow—usually at great risk and with the backing of callous human smugglers—managed to comply with the rigid requirement of “touching base.” However, if we wish to find fresh prescriptions fit for a world of shifting borders, where human mobility is a regular target of blockade and


\textsuperscript{177} Gammeltoft-Hansen, ‘Extraterritorial Immigration Control’ (n 32), p. 114.
policing from afar, then additional routes for acquiring rights and protections must be envisioned.

As several authors have noted, the fact that a significant premium is placed on territorial arrival—the requirement that in order to gain a chance to activate the asylum-seeking process moving bodies must first arrive at our shores—is not surprising, for “[t]his interpretation . . . poses a negligible threat (if any) to the sovereignty” of states under the traditional Westphalian image of bounded and exclusive legal spatiality. Efforts to extend the applicability of human rights beyond fixed territoriality are more disruptive, yet they are urgently called for, as we cannot blind ourselves to the unequal distributional effects of the current system. The requirement to have the soil of the recipient country firmly under one’s feet, after “eluding the frontier guards,” is soaked in a hefty dose of arbitrariness, as it grants some safety and others “hard luck.”

Given that the frontier guards themselves are no longer physically restricted to operating only on the edges of the protected territory, and that the most needy are frequently those least able to embark on dangerous and costly travel to affluent countries, the traditional notion of “touching base” cannot exhaust the routes for protection.

A new approach

Amid a backdrop of governments who bicker and shirk responsibility for receiving and protecting the inflow of migrants who have managed to reach their territory, and fear-mongering politicians proclaiming that Europe is on the brink of “invasion,” can we not envision more creative and humane approaches to addressing the plight of people out


of place? To overcome the current impasse, we need to return to the basics—to the conception 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.

We have already seen the manifold ways in which the shifting border disrupts these traditional notions. Now I wish to take the argument a step further and argue that instead of ignoring this reality, as most accounts of migration do, whether positive or normative, 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. Such a transformation may take many forms. Instead of having to reach Europe (or any other desired destination) through irregular and increasingly deadly routes of passage, humanitarian-visa applications can in theory be accepted anywhere en route: in countries of origin or transit, via embassies, upon encounter with official agents of border enforcement or their delegates, even if the latter are privately employed or operate under the flag of a third country. Humanitarian corridors that temporary seal off conflict zones to permit vulnerable refugees to be airlifted to safety or escape harm’s way by crossing the territories of several countries can be drawn and redrawn through joint action by states, migrants, non-governmental organizations, and international bodies such as the UNHCR. Another range of possibilities opens up when new technologies are taken into account. Just as countries can pre-authorize entry electronically, they may permit non-emergency applications to be transmitted digitally from anywhere in the world. These various examples manifest a human-rights-enhancing vision of responsibility and accountability that does not stop at the territorial edges of states, much like their migration-regulation activities no longer stop there either. Where a country intentionally delinks migration-control activities from its geographical borders, a correlated expansion of rights and protections for the individual must follow. Two complementary methods would achieve this result: (1) expanding the
extraterritorial reach of human rights, on the one hand, and (2) relaxing the fixation on territorial access as a precondition for securing refuge and protection, on the other. These changes in law and thought would place the burden on wealthier 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 human mobility and rights-protection rather than as a mere tool for exclusion. This shift is necessary if we are to respond to the reality of borders that move. Both components of this hinge-like strategy warrant further elaboration.

**Human rights follow the shifting border**

The first method would function to “rein in” the shifting border by ensuring that core human rights and constitutional provisions that regulate and constrain the exercise of executive power will apply *irrespective* of the location of border-control activities, whether on land, sea, or in the air. The goal is to close, or at least significantly minimize, the gap between a shifting border—which escapes the standard limits on the exercise of authority—and to act *as if* such power had been exercised within the domain of the territorial state or its actual, physical frontiers, inviting the range of legal instruments and norms that constrain the state and its agents in the act of exercising governmental authority. The ECtHR 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.” See *Issa and others v Turkey*, App. No 31821/96, Eur. Ct. H.R. (2004). This principle originally focused on military action but was gradually expanded to other contexts.

This does not mean that migration regulation would “resettle” at the fixed border. Rather, the approach I propose may bring about an equally radical shift toward safeguarding legality and legitimacy in the exercise of power, according to the basic rule-of-law principle that the “presence of authority does not entail the absence of constraint.”

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180 This approach is grounded in the jurisprudence of national and supranational courts as well as human rights tribunals. The ECtHR 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.” See *Issa and others v Turkey*, App. No 31821/96, Eur. Ct. H.R. (2004). This principle originally focused on military action but was gradually expanded to other contexts.

This restraining principle is accepted in most other fields of law, and 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, judicial oversight and even moral objection.”182 From the perspective of the individual, bringing constitutional and human rights constraints to bear on the shifting-border exercise of authority would entail that whatever procedural and substantive protections would have applied to the encounter with a border agent at the territorial edges of the country should similarly apply if equivalent movement-control authority is exercised in a remote location or like fashion.183

The operative logic, then, is not to “undo” the flexibility of the shifting border but to bring it under the normative umbrella of regulatory and democratic oversight. Accordingly, if we adopt more flexible interpretations of jurisdiction, effective control, and the exercise of authority, following the actual geography of power of moveable legal walls, freed from the confines of a fixed territory, then instances of protection will begin to match the spatial and temporal acrobatics of the shifting border, becoming operative not only upon arrival at the territory but also upon contact with state officials or their delegates exerting binding migration-regulation authority, whenever and wherever such authority is implemented under color of law.184 This first line of responses is based on the rationale of switching the basis for bringing the shifting border in check from the mere territorial to the jurisdictional and the functional, in line with human rights arguments in favor of relying on the

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182 Ibid., p. 53. In practice, such regulation is hard to achieve even within the domestic sphere, let alone at the transnational level.

183 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.

184 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. For an illuminating articulation of different legal bases or justifications for extending rights beyond borders, see Chimène I. Keitner, ‘Rights beyond Borders’, Yale Journal of International Law 36 (2011): pp. 55–114. Although Keitner focuses exclusively on the extraterritorial application of constitutional rights by domestic courts, the models she develops can be applied to regional and international human rights.
concept of effective control as the relevant ground for establishing responsibility in such extraterritorial, or “grey zone,” situations.185

There are important precedents pushing in this direction. In its recent case law, the ECtHR has imposed juridical limits on extraterritorial migration control on the high seas. In the early 2000s, facing a tide of irregular migrants arriving from Libya with the aim of reaching 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.186 To achieve its vision, Italy signed the innocently named Treaty of Friendship, Partnership and Cooperation with Libya, which stipulated a grandiose migration-control project: Italy would provide ships and staff to patrol the 2,000 kilometers of Libyan coastline. Several protocols put this plan into action. None mentioned explicitly the “push backs” of irregular migrants intercepted on the high seas. Nor did the protocols specify human rights provisions or protections for asylum seekers. In the landmark Hirsi case, decided in 2012, the ECtHR was called upon to determine whether Italy had breached its protection obligations by stopping a vessel with about 200 passengers on the high seas and sending these intercepted migrants back to Libya without affording them a chance to make their protection claim. To establish such responsibility, the ECtHR had to determine whether the group of irregular migrants who filed the claim (24 of the estimated 200 migrants who were on-board the interdicted boat) were at any stage under Italy’s jurisdiction. Although the European Convention of Human Rights does not extend globally, in Hirsi the Grand Chamber held that human rights obligations do not necessarily stop at the traditional, territoriality-fixed, “Westphalian,” border. Instead, such obligations can follow state action and thus become applicable in an extraterritorial fashion if and when state officials exercise “continuous and exclusive de jure and de facto control.”187 By focusing on the exercise of effective

185 For a powerful elaboration of this claim, see Hathaway and Gammeltoft-Hansen, ‘Non-Refoulement’ (n 12).
187 Hirsi v Italy (n 25), sec. 81.
control, rather than asking where the act took place, the ECtHR was able to expand Italy’s legal liability beyond its territorial border. Moreover, it was the 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—that amounted to a breach of the Convention.

In this, the ECtHR rejected the narrow approach adopted by the US Supreme Court in Sale—which held that under domestic or international law the US coastguard is not obliged to non-refoulement if irregular migrants are interdicted on the high seas and then turned back—in favor of 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, acting alone or in concert, or under the auspices of supranational entities such as Frontex, helps close the gap, extend rights, and apply regulatory controls on otherwise “unruly” practices.

In another recent case, dealing with attempts 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” or where it locates and relocates it, but whether those affected by such exercise of migration control are given basic procedural protections, such as the opportunity to raise a claim of credible fear and activate the protection process. Whereas the Hirsi case dealt with a policy of stretching the border outward, this case, N.D. and N.T., followed in the tradition of bleeding the border inward, as we have seen in the US 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, separating the European Union from Africa. The barrier and the three fences constituting it were located on Spanish territory, not outside it. Reminiscent of the Australian concept of excised
territory, Spain carved out a zone of Spanish territory in Melilla that was “non-Spain” for the purposes of migration control—the so-called operational border—a zone in which the principle of non-refoulement did not apply.\footnote{Anyone caught trying to climb the fences, cross the area between the fences, or sit 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 who 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.” Article 10, Aliens Act 2000 (Spain), translated and cited by Christina Gortazar Rotaache and Nuria Ferre Trad, ‘A Cold Water Shower for Spain—Hot Returns from Melilla to Morocco: N.D. and N.T. v. Spain’, online: http://emigrationlawblog.eu/a-cold-shower-for-spain-hot-returns-from-melilla-to-morocco-n-d-and-n-t-v-spain-ecthr-3-october-2017/.
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Representing the claims of two individuals, a Malian and an Ivorian national, identified as N.D. and N.T., who were part of a group of migrants who attempted to enter Spain via the Melilla barrier, human rights groups challenged Spain’s practice before the ECtHR.\footnote{N.D. and N.T. v. Spain, App. Nos 8675/15 and 8697/15, Eur. Ct. H.R. (2017), p. 1.
} While there was some confusion about the precise chronology of the events at the enclosures, the two had succeeded in scaling the first two fences and climbed on top of the third fence. After several hours, they climbed down the third fence with the assistance of the Spanish police. They were immediately arrested by members of Spain’s Guardia Civil and, without receiving procedural treatment or the opportunity to identify themselves and explain their circumstances, were transferred back to Morocco and subsequently deported.\footnote{Registrar of the Court, Press Release, European Court of Human Rights, The Immediate Return to Morocco of Sub-Saharan Migrants who Were Attempting to Enter Spanish Territory in Melilla Amounted to a Collective Expulsion of Foreign Nationals, in Breach of the Convention (ECHR 291 (2017), October 3, 2017) (EU), p. 2.}

On Spain’s account, the two 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 Strasbourg 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.” By virtue of this exercise of effective control by uniformed state officials, jurisdiction arose—and with it came the whole slew of rights and protections enshrined in regional, international, and domestic human rights instruments and standards.

These legal precedents offer a glimpse into how effective control, as a functional rather than a territorially 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. States cannot have their cake (rely on the shifting border) and eat it (be released from legal liability for their action). Governments seek the “gain” of excision, fortification, the creation of constitution- or human-rights-free zones, and the like; they cannot do so without constraints, however. The “pain” of judicial review and the application of constitutional and human rights and protections is slowly catching up with the dynamic reinvention of territorially unbounded border control. This is one promising path on which to begin to close the gap between a mobile exercise of migration control 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.

This is no panacea, however. Just as the attraction of this “jurisdictional turn” is established, so is its frailty exposed. In the cat-and-mouse game of extending the reach of the shifting border both inward and outward while seeking to skirt their constitutional and human rights responsibilities, governments may again prove more adaptive and savvy than the demise-of-the-state theory or globalization theories would

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192 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.
The shifting border

predict. Post-\textit{Hirsi}, Italy no longer sends its ships and personnel to interdict unwanted migrants on the high seas. Instead, with generous EU funding, it has trained Libyan coastguard officials to do Europe’s dirty job of closing the border.\textsuperscript{193} Such “outsourcing” of migration control to third countries makes it difficult to establish legal responsibility, as effective control—the requisite jurisdictional link with a member state—is technically broken.\textsuperscript{194} Similar concerns arise with the growing reliance on carrier sanctions. Through a series of bilateral and multilateral agreements, airline companies and other private, for-profit actors are obliged to engage in what is essentially a quintessential act of public exercise of migration-control authority: pre-entry clearance. 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.”\textsuperscript{195} In many parts of the world, these private actors are “often assisted by immigration liaison officers, or other officials from the destination state stationed in the departure state.”\textsuperscript{196} This requires the cooperation of third countries, which must authorize the deployment on their territories of these stationed-abroad 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 airline staff,” thus limiting the possibility of attaching liability to their home countries.\textsuperscript{197}

As these examples illustrate, the more layers of discretion that are

\textsuperscript{193} 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 with unspeakable abuse of human rights.


\textsuperscript{195} Moreno-Lax, \textit{Accessing Asylum in Europe} (n 86), p. 6.


\textsuperscript{197} Gammeltoft-Hansen, \textit{Access to Asylum} (n 77), p. 8; Moreno-Lax, \textit{Accessing Asylum in Europe} (n 86), pp. 3, 6.
introduced and the greater the number and variation of the actors involved (public and private, at home and abroad, official and semi-official), the more difficult it becomes to attribute legal responsibility, even under the more expansive interpretation of effective control.

**Affording protection extraterritorially: shifting the burden from the individual to the state**

The second, complementary approach is to relax the connection between accessing territory and seeking asylum. If mobility is to be protected in the age of the shifting border, it is not enough for powerful destination countries merely to affirm the human rights of those under their effective control. Rather, these countries (and their enforcement partners along major migration routes) have an active 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.” Instead, individuals in need of protection will be able to claim asylum or other forms of protection upon encounter with the shifting border, which will likely occur far away from the territory they wish to enter. When affluent states flex their legal muscle, the shifting border moves to avert uninvited entry. However, the very same techniques of reaching people before they encounter the territorial border can in theory also become rights-enhancing, just as they are presently rights-restricting.

An example may help explain this last point. In 2015, Canada emerged as one of the global “do-gooders” in swiftly airlifting and resettling over 25,000 Syrian refugees. 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. Canadian immigration officials were dispatched to refugee camps in

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198 By 2017, the number of resettled Syrian refugees in Canada had almost doubled, reaching approximately 50,000, many of whom benefited from the country’s innovative private-sponsorship resettlement program.
The shifting border

Jordan, Turkey, and Lebanon, where they conducted pre-screening interviews and identity verification of asylum seekers. Within a matter of weeks, these reviews were completed, and successful refugee claimants were given not only temporary travel documents to Canada but also permanent-resident visas, placing them on the road to citizenship, instead of putting them through the years of insecurity that would otherwise have laid ahead of them if they had been made to wait for determination of their status in Europe—that is, if they were among the lucky ones who managed to reach its shores and comply with the requirements of the territoriality of asylum in the first place.\(^{199}\)

Importantly, and unromantically, the Canadian initiative allowed the state to exercise powerful gatekeeping functions. It was revolutionary, however, in deploying the shifting border “machinery” in the service of enhancing rights and securing mobility, rather than inhibiting both.

This can be 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, \textit{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.\(^{200}\) 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. Conceptually, then, affording protection extraterritorially retains a statist logic, exerting sovereign control over admission and membership decisions.\(^{201}\) However,

\(^{199}\) Resettlement, voluntary repatriation, and local integration are the three durable solutions promoted by the UNHCR, although there is also growing discussion of incorporating labor migration into the durable-solutions framework as well as creating sustainable economies and self-sufficient “cities” in refugee camps in so-called haven countries in the vicinity of conflict zones. These latter suggestions are not uncontroversial.

\(^{200}\) Resettlement facilitates relocation from refugee camps in conflict zones, where the vast majority of the world’s displaced persons are presently hosted, to willing third countries that are often far removed from the conflict zone. For states, this “de-territorialized” procedure grants control and containment, in lieu of the chaos of spontaneous migration, in addition to facilitating a “tangible expression of international solidarity and a responsibility sharing mechanism.”

\(^{201}\) Pre-screening and admission from abroad also keeps the resettling government in the driving seat and allows it to combine international humanitarian assistance with a message of control communicated to the domestic population. As official documents
shifting the burden from the individual to the state here bolsters, rather than undermines, rights and protections for those who need them most.\textsuperscript{202} At the same time, for the individuals selected, it provides hope, dignity, and a ticket to a new, permanent home.\textsuperscript{203} 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. Reversing expectations, geographically far-flung resettlement processing of permanent-residence permits or humanitarian visas that facilitate safe, dignified, and legal migration channels provide greater control over who gets in and under what conditions, even in the context of an unfolding crisis, than the classic insistence on exercising sovereignty through 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. This inversion of roles tasks states with the responsibility to reach out to the individual in need of international protection and not, as current law has it, put the onus on the 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. Not all countries have the luxury of pre-screening and resettlement.\textsuperscript{202} Of course, the number of refugees who are offered resettlement and the number of states involved in such relief efforts must rise significantly. 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 10 percent of the world’s refugees every year. This proposal is nested within a broader range of proposals to develop responsibility-sharing formulas to respond to large-scale movements of people out of place, as well as recommendations that call for greater cooperation between destination and transit countries to close gaps in the current refugee-protection system and the provision of asylum and due-process safeguards at borders. For a concise overview, see Kevin Appelby, ‘Strengthening the Global Refugee Protection System: Recommendations for the Global Compact on Refugees,’ \textit{Journal on Migration and Human Security} 5 (2017): pp. 780–799.\textsuperscript{203} Such resettlement determinations usually rely on UNHCR or country-specific priority criteria; they offer more immediate relief for those considered more vulnerable. Related programs have now been established by other countries, in different regions, providing greater protection for migrants, by establishing mechanisms to acquire visas in countries of origin or transit. 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 a visa processing facility in Port-au-Prince, Haiti, in cooperation with the IOM. The aim of this initiative is to allow potential migrants to apply for special humanitarian permanent visas on
already vulnerable and displaced individual to reach the territory of a protection-granting state.

This alternative turns the logic of the shifting border on its head by making the severance of the relationship between territory and the exercise of sovereign authority rights-enhancing rather than rights-restricting.\textsuperscript{204} Past experience with international cooperation in planning and executing “orderly departure programs,” which introduce legal channels for the departure of asylum seekers whose claims have already been processed overseas, relaxing the requirement of territorial “contact” prior to activating the refugee-determination process, has drastically reduced irregular migration and saved lives.\textsuperscript{205}

The world has seen such initiatives before. There are two iconic historical precedents.\textsuperscript{206} one was a tragic failure, the other an impressive success. The infamous Evian multilateral conference, convened by Franklin D. Roosevelt in 1938 after the Anschluss in response to the escalation in Nazi persecution of the Jews in Germany and in annexed Austria, brought together representatives of thirty-two countries, including the United States, the United Kingdom, France, Canada, Australia, New Zealand, and several other European and Latin American countries. The conference gave participating nations the opportunity to coordinate with one another higher rates of entry to Jews seeking to escape the Nazi regime; all of them paid lip service to the cause and expressed 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.

\textsuperscript{204} Such initiatives could save lives, dry up the market for human smugglers, allow security screening of entrants prior to arrival, permit greater choice and agency for migrants themselves to select their destination country, and help alleviate fear of “loss of control” among voters in the recipient countries.


\textsuperscript{206} See Patrick Weil and Itamar Mann, ‘We Need a New Orderly Departure Program’, \textit{Opinion, Al Jazeera America}, September 9, 2015.
commiseration with the plight of the persecuted. But, one by one, they excused themselves from upholding these commitments by refusing to alter national immigration quotas or consular visa policies. The consequence was that just as the Nazis were increasing the crackdown on Jews, destination countries’ gates of admission were being locked and sealed when it came to emigrants whose passports the Nazis stamped with the letter “J” (Jude=Jew). The conference did succeed, however, in creating the Intergovernmental Committee on Refugees (IGCR), with a mandate to negotiate with candidate countries the provision of places of refuge for those escaping Germany. The Dominican Republic was, alas, the only country that eventually heeded to the plea of the IGCR and agreed to resettle a small number of Jewish refugees before the Nazis shut down Jewish emigration altogether. Had the member nations followed on their promise to work out multilateral burden-sharing arrangements in the face of calamity, the number of survivors would have been significantly higher. Arendt might have then written a different essay from “We Refugees.” But that never happened.

The more successful example flexed the muscles of protection beyond borders: the Orderly Departure Program, coordinated by the UNHCR in response to the alarming death toll among the massive exodus of so-called boat people—Vietnamese fleeing to the South China Sea after the end of the Vietnam War. Although the Program arose after the negotiation of the Refugee Convention and its 1967 Protocol, it was premised on participating countries’ suspension of the principle of geographic proximity and the deadly ordinance of “touching base.” This multilateral cooperation began in the late 1970s and involved more than thirty countries, none of which were in geographical proximity to the Indochinese refugee crisis. It is credited with saving more than 2 million lives over a fifteen-year period. An unknown number of those who departed clandestinely on rickety boats drowned and perished; others reached neighboring coastal states. As the flow of irregular migrants grew, countries in the region were fearful of the destabilizing effect. They refused to grant the boat people permission to land. Instead, they were pushed back to sea and then “denied permission to disembark in
The shifting border

There was literally no place on earth where they could go, the plight that Arendt so powerfully identified. The situation reached crisis proportions. In the midst of the Cold War, and against all odds, the UNHCR managed to broker a multilateral agreement to address this outflow of irregular migration. At the core of this orderly-departure program we find two elements: international cooperation and the **severance** of the linkage between territorial arrival and the granting of protection status. Vietnam agreed to offer regular channels of exit to those who wanted to leave the country, thus averting the resort to smugglers, unsafe boats, and unauthorized means of passage. No less significant, with international assurances that the refugees would benefit from onward mobility, the coastal countries that had previously closed their gates and refused to grant entry to the escaping Vietnamese refugees agreed to grant them temporary refuge until they were resettled under the international program. The United States alone resettled over 1.3 million individuals, with Canada, Australia, France, Germany, the Netherlands, Japan, Israel, and New Zealand, among other countries, taking in significant numbers of refugees. This program, while far from perfect and conceived in a geopolitical era quite different from today, nevertheless provides testimony that international cooperation is possible in a field where currently we mostly see states bickering and passing the buck of responsibility.

Adopting any or all of these steps would represent an advancement in comparison with the current situation, in part because they offer hope for the displaced, reduce the pressures on refugee-hosting societies in the region (some of which are on the brink of insolvency and turmoil), and draw a commitment from richer countries that are shielded by geography from the immediate impact of the current refugee crisis to help share responsibility for offering that hope—and a new home.  


208 The UNHCR helps in the process of identifying and prioritizing the urgency of individual protection needs; the resettlement country can also define the profile of vulnerable categories for resettlement, including those with urgent legal or physical-protection needs or life-threatening medical conditions, survivors of torture and violence, women and girls at risk, and so on.
In a world where 85 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 by breaking the current gridlock. The twofold strategy I have just described rests on the lexical priority of the first principle (human rights follow the border) over the second (relocating protection operations to where vulnerable migrants are, rather than vice versa), to ensure that governmental authorities do not use the latter as a fig leaf to extend the reach of the rights-restricting shifting border under the guise of humanitarian do-gooding, a result the former proviso aims to address.

**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 activists might think about place and space as part of the solution and then muster the political organization to follow. More importantly still, treating space as a resource, not a problem, can help avert the plight indentified by Arendt: that of there not being a place, *any* place, in the world in which the rightsless, 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 globally need them most; it condemns many of them to the Sisyphean fate of traversing and re-traversing terrains of shifting borders, in order, potentially, to be sent back to square one.

209 Governments themselves now routinely amend and challenge fixed conceptions of territoriality—for example, by creating special economic zones within their jurisdictions in which 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. We have seen this creatively unleash itself in the name of neoliberal economic restructuring, but have witnessed almost a complete standstill when it comes to promoting safe passage or establishing jointly governed humanitarian zones for refugees and displaces persons to cross through the “gates” of several countries, let alone imagining, in a more out-of-the-box fashion, the allotment of designated parcels of land for “refugee nations” to rebuild their lost homes and political autonomy.
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 Welcome Refugees initiative, operating at the discretion of the resettling state, which is conditional upon the consent of the host country offering refuge to hold the interviews and screening procedures on *its* territory.\(^{210}\) Here, we witness both the de-territorialization of legal space, as the process can in principle take place anywhere in the world, as well as its re-territorialization, as the interview must take place *somewhere* on the face of the earth, in this case in the place where temporary protection was granted. More comprehensive relief efforts would require involving a larger number of states pooling resources and collaborating on resettlement and responsibility sharing according to criteria relating to vulnerability, urgency, matching links, and so on. Rather than relying on geographical proximity to allocate responsibility—as is the current norm—placing the heaviest burden on poorer, neighboring countries in the Global South that are already stretched to capacity, more equitable distribution mechanisms would require harnessing significant cooperation across national and regional borderlines; so too will any feasible solution.\(^{211}\) To increase the chances of success, such cross-border and multi-actor efforts would benefit from the active participation of, among others: civil societies, supranational entities, NGOs, regional and international organizations, transnational diasporas, and refugee representatives. In terms of institutional design, such programs will likely have to rely on embracing bilateral and multilateral burden- and responsibility-sharing initiatives, in line with the recent UN Global Compact for Migration recommendations.\(^{212}\) If such a system were put

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\(^{210}\) 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. I thank Tracy Strong for this point.

\(^{211}\) The goal is to undo or at least tame the current linkage between arbitrary geographical proximity and bearing the brunt of humanity’s dispossessed.

\(^{212}\) 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
in place, individuals in need of international protection would gain greater voice and agency in shaping their future. The political units participating in such global schemes, be they cities, nations, or regions, would gain an air of control over orderly mobility and the ability to plan for the arrival and absorption of newcomers. Future endeavors to break the exclusivity of the touching-base dictum will require daring political leadership, which is currently in short supply, but it is, contrary to populist and anti-immigrant rhetoric, in the sovereignty interest of states to create a comprehensive action plan that will allow refugees to apply from afar, in addition to keeping 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. 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 relief effort. Such programs reach out to “people out of place” in the countries to which they have fled. In this way, they encompass those resources among states.” See United Nations General Assembly, Resolution adopted by the General Assembly on September 19, 2016, New York Declaration for Refugees and Migrants, A/Res/71/1, October 3, 2016 (United Nations), Articles 7 and 11. 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. For a detailed analysis, see Rebecca Dowd and Jane McAdam, ‘International Cooperation and Responsibility-Sharing to Protect Refugees: What, Why, and How?’, International and Comparative Law Quarterly 66 (2017): pp. 863–892.

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.\textsuperscript{214}

As already mentioned, there are yet other creative possibilities to be considered within the context of the new approach I have defended. Beyond the obvious call to expand and deepen regional and international cooperation in relief and resettlement efforts, additional steps may include reclaiming the pre-1951 Refugee Convention legacy of facilitating safe passage and opportunities for lawful mobility by issuing international (rather than national) travel documents, following the tradition of the interwar Nansen passport issued by the League of Nations.\textsuperscript{215} Issuing humanitarian visas and related emergency, single-journey entry permits would perform a similar function, allowing displaced people to lawfully cross borders at recognized ports of embarkation and entry rather than risk unauthorized passage and the survival-of-the-fittest requirement.\textsuperscript{216}

\textsuperscript{214} Although we have seen a breakdown of unity and division in response to the refugee crisis in Europe, it is easy to forget that in 2016 the world’s leaders had already made the milestone commitment to a “more equitable sharing of the burden and responsibility for hosting and supporting the world refugees.” Of course, declaration is one thing, implementation another. However, some initial progress is already under way. In 2017, the OECD International Migration Outlook reported that “[i]n response to the growing demand for international protection, many OECD countries have increased their resettlement programmes.” OECD, \textit{International Migration Outlook 2017, Summary} (Paris: OECD 2017), p. 1.

\textsuperscript{215} Resettlement and procedural fairness are concrete responses that relate to the encounter at the border. They do not, and cannot, resolve much broader debates about the relationship between mobility and global inequality, self-determination and freedom of movement. Any sustainable solution or comprehensive response to migration pressures in an unequal world requires a wide-ranging approach that will facilitate development measures, expansion or addition of new definitions of people in need of protection, and the opening up of new legal channels of migration and mobility.

\textsuperscript{216} Pushing the envelope ever further, economists have argued that “matching markets” do a better job than current regulations of reflecting and accounting for refugees’ agency and expressed preferences about where they wish to live, considerations that are sorely lacking in the top-down vision of the European Union’s planned “relocation” strategy. The argument advanced is that two-sided matching markets grant greater agency to refugees and allow states to include more variables in setting their priority criteria (severity of threat, degree of vulnerability, etc.) as well as regain control over what is perceived, politically and administratively, as a chaotic process. Such proposals have been advanced by scholars such as Hillel Rapoport, Will Jones, and Alex Teytelboym.
Paradoxically, a major obstacle is the current inflexibility of the refugee-protection legal framework, establishing a firm linkage between territorial arrival and the obligation to protect, an obligation that, as we have already seen, states seek to skirt and avert by almost any means possible, including the invention of the shifting border. If there were a constellation whereby countries could provide some relief and an immediate safe haven, without necessarily attaching themselves to a long-term commitment to arriving refugees, relying on the knowledge that they are part of a larger system of fair and equitable international response, where non-proximate countries commit to contributing to assisting those in need with resettlement or other mobility-supporting mechanisms, there is reason to believe that there would be many more takers than deflectors.\textsuperscript{217}

None of this will be easy to achieve. Decisions pertaining to the border will always be contested, as they are tied to access to territory and membership, partaking in the definition of who belongs to the political community—the last bastion of sovereignty. My account has proceeded on the assumption that states currently have, and are likely to continue to have in the foreseeable future, the authority to determine conditions of entry and stay. It has emphasized, however, the constraints of law and justice that come with the exercise of such authority in a world of shifting borders. This new approach places center stage the obligation to respect and protect the human rights of those who come into contact with the regulatory power of the state, irrespective of the location of that encounter: on the territory’s edge, deep in the interior, in transit hubs, or in far-flung third countries, where the function of border control increasingly takes place.

\textsuperscript{217} Refugee-law and policy experts have drawn an analogy with the variable architecture of international environmental law to overcome the current situation, whereby the allocation of responsibility to protect is “starkly imbalanced,” with the vast majority of the world’s refugees hosted by poorer and less stable countries in the world’s developing regions. For further discussion, see Dowd and McAdam, ‘International Cooperation and Responsibility-Sharing’ (n 205). Such a variable architecture would envision a mixture of voluntary and mandatory contributions, temporary and permanent protection options, relocation and resettlement as well as in-lieu instruments, and would also take into account the socio-economic and political-stability considerations of refugee-hosting countries. This new approach could be further placed within a broader framework of authorized migration and development measures.
In a world of regulated mobility, migrants considered undesirable will continue to face significant obstacles. With this in mind, the two-pronged response I have outlined seeks to mitigate vulnerability and offer protection and empowerment to those who need it most. As with any proposed change, such a transformation cannot happen in a vacuum, nor can it rely exclusively on adjudication and advocacy. To stand a fighting chance of success, significant political mobilization is required of critical civil publics, acting locally, nationally, and transnationally, in order to resist what they see as unjust and unjustifiable acts of border control, especially those stretching inward and outward with no limit in sight, infringing the basic human rights and dignity of the migrants caught in the whirling kaleidoscope of the shifting border.

Governments and their voters detest irregular movements of people across borders. An idealist can ignore such realities, but the non-idealist cannot. We are thus in search of a system that, under current conditions, recognizes states’ pro tanto sovereign authority to regulate movement across borders, while at the same time re-spatializing their law and justice obligations in line with their ever more creative and multi-scaler migration-regulation operations. The path I have advanced emphasizes the jurisdictional link as a basis for expanding and extending responsibility beyond borders. This is complemented by the basic human rights idea that “[e]veryone has the right to recognition everywhere as a person before the law” (a formulation drawn from the New York Declaration for Refugees and Migrants), especially at the encounter at the border, wherever the capricious shifting border may reach her. Such

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218 Here I share Rainer Forst’s observation that “[i]f we do not understand how norms and interests intermesh to generate and reproduce power, we are condemned to failure” in our efforts to understand political, legal, and normative orders, let alone transform them. See Rainer Forst, Normativity and Power: Analyzing Social Orders of Justification (Oxford: Oxford University Press, 2017), p. 143.

219 This formulation is drawn from the United Nations General Assembly, Resolution (n 205). The process for developing the global compact for migration and the global compact for refugees is well underway, under the auspices of the United Nations and the UNHCR respectively, and will be presented in 2018 with a view to their adoption. For a comprehensive discussion of the potential promises and pitfalls of such international instruments, see Klaus Günter, ‘World Citizens between Freedom and Security’, Constellations 12 (2005): pp. 379–391.
recognition is based on personhood, not membership, and thus applies equally to non-citizens irrespective of their legal status in relation to the given place or particular political community whose border, shifting or static, fortified or erased, they encounter.\textsuperscript{220} It offers a minimal baseline of protection and dignity for each person, irrespective of place and time, when encountering the exercise of coercive governmental power that affects their basic interests.\textsuperscript{221}

As the reach of the shifting border has expanded, so have new spaces for democratic contestation been created, stretching the boundaries of the political, both above and below the nation-state level. These changed scales provide room for resistance and protest, both local and transnational, against the encroaching shifting border in its various spatial manifestations.\textsuperscript{222} As Michael Walzer recently observed, “[s]uddenly, everyone . . . is talking about resistance.”\textsuperscript{223} In the United States, for example, we witness acts of resistance to sweeping migration enforcement measures by civil society activists, cities and municipalities, colleges and universities, local authorities, faith-based communities, various professional and non-governmental organizations, advocacy groups, and undocumented migrant networks, to name but a few examples, galvanizing their multiple voices into action, mobilizing protests, filing law suits, planning sit-ins, accompanying irregular migrants to their deportation hearings, offering shelter, food, legal aid, and medical care in houses of worship, and providing “sanctuary” in cities, campuses, and

\textsuperscript{220} On this account, the rule of law “defines the parameters of permissible government action \textit{wherever}, and toward \textit{whomever}, the government acts.” See Keitner, ‘Rights beyond Borders’ (n 182), pp. 66–67 (emphasis added).

\textsuperscript{221} Similar conclusions can be drawn from a variety of theoretical perspectives, as developed in recent years by scholars focusing on the claims of non-domination, the right to justification, or the all-affected or all-subjected principles, to mention but a few such sources.


\textsuperscript{223} Michael Walzer, ‘The Politics of Resistance’, \textit{Dissent}, March 1, 2017, online www.dissent-magazine.org/online_articles/the-politics-of-resistance-michael-walzer. While offering a full account of these developments falls beyond the scope of this work, it is worth noting that we are witnessing such an awakening.
workplaces.\textsuperscript{224} As the shifting border operates in increasingly invasive ways to identify individuals “out of place,” local jurisdictions and sanctuary cities have developed counter-policies that limit cooperation with federal immigration authorities and offer protection for immigrants at the local level by issuing ID cards irrespective of legal status, creating a new spatiality of subnational membership informed by ideas of “rooted cosmopolitanism” and transnational human rights discourses. Across Europe, new networks and cross-border solidarities have emerged from pro-migrant groups resisting the production of a “Europe of borders.”\textsuperscript{225} In Australia and Canada, refugee advocates have taken the lead in challenging detention and contesting the rhetoric of bogus claimants and queue jumpers. The politics of contestation and resistance is on the rise, providing a vital companion and catalyzer for any progressive legal and conceptual change along the lines I have advocated here.

\textbf{Coda}

The train of extraterritorial border control has already left the station—the classic functions of regulating entry, admission, settlement, and membership demarcation are no longer contained within a fixed and clearly delineated geopolitical space and instead take place \textit{beyond} territory and long \textit{before} travelers can reach the political community in


which they wish to settle or seek refuge. Yet these tools can be repurposed to help those they currently keep out.

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—and especially not in the current political environment. Under such circumstances, the two-pronged change I have proposed would offer a more sanguine future: namely, extending the extraterritorial reach of human rights provisions while simultaneously relaxing the linkage between territory and asylum. It would lay the foundation for a conceptual and paradigm shift that is long overdue.