AFTER THE BERLIN WALL: SHIFTING, NOT DISAPPEARING, BORDERS

*Ayelet Shachar**

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 different reality. Today, new walls are erected at an unprecedented pace the world over.[1] Around Spanish enclaves in Morocco, between South Africa and Zimbabwe, India and Bangladesh, Bulgaria and Turkey, and along the U.S.-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.[2] 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. 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.[3] 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*.

---

*This draft is drawn from a longer manuscript, entitled *The Shifting Border: Legal Cartographies of Migration and Mobility*, which will appear in 2019 as part of the Critical Power Series, published by Manchester University Press. Comments and suggestions are welcome: shachar@mmg.mpg.de

[1] Ron E. Hassner and Jason Wittenberg, "Barriers to Entry: Who Builds Fortified Boundaries and Why?" *International Security* 50 (2015), 157-190. For a critical exploration of border walls, see Wendy Brown, *Walled States, Waning Sovereignty* (Zone Books, 2010); Elisabeth Vallet, *Borders, Fences and Walls: State of Insecurity?* (New York: Routledge, 2016).

[2] Shaugnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953); 3); Zadvydas v. Davis, 533 U.S. 678 (2001).

[3] 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."

When it comes to migration control, the *location* of the border is shifting: at times penetrating deeply into the interior, while in other circumstances 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 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."[4] 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."[5] The traditional static border is thus reimagined as the *last* point of encounter, rather than the first.[6] 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.[7] 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 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

---

[4] Canada Border Services Agency, "Section II: Analysis of Program Activities by Strategic Outcome", Department Performance Report 2008-09, (Ottawa: CBSA, 05 November 2009). Office of the Auditor General of Canada, *Report of the Auditor General of Canada to the House of Commons*, Chapter 5, Citizenship and Immigration Canada - Control and Enforcement (2003), at 8.

[5] Government of Canada, Preamble, *Canada US Statement of Mutual Understanding* (SMU), available online: https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/statement-mutual-understanding-information-sharing/statement.html.

[6] My reference here is to the current legal situation which holds, in the words of the European Court of Human Rights, that "[s]tates enjoy an undeniable sovereign right to control aliens' entry into and residence in their territory." *Saadi v. UK*, Appl. 13229/03, 29 Jan. 2008, at para. 64 (internal references omitted). Contemporary political theorists have, however, questioned the justice and legitimacy of this current legal situation. Of this fast burgeoning literature, see e.g. Sarah Fine, "The Ethics of Immigration: Self-Determination and the Right to Exclude," *Philosophy Compass* 8 (2013), 254-268.

[7] I discuss these developments in detail elsewhere. See Ayelet Shachar, "Citizenship for Sale?" in *The Oxford Handbook of Citizenship* (Oxford: Oxford University Press, 2017), 789-816.

constitutional rights are partially suspended or limited, especially in relation to those who do not have proper documentation or legal status. As migration pressures mount, governments frantically search for new ways to expand the reach of their remit, both conceptually and operationally, inwards and outwards.

In this essay, and the larger from which it is drawn, I propose a shift in perspective—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*. This 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.[8] My analysis builds on some of these insights but seeks to both deepen and sharpen them by emphasizing the core role played by law and legal institutions in the reinvention of the border in the presence of the sovereign authority to regulate migration, and further explores whether there are limits on such authority, and if so, how to activate them and by whom.

In a world where borders are transforming, but not dissolving, I will aim to show that the question of legal spatiality—*where* a person is barred from onward mobility, and by *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. By charting the logic of a new cartography (or legal reconstruction) of borders and membership boundaries I seek to show both the tremendous creativity and risk attached to these new legal innovations and the public powers they invigorate and propagate. I further aim to establish that debates about migration and globalization can no longer revolve around the dichotomy between open versus closed borders. Instead, the unique and perplexing feature of this new landscape is that countries simultaneously engage in *both* opening *and* closing their borders, but do so *selectively*, indicating, quite decisively, whom they desire to admit (those with

[8] Borders studies scholars have creatively explored borders as processes or methods. See e.g. 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 e.g. Stuart Elden, *The Birth of Territory* (Chicago: The University of Chicago Press, 2013).

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."[9]

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.[10] 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."[11] As it facilitates unequal access to desired destinations, this reinvention of the border 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.

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. Contrary to the predictions by globalists, humanists, post-nationalists, and others who forecasted the imminent demise of borders and citizenship regimes, the legal distinction between member and stranger is, if anything, back with a vengeance.[12] This distinction has gained a renewed and at times stark significance in the post-9/11 years. Today, more than ever before, questions of migration, membership, identity and belonging have become pressing issues and are likely to remain at the forefront of public debate for the foreseeable future.

---

[9] Ayelet Shachar and Ran Hirschl, "On Citizenship, States and Markets," *Journal of Political Philosophy* 22 (2014): 231-257; Ayelet Shachar, "Selecting by Merit: The Brave New World of Stratified Mobility," in Sarah Fine and Lea Ypi eds., *Migration in Political Theory: The Ethics of Movement and Membership* (Oxford: Oxford University Press, 2016).

[10] On the initial allocation, see Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Cambridge, MA: Harvard University Press, 2009).

[11] David Cook-Martin and David FitzGerlad, "Culling the Masses: A Rejoinder," *Journal of Ethnic and Racial Studies* 38 (2015): 1319-1327. See also Cass R. Sunstein, "On the Expressive Function of Law," *University of Pennsylvania Law Review* 144 (1996): 2021-2053.

[12] Catherine Dauvergne, "Citizenship with a Vengeance," 8 *Theoretical Inquires in Law* 498 (2007). See also Ayelet Shachar et. al., "Introduction: Citizenship—*Quo Vadis*?" in *The Oxford Handbook of Citizenship* (Ayelet Shachar et. al. eds., Oxford University Press, 2017), 3-11.

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" 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 coast guard agency) increasingly rely upon a complex web of national, subnational, supranational, transnational and international instruments to profoundly re-conceptualize and "de-territorialize" the classic Westphalian manifestation of sovereignty as an activity may potentially take place *anywhere* in the world

Consider the following examples, from near and far, merely a small sample of the rapidly-evolving shifting border phenomenon.[13] While each of the countries I explore has developed its own variant of the shifting border strategy, deserving a more extensive treatment than we can offer here, their policies offer excellent illustrations of the reliance on *legal* (not extralegal) measures to detach the border from a fixed territorial marker. As part of a major reform to U.S. immigration regulation, a procedure called "expedited removal" was introduced into law.[14] This legal provision permits frontline officers and border agents to both expeditiously return undocumented migrants at the border, as well as 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.[15]

[13] These examples were selected for illustrative purpose; they are not exhaustive. The analysis focuses on the legal innovations adopted by the world's leading immigrant-receiving countries that, along with European countries, have spearheaded the shifting border paradigm: the United States, Canada, and Australia.

[14] This procedure was ushered in as part of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). 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 8 U.S.C. § 1225(b)(1)(A)(iii)(II). 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 U.S. asylum system.

[15] 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," *Refuge* 19 (2001): 41-47, at 41

Image 1: United States: The Shifting Border-Bleeding into the Interior

Source: ACLU, https://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.[16] 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 U.S. census data reveal that no less than two thirds of the United States 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*."[17]

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 into a massive spatial and temporal

[16] These current temporal and spatial specifications appear in the Federal Register. *See* Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877 (Aug. 11, 2004).
[17] Press Release, US Department of Homeland Security, Fact Sheet: Secure Border Initiative (Nov. 2, 2005) (emphasis added). l.

expansion of expedited removal. Supplemented by multiple executive orders and accompanying memos, expedited removal could potentially reach "*any* immigrant *anywhere* in the United States who can't prove that they've been in the country for two or more years."[18] 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.[19]

The notion that legal circumstances affecting non-members change dramatically after they "pass through our gates" is well established, as canonical case law from *Shaugnessy* to *Zadvydas* attests.[20] However, in addition to conjuring mirror-house-like stretching and contracting movements, the shifting border also distinguishes between *physical entry* into the country (which does not count for immigration purposes) and *lawful admission* through a recognized port-of-entry (which makes one's presence in the territory permissible, and therefore visible, in the eyes of the regulatory state). 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."[21] 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 the irregular migrant (who is already present on the territory) had never really crossed the border into the country.[22] This legal fiction bears 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

[18] Parties in *Castro* and *Peralta-Sanchez* raised the likelihood of such expansion in their arguments (emphasis added). Interview with ACLU lawyers for *Castro*, https://thinkprogress.org/immigrant-families-arent-getting-their-day-in-court-f7edc1026c2c/; source for *Peralta-Sanchez* - http://www.sfgate.com/nation/article/Court-denies-immigrants-Sright-to-attorney-in-10915296.php.

[19] To date, no such notice has been issued. If such an expansion were to occur, major litigation challenging its constitutionality on due process grounds will likely follow.

[20] Shaugnessy v. United States *ex rel*. Mezei, 345 U.S. 206 (1953); Zadvydas v. Davis, 533 U.S. 678 (2001). See also Kaplan v. Tod, 267 U.S. 228 (1925).

[21] The term "being here" is drawn from Linda Bosniak's critical investigation into the ethical significance of territorial presence of unauthorized migrants. See Linda Bosniak, "Being Here: Ethical Territoriality and the Rights of Immigrants," *Theoretical Inquiries in Law* 8 (2007): 389-410.

[22] 8 U.S.C. § 1182(a)(6)(A)(i). These individuals will have certain constitutional protections while in the country.

inspection and permission (the otherwise un-recognized presence of the non-citizen in the territory) is turned into the "main substantive charge used to remove them."[23]

In creating the legal distinction between "entry" and "admission," American 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.[24] The exclusion-deportation line has become *de-territorialized*: the key factor for the legal analysis is not whether the person has passed through the territory's physical frontiers. Rather, the question for immigration regulation purposes is whether the person has crossed at any time or place through *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.[25]

Just as the shifting border bleeds into the interior, it extends the long arm of the state outwards, ever more flexibly, to regulate mobility at a distance. To provide but one example, travelers that wish to embark on a U.S.-bound flight now regularly encounter the U.S. border, or its authorized guardians—American officials located on foreign soil—in places as diverse as Freeport and Nassau in the Bahamas, Dublin and Shannon in Ireland, or Abu Dhabi in the United Arab Emirates. Thanks to a legal carve-out known as the pre-clearance 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. Currently, more than 600 American customs and border control and agricultural specialists are deployed in airports around the world, processing over 18 million U.S.-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 has been launched in 2015 with the goal of pre-clearing, on foreign soil, at least a third of all U.S.-bound air travelers by 2040. Such expansion is expected to promote America's interests by facilitating international trade and travel, while at the same time countering global security threats by allowing the "United States and our international partners to jointly identify and address threats at the earliest possible point" (conflating priority in time with location and distance), as the

[23] There are also 3-year and 10-year bars to re-admission.
[24] Thomas Alexander Aleinikoff et. al. eds., *Immigration and Citizenship: Process and Policy* (West, 5th ed. 2003), at 428.
[25] 8 U.S.C. § 1182(a)(6)(A)(i).

official publication of America's border protection agency simply and elegantly summarizes the thinking behind this manifestation of the shifting border, highlighting its outwards expansion.[26] Strikingly, such pre-inspection decisions bear the full weight of U.S. law as though their determinations were made "at the border"—although the territory of the U.S. is very far from sight. The border has instead been replanted as a legal construct on non-US soil.

While no other country operates its immigration control on American soil, the United States has now entered advanced negotiations to build more preclearance capacity at airports overseas, seeking to further expand its reach into new regions and continents.[27] The rationale for such expansion is drawn straight from the playbook of the shifting border. As the government's highest officials readily pronounce, the intent is to "take every opportunity we have to push our [operations] out beyond our borders so that we are not defending the homeland from the one-yard line."[28]

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."[29] 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 American officials to obtain "quasi-operative competences at European airports" so as to perform security checks on passengers before embarking on transatlantic flights.[30] Iceland and Italy are the latest countries to have joined this list.[31]

---

[26] U.S CBP 2014, 6.

[27] In addition to extending migration control aboard for air travel, the United States also has a long history of interdiction at sea, which has engendered the controversial US Supreme Court *Sale* precedent, according to which summary return of migrants, including asylum seekers, interdicted on the high seas does not engage the *non-refoulement* obligation to which the United States, like other rich democracies, has committed through both its domestic and international law obligations. *Haitian Centers Council, Inc. v. McNary*, 807 F. Supp. 928 (E.D.N.Y. 1992). *cert. granted*, *Haitian Centers Council*, 113 S.Ct. 62 (1992). [on land, too - Southern Frontier].

[28] DHS Press Office, "DHS Announces Intent to Expand Preclearance to 10 New Airports" (May 29, 2015) (quoting Secretary of Homeland Security, Jen Johnson).

[29] Philip Oltermann, "UK May Allow the U.S. Security Checks on Passengers before Transatlantic Travel," *The Guardian*, Sept. 11, 2014.

[30] DHS Press Office, "DHS Announces Intent to Expand Preclearance to 10 New Airports" (May 29, 2015).

[31] DHS Press Office, "DHS Announces 11 New Airports Selected for Possible Preclearance Expansion Following Second Open Season" (Nov. 4, 2016).

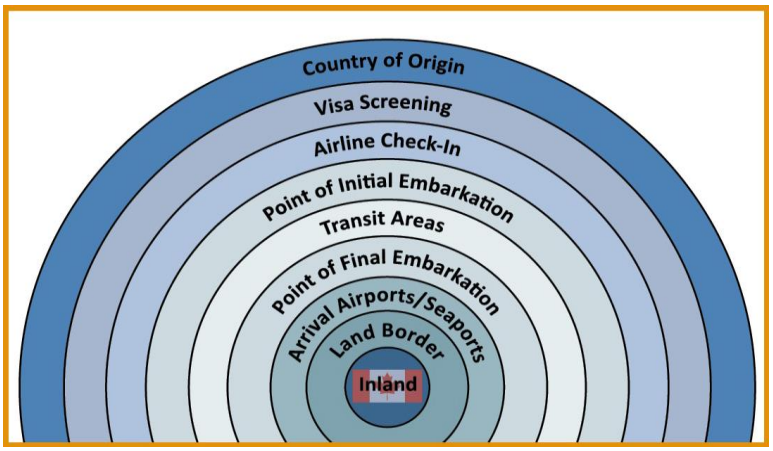
Such measures for screening individuals before their arrival to a desired destination may well prove to be the wave of the future; they arguably are a regulator's dream tool for deterring unwanted admission. As the International Organization for Migration (IOM) noted in a recent report, "[m]any states 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."[32] 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 American 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. [33] Such decisions made by American officers stationed at these non-U.S. locations are *final* determinations of admissibility. A fine example is found in the arid, bureaucratic words of American 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 U.S. agents are permitted to conduct the preclearance).

America's shifting border is part of a larger transformation, which is complemented by the 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."[34] 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 called) now 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

[32] Human Rights Watch et al., NGO Background Paper on the Refugee and Migration Interface (2001), available at http://www.hrw.org/campaigns/refugees/ngo-document/ngo_refugee.pdf.
[33] 8 C.F.R. § 235.5(b) (2014).
[34] Janet Dench, "Controlling the Borders: C-31 and Interdiction," *Refuge* 19 (2001): 34-40, at 37.

component of the shifting border strategy, these government officials are strategically located in "key foreign embarkation, transit and immigration points around the world."[35] 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."[36] 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.[37]

Image 2: Canada: The Shifting Border - Stretching Outward



Source: Canada Border Service Agency: Multiple Border Strategy

Just as is traditionally the case in the United States, in Canada the act of "touching base" on the territory matters has significant legal consequences for the scope of rights and protections granted to asylum seekers, according to domestic and international legal obligations. In 1985, one of the earliest and most revered cases of the Supreme Court of Canada during the Charter era dealt with the rights of refugees. In that case, *Singh v. Minister of Employment and Immigration*, the Court held that if undocumented or irregular migrants reach Canadian territory, they are entitled to the protection of the Charter of Rights and Freedoms, and as such, have a consecrated right to a refugee status hearing before facing potential removal from the country. No similar substantive

[35] CBSA fact sheet 2009.
[36] Office of the Auditor General of Canada 2003, Chapter 5: Citizenship and Immigration Canada – Control and Enforcement 8.
[37] 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."

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."[38] Under this scheme, Canada can avoid triggering the constitutional provisions that were established to apply to protect the rights of non-citizens landing on Canadian territory.[39] Investing such legal meaning in the distinction between "inside" rather than "outside" had the unintended consequence of incentivizing policymakers to introduce a slew of measures "to push out the border" in order to avert both the arrival of unauthorized migrants and the engagement of 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.[40]

Being turned away *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 *Singh*, they would have been entitled to a full oral hearing to determine the merits of their claim to stay, even if they were carrying improper documents. No similar rights apply to them if they are interdicted prior to reaching Canada. Here again, we see an example of the tension between human rights protections and 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 and confine rights protections to the classic boundaries of the *static* Westphalian vision of territory in a world where mobility is increasingly cross-border and international. The dynamism of the shifting border—its flexible and alternating inward and outward mobility—thus actively contributes to the *immobility*

[38] Canada, Senate Report of the Standing Committee on Citizenship and Immigration, *Immigration Detention and Removal*, June 1998, Recommendation No. 18, *available at* http://cmte.parl.gc.ca/Content/HOC/committee/361/citi/reports/rp1031513/citirp01/09-rec-e.htm

[39] *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R 177 (Can.).

[40] For illuminating analysis, see James Hathaway, "The Emerging Politics of 'Non-Entrée'," *Refugees* 91 (1992); François Crépeau and Delphine Nakache, "Controlling Irregular Migration in Canada: Reconciling Security Concerns with Human Rights Protection," *Immigration and Refugee Policy Choices* 12 (2006).

of those who seek to cross it. By barring certain bodies and populations from territorial arrival to 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 law-abiding countries from otherwise binding human rights obligations towards those escaping persecution.[41] Nevertheless, it is not difficult to appreciate why such legal fictions and the idea of a shifting border more broadly is so attractive to policymakers who are 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, also relies heavily on private-sector third-party actors, in particular airline carriers, as "enforcers" of its immigration regulation and border control provisions.[42] 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.[43] They do so, at least in part, because their companies face steep financial penalties by the receiving countries if they transport improperly documented persons into their territories. Canadian law permits the government to seek reimbursement from airline carriers for "costs of detention, return, and, in some cases, medical care" associated with irregular migrants that arrived aboard their flights.[44] Similarly, the Schengen Implementation Agreement obliges all members of the European Union to implement carrier sanctions.[45] Allowing

[41] 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 these normative and legal considerations, offering possible institutional and democratic responses to these concerns, in *The Shifting Border.*

[42] For a comprehensive account of "outsourcing" migration control, see Gammeltoft-Hansen, *Access to Asylum*: *International Refugee Law and the Globalisation of Migration* (Cambridge: Cambridge University Press, 2011),

[43] Canada as well as other countries have also signed memoranda of understanding with airline carriers that permit immigration officials abroad to refuse permission to individual passengers to board flights in return for indemnity from the administrative fines these airline carriers would have been obliged to pay if found carrying inadmissible passengers.

[44] Brouwer and Kumin, "Interception and Asylum: When Migration Control and Human Rights Collide," *Refuge* 21 (2003): 6-24

[45] 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

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.

In the same vein, the United Kingdom, New Zealand, and Australia have also developed comparable mechanisms of migration regulation and control abroad, working in close cooperation with American and Canadian overseas migration integrity and liaison officers, resembling the collaborative model of the "five-eyes" alliance (FVEY, as it is known), which is a wide ranging intelligence and data-sharing network with extensive surveillance capabilities, that focuses, among others, on "remote control" border and migration control. 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 contacts with host-country officials, officials from other governments in the designated region, airline personnel and law-enforcement agents," operating along the travel continuum, so as to identify and interdict improperly-documented travelers at the earliest point at which their identity can be verified and as remotely as possible from the actual border, before these irregular migrants stand a chance of reaching their respective territorial boundaries.

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 *non-state* organization representing the global airline industry, reveals not only the shifting *location* of the border but also the increased collaboration between private *and* public actors in regulating de-territorialized "edges" of well-off polities seeking to prevent admission of persons they deem unwanted.[46] 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.

diminish the prospects of arrival to their shores of unauthorized migrants.

[46] See U.N High Comm'r for Refugees [UNHCR], Standing Committee, Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach, 10, U.N. Doc. EC/50/SC/CPR.17 (June 9, 2000).

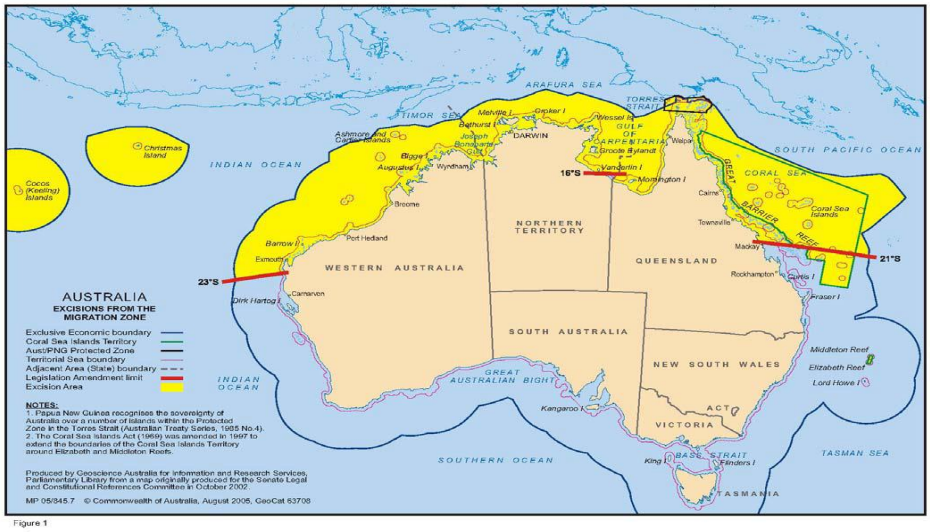
Australia, even more explicitly than Canada or the United States, has officially *re-located* its border through words of law, creating—as its government readily admits—a distinction between the country's "migration zone" and "Australia" as we know it on the map. This "excision" policy was created through the Migration Amendment Act of 2001, and it was expanded in 2005, and then again in 2013.[47] 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.[48] 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. 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.[49] It also eliminates the possibility of judicial review thus not only redrawing the territorial border but also attenuating legality in the process.[50] In 2013, the excision zone was expanded, through 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 to Australia's "erased" territory are both far-reaching and irreversible; those falling under the spell of excision are refused the possibility 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

[47] Migration Amendment (Excision from Migration Zone) Act 2001, No 127, 2001.
[48] Instead, they are immediately directed to third countries declared safe, such as Nauru and Papua New Guinea (until the latter's court ruled the practice unconstitutional according to PNG law) where Australia has funded detention centers. Even if found to be refugees, such unauthorized arrivals cannot be settled in Australia, and must remain in Nauru or PNG, or be resettled elsewhere.
[49] Even before the creation of the excision zone, Australia introduced a mandatory detention policy for all arrivals without valid visas. See Migration Act 1958 (Cth), s. 196.
[50] 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[t] refers collectively to such contributions as *tempering* power." See Martin Krygier, "Transformations of the rule of law: legal, liberal and neo-" in Ben Golder and Daniel McLoughlin, *The Politics of Legality in a Neoliberal Age* (Routledge, 2018), at 19-20.

reach the country's (actual) territory. This logic is reminiscent of the rights-restricting inward "bleeding" of the U.S. border into the interior, but with a unique Australian twist of "erasing," with the stroke of a pen, certain segments of its own territory off the map for migration regulation purposes.[51]

Image 3: The Shifting Border – Australia's "Excision" Map



Source: Parliament of Australia, Department of Parliamentary Services, *Excising Australia: Are We Really Shrinking?* Research Note, No. 5, 2005-2006

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."[52] 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 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

[51] This unprecedented act was prefaced by a governmental clarification that the excised zones were not altogether removed from Australian sovereign territory.
[52] Robert A. Davidson, "Spaces of Immigration 'Prevention': Interdiction and the Nonplace" *Diacritics* 33 (2003): 2-18, at 6.

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."[53] The act of self-erasure of territory is paradoxically expressed here as a manifestation of self-determination and resolve.[54]

More limited versions of "excision" were also found in several high-traffic airports located in European capitals, which have 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 do not apply.[55] 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 which concluded that "[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.[56]

The creation of these legal "grey zones" is not entirely new; the U.S. navy base in Guantanamo Bay, before it became infamous for serving as the detention place for hundreds of foreign nationals suspected of terrorism links, had been used as a repository for asylum seekers (particularly from Haiti) whose shattered boats were intercepted on the high seas by U.S. navy ships in order to prevent those onboard from claiming refuge at "our gates." Again, we witness the

[53] Critics have pointed out that this has not been the first time in which 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 the 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 disembrakment even after escaping Europe, the grammar of the modern state's control over immigration was expressed loud and clear, in Australia (just as it was pronounced unequivocally 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. This absolutist expression of the static interpretation of the Westphalian border is now arguably subject to both legal and normative limitations, although their precious delineation is disputed.

[54] 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.

[55] On airports, seaports and train stations as "grey zones," see Mark B. Salter, "Governmentalities of an Airport: Heterotopia and Confession" *International Political Sociology* 1 (2007): 49-66.

[56] *Amuur v. France*, European Court of Human Rights. 33 Appl. No. 19776/92 (25 June 1996), at para. 52.

craftsmanship of flexing the muscles 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.[57] 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 off-shore locations in remote islands in the Pacific, such as Nauru, a tiny microstate island-nation that is 4,500 kilometers away from Australia, or Manus Island in Papua New Guinea, where asylum seekers may languish for years while their claims are being processed and assessed. Australia is the only country in the world that uses *other* countries to process asylum claims. Close to eighty percent of those transferred to such offshore processing centers have proven to have credible claims.[58] 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 *away* from Australia—has recently attracted the interest of European policymakers desperately seeking answers to their respective challenges of responding to uninvited migration flows, and has fueled discussion of building migrant "reception" centers in North Africa and deeper 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 on off-shore 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 a remarkable testimony about 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 breaching basic rights-protection obligations to which they have committed, both domestically and internationally. To complicate the picture even further, there are some early

[57] Migration Amendment (Unauthorised Maritime Arrivals and other Measures) Act 2012 (Cth).
[58] Parliament of Australia, Research Paper Series 2016-2017, Elibritt Karlsen, *Australia's Offshore Processing of Asylum Seekers in Nauru and PNG: A Quick Guide to Statistics and Resources* (Canberra: Parliamentary Library, 19 December 2016).

indications that Australia's wildly problematic interpretation of its refugee protection obligations, is proving effective in advancing in its stated policy mission: to stop unauthorized maritime arrivals.[59] As a representative of the UNHRC in Indonesia (a major transit hub in the region for asylum seekers and human smugglers heading towards 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." Such focus on deterrence and reclaiming border protection is in turn used politically to justify the tough policies adopted by Australia in 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 queries about how to avert the denial of constitutional and human rights by very institutions and processes designed to protect them, and *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 been largely been overlooked in the literature.

If we conceptualize borders as "crucial sites from which the nation state is narrated and constituted,"[60] Australia's all-out approach brings to sharp relief several important quandaries. Key among them is: 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 M69/2010*, in which the High Court found unanimously that two Sri Lankan asylum seekers detained on Australia's Christmas Island were denied procedural fairness, leading the

[59] Australian Government, *Australia by Boat? No Advantage*, available online: http://malaysia.highcommission.gov.au/files/klpr/No%20Advantage%20flayer.pdf

[60] Anthea Vogl, "Over the Borderline: A Critical Inquiry into the Geography of Territorial Excision and the Securitisation of the Australian Border," *University of New South Wales Law Journal* 38 (2015), 114-145 at 117.

government to amend certain aspects of the processing of claims off mainland Australia.[61] In another case, *Plaintiff M70/2011 v. Minster 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 does it recognize the status of refugees under its domestic law.[62] 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.[63] 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 the 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.[64]

An unexpected twist in this saga occurred when the Supreme Court of Papua New Guinea, unlike the High Court of Australia, ruled that the practice of transferring and detaining asylum seekers on Manus Island was both illegal and in violation of the constitutional right to personal liberty. The Court held that because the "asylum seekers held [on Manus Island] did not arrive…of their own volition, they had not broken any immigration law," and "keeping them in indefinite detention, where they face frequent acts of violence and suffer from poor health care, therefore, violated their constitutional protections." Here, the apex court of a global south country holds to account the policy of a wealthy, global north country, potentially pointing to a horizontal (rather

[61] Plaintiff M61/2010E v Commonwealth of Australia and Plaintiff M69 of 2010 v Commonwealth of Australia [2010] HCA 41.

[62] Plaintiff M70/2011 v Minister of Immigration and Citizenship [2011] HCA 32. 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 of Immigration and Border Protection (28 January 2015). 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 (18 June 2014), the High Court unanimously rejected a challenge to the constitutional validity of sections 198AB and 198 AD of the Migration Act 1958, as amended by the Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 (Cth), which gives the immigration minister the power to designate regional (offshore) processing countries. These amendments were introduced into law in response to a previous ruling of the High Court, Plaintiff M70, a decision in which the Court struck down the government's "Malaysian solution."

[63] Mary Crock ed., *Migrants and Rights* (Routledge, 2015).

[64] Robert M. Cover, *Justice Accused*; see also "Violence and the Word," *Yale Law Journal* 95 (1986), 1601-1629, at 1601.

than vertical) framework of limiting the excess of the extraterritorial reach of the shifting border through constitutional challenge before the courts of the countries directly affected by the said policy. In a world in which all inhabitable parcels of land are divided to different jurisdictions, what is off-shore for a country such as Australia enforcing policies of excision and exclusion, is on-shore for those countries in which such processing centers are located, creating new openings for resistance and dissent.

Another twist to the shifting border trend is the implementation of new technologies that create virtual, contactless border control, potentially deployable anywhere within a country's territory. Countries as different as China, Australia, the United States, and the United Arab Emirates are leading the way. Dubai International Airport's Terminal 3, for example, is planning to introduce new "biometric borders" by late 2018 and the rest by 2020. Preregistration takes place at 3D face-scanning kiosks around the airport with passengers then walking through an 80-camera-fitted virtual aquarium tunnel that uses virtual fish to attract the vision of travelers in order for the cameras to facially-scan each passenger. The information is then matched with the passenger's digital profile. Deputy Director General of Dubai residency and foreign affairs Major Gen Obaid Al Hameeri claims "it has already managed to cut down time spent at the security counters to a mere five seconds, but that's not enough." Meanwhile, in China, railway police have employed facial-recognition sunglasses for scanning domestic travelers on trains with suspected criminal backgrounds, ranging from traffic infringements to the use of fake identity documents and human trafficking.[65] The glasses would then match the scans against a linked database to identify faces, with exceptionally fast and accurate results. Human rights groups such as Human Rights Watch, contend that these new programs likely raise concerns of violations of privacy rights and other human rights issues relating to government monitoring and control of religious minorities.[66]

Additionally, sought-after destination countries are simultaneously 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

---

[65] Tara Francis Chan, "Chinese police are using facial-recognition glasses to scan travelers" (8 Feb 2018), *Business* Insider, online: <https://www.businessinsider.de/china-police-using-facial-recognition-glasses-2018-2?r=US&IR=T>.

[66] See Human Rights Watch, "China: Minority Region Collects DNA from Millions" (13 Dec 2017), *Human Rights Watch*, online: <https://www.hrw.org/news/2017/12/13/china-minority-region-collects-dna-millions>.

zones" for wealthier nations (often in exchange for capacity building and material assistance in the form of development aid). The 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. Sharing these records prior to travel has replaced traditional interactions between the individual and state officials at the actual, territorial border, because, as the UK Home Office revealingly put it, this encounter "can be too late—they [unauthorized entrants] have achieved their goal of reaching our shores."[67] 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 before long, 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. Such electronic travel authority 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 travel's passport. Without such authorization, it is impossible to board a plane heading to the United States, Canada, Australia, or to enter these respective countries. Following suit, European countries are expected to implement the European Travel Information and Authorization System in 2021. 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, allowing governments to "see like a state" *outside* their own territories.[68]

As these examples illustrate, borders are not vanishing, but are reinvented and revitalized by governmental authorities. 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 had emerged after the Berlin Wall came down, today, we find not

[67] Home Office, *Securing the UK Border: Our Vision and Strategy for the Future* (2007), point 1.4. (United Kingdom).
[68] James C. Scott, *Seeing Like a State: How Certain Schemes to Improve Human Conditions Have Failed* (New Haven: Yale University Press, 1999).

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 that 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 preemption, containment and control in their quest to prevent uninvited migrants, including asylum seekers, from accessing their bounded legal spaces of rights protection and relative safety and stability.

To comprehend the novelty of the shifting border, 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)."[69] 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.[70] 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.[71] By understanding the *shifting* border as an alternative to the established theoretical poles of static and disappearing boundaries, we 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.

---

[69] James F. Hollifeld, "Sovereignty and Migration," in Matthew J. Gibney and Randall Hansen eds., *Immigration and Asylum from 1900 to the Present* (Santa Barbara, CA: ABC-CLIO, 2005), at 575.

[70] Among those defending the post-national claim that universal personhood has surpassed the significance of national belonging, see Yasmin Nuhoglu Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (University of Chicago, 1994); David Jacobson, *Rights Across Borders: Immigration and the Decline of Citizens* (John Hopkins University Press, 1996). Political theorists have advanced a justice argument for more open borders as a challenge to the prevailing legal situation according to which states may legitimately exercise their authority to restrict mobility and control access to their territorial jurisdiction.

[71] The establishment of free movement rights within the Schengen zone as well as prospective "regionalization" developments in other parts of the world can also be seen as part of such reinvention, which changes the scale, scope, and possibly the agents involved in regulating the protected migration area, but it does not erase the function of such regulation. This is especially evident at the perimeters of free-movement zones.