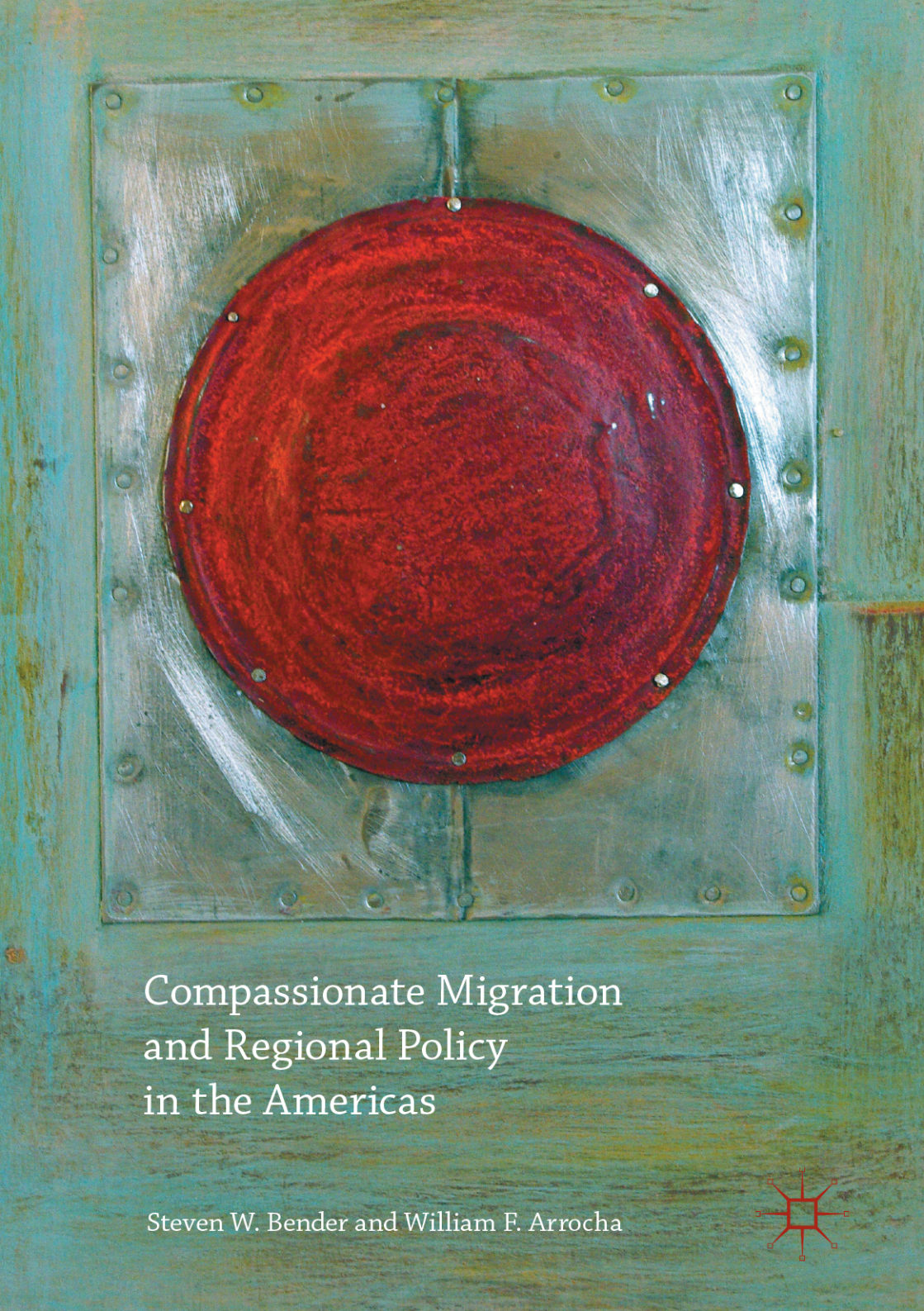

Compassionate Migration and Regional Policy in the Americas

Steven W. Bender and William F. Arrocha

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Contents

List of Figures

List of Tables

CHAPTER 1

Introduction

Steven W. Bender and William F. Arrocha

> *The reality of migration, given its new dimensions in our age of globalization, needs to be approached and managed in a new, equitable and effective manner; more than anything, this calls for international cooperation and a spirit of profound solidarity and compassion.*
>
> Pope Francis (August 15, 2013) *Message of his Holiness Pope Francis for the World Day of Migrants and Refugees.*

In a world of deep social and economic inequalities, millions at the margins of society are leaving their countries in search of a better life. Others must escape internal and regional conflicts that embroil their homelands. The eyes on global migration are fixated on the haunting scenes of despair and hopelessness of millions of people forced to flee their homeland, leaving behind family, friends, and shattered dreams. The media pierces our hearts with images of brittle boats loaded beyond their capacity with survival

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migrants[1] attempting to cross vast Mediterranean waters, and placing their fate in the hands of fortune and compassion: a passing boat, a coast guard ship, or a strip of land where they just might get close enough to jump into uncertainty. We see images of families, mothers, and children fleeing extreme poverty and long-lasting wars trying to break through the endless spreading of barb wire fences that follow their steps as states shut their paths to freedom, waking up the ghosts of World War II. We see thousands of unaccompanied children knocking on closed doors that when open shatter their dreams of a better life, as many are treated as "illegal aliens" who had the audacity to break the laws of the land. There is no welcoming for them—they are thrown in cages with blankets spread across cold floors, or detention centers that should be called penitentiaries. Those who are fortunate enough to survive will still have to prove their case as minors, often without legal representation, on why they are not "illegal aliens" subject to deportation but rather are young souls in search of a family member, a safer place to live and, most of all, compassion.

According to the International Organization for Migration, from January 2016 to August 2016, worldwide migrant deaths topped 4,000 with more than 3,000 of those deaths in the Mediterranean.[2] Regrettably, the Americas are no haven to the brutalities of migration. In the Americas, the migrant death toll surpassed 300 deaths in the same period, with most occurring near the U.S.-Mexico border.[3] For those who do survive, their future is uncertain as they will most likely end up in jobs labeled 3D—Dirty, Dangerous, and Demeaning. Many will reach their dreams but at a high cost—in most major migrant-receiving states, irregular migration[4] is criminalized at the same time that most migrants, regardless of their legal status, are "othered" as criminals who threaten their communities.

Hate speech and hate crimes greet immigrants on a daily basis, driven by nativism and xenophobia. Today's hateful rhetoric is most vividly spewed by Donald Trump, who as a U.S. presidential candidate referred to Mexicans as criminals and "rapists" (Montero 2016). He did not stop at disparaging Mexican migrants: "It's [a problem] coming from more than Mexico . . . It's coming from all over South and Latin America" (Montero 2016).[5] Like nativists in other major migrant-receiving countries, he exacerbated the misperception that the Global South is a threat to a Global North that needs to erect new Hadrian walls to guard itself against the latest wave of "invaders."

Regardless of the calls to erect new and stronger walls to stop irregular and survival migrants from crossing national borders or, for the United Kingdom, to "Brexit" the European Union under the justification of regaining control of migration flows from the Global South, international migration keeps growing at a steady pace. According to the United Nations *2015 International Migration Report*, the number of international migrants continued to grow rapidly over the past 15 years, reaching 244 million in 2015, up from 222 million in 2010 and 173 million in 2000,[6] with high-income countries absorbing most of the migrants. Of these 244 million international migrants, the U.S. still hosts the most—47 million—almost 20 percent of the total.[7] For the rest of the Americas, the numbers are much lower, but there has been a steady increase in intra-regional migration over the past decades, with Argentina, Costa Rica, Venezuela, and recently Chile becoming regional migrant-receiving countries.[8]

As demonstrated in this volume, stark differences in the Americas surround how international migrants, regardless of their legal status, are perceived. In this volume, we address the need for regional cooperation toward compassionate migration policies to ease the suffering of those who deserve to be treated with dignity and respect as they bring our communities across the hemisphere closer. Today, the Americas are divided between open-door migration policies in the South and closed-door policies in the North. In the middle of this divide are millions of migrants caught between hope and despair. South-North migration seems unstoppable despite the increasing perils migrants suffer in their journeys. On the other hand, intra-South migration is also on the rise as a push for deeper regional integration is accompanied by open-door policies that facilitate the movement of people and labor. In the Americas as a whole, there seems to be a tug-of-war between states that believe the best way to manage migration is by erecting walls and enacting laws that exclude the marginalized knocking at their door, and those receiving states cooperating with sending states in a regional spirit to further integrate their economies and societies.

Embracing unilateralism, the U.S. is slowly closing its southern doors as it keeps building its southern wall to exclude the most vulnerable at its gates. Long ago the U.S. opted for unilateralism to control the flow of migrants into its territory. That approach, however, seems out of touch with a globalized world where cooperation is the most effective means to deal with vexing social, political, and economic issues that drive and result from migration. In contrast, South American states are embracing cooperation and dialogue to manage traditional and new migration flows that

are rising as their economies come closer. Their challenge is to ensure the most vulnerable migrants are protected as these states open their doors to all migrants from the region.

Many migrant workers and transmigrants in the Americas have to navigate increasingly tougher physical and legal barriers to reach their destinations and integrate into new economic spaces and communities. The challenges migrants face in the Americas are daunting because their fundamental human rights and personal safety are not always guaranteed. Their journeys can be long and perilous: They are victims of inhospitable environments, climate change, corruption, gang violence, human trafficking, xenophobia, and racism. The authors in this volume will demonstrate through different disciplines that compassionate migration as a counter-hegemonic response to the institutions and systems that criminalize unauthorized immigration, including compassionate assistance from those who aid migrants, is not only possible but an imperative. The suffering of migrant workers and their families, particularly those without proper documents, could be eased if the U.S. abandoned its unilateral approach and engaged in a hemispheric dialogue with the common goal of promoting compassionate migration policies.

The most important challenge in the Americas is to forge new spaces of dialogue with shared commitments to create new institutions and common hemispheric policies that ensure the safety and dignity of those who search for a better life elsewhere, or for life itself. As demonstrated in this volume, we are very far from meeting this challenge. Without a migration policy map drawn with compassion in mind, vulnerable migrants will keep wandering in despair and living in the shadows of prosperity and dignity. The U.S. has to reach out to its southern neighbors to mend what many consider is a broken relationship. When it comes to forging a regional partnership to manage in a humane way the inevitable flows of migrants throughout the Americas, much has to be done, and this book contributes to that dialogue and development.

In April 2012, the Inter-American Dialogue issued the report "Remaking the Relationship: The United States and Latin America" (Inter-American Dialogue 2012). Written by a working group of 100 that included 14 current or former heads of state and representatives from all 35 hemispheric nations, the report chided the U.S. for "breeding resentment across the region" and failing to be a good neighbor. U.S. migration policies to securitize the U.S.-Mexico border and the interior, while so-called comprehensive reform stagnates,[9] have placed undue pressure on Mexico, other

sending and transit nations, migrant populations and their communities of origin, and the more than 11 million unauthorized immigrants within the U.S. today—many of them women and children coming from or through Mexico. All must live in a state of constant fear. For these northward-traveling economic and survival migrants, their stories and their reasons for migrating vary. Often they seek to escape socioeconomic despair, crime, extortion, violence, human rights abuses, or other problems. Most come to work. In all cases, they hope to find better lives and better times ahead for their loved ones and themselves. They are courageous and oftentimes desperate—enough to risk their lives and safety in hopes of reaching *el otro lado* ("the other side"). Yet they pursue an American Dream that at times is closer to a nightmare, for they live outside the nation's scope of compassion and permission. These migrants are first and foremost considered "illegals" who committed the "crime" of crossing borders into the "land of the free" without proper documents. In doing so, they are often vulnerable to the harsh elements of nature, gangs, organized crime, corrupt authorities, and other dangers. If they are fortunate enough to reach the U.S., they often suffer human rights abuses such as exploitive labor conditions, xenophobia, hate crimes, domestic and sexual violence, as well as exclusion and discrimination under the law in their housing, employment, and other venues of everyday life. U.S. deportation rates for unauthorized migrants remain at or near record levels, as tens of thousands of women and children fleeing violence and extreme poverty in their homelands are caught in a humanitarian crisis-turned-political quagmire, and the struggle for social equity and human rights as reflected in legislation such as the long-proposed DREAM Act continues unfulfilled.

In the current era, U.S. federal immigration reform has generally expressed an ethos and policy orientation of "enforcement now, enforcement forever," even to the point of deputizing state and local law enforcement officers under programs like Secure Communities and its replacement, the Priority Enforcement Program (PEP), as well as the 287(g) program. Meanwhile, U.S. state and local government actors have sought to regulate immigration, often through discriminatory policies steeped in xenophobia. Although these national and subnational reactions are somewhat tempered by the longtime U.S. economic reliance on immigrant labor, the larger point is that many U.S. federal, state, and local actors have done much to dehumanize and criminalize migrants, even those whose journeys were prompted by the most dire, desperate human conditions. What remains is an ongoing jurisdictional battle over U.S. immigration regulation within a policy climate

of blurred lines between the federal power over immigration regulation and the powers over alienage (or immigrant regulation) that federal, state, and local government alike may exercise. Caught in the fray, migrants continue to suffer from an overall climate that is toxic to the advancement of migrant rights, human dignity, and the flourishing of local communities and hemispheric nations alike.

Despite recent compassionate executive actions taken by President Obama in the spirit of protecting migrant children and families,[10] the authors acknowledge that there is no substitute for an immigration reform that takes into account, if not in fact mirrors, key principles from the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW) and other relevant "core" international human rights instruments and/or their national-level equivalents, and the establishment of a regional dialogue toward compassionate migration policies that could result in a shared vision of how to manage migration at a hemispheric level.

In seeking to prompt and articulate such a regional policy vision, this volume approaches "compassionate migration" (defined below) and its legal and extra-legal sources as a normative orientation and policy strategy for encountering, countering, and preventing dehumanization and for promoting human dignity and social justice. We seek to inform, educate, persuade, and facilitate newer or less-heard perspectives, toward wider participation and influence within the immigration policy debate. Overall, this collection strives to offer carefully balanced analyses, forward-looking strategies, and pragmatic proposals for compassionate immigration reform at domestic and regional levels.

Rooted in concerns over the ongoing securitization of U.S. migration policies, the militarization of the U.S.-Mexico border, the humanitarian crises that have ensnared unaccompanied minors and families with children who flee violent conditions in Central America and seek haven in the U.S., and persistent exclusion, disregard for fundamental human rights, and other dehumanization of unauthorized migrants, this volume explores what compassionate migration entails and which laws, policies, actions, and venues might establish compassion for migrants. Penned by recognized international scholars and policy experts working within the U.S., Canada, and Mexico, as well as Central and South America, the authors provide fresh discussions and critical diagnoses of past and present human rights violations, and identify opportunities to advance compassion as a matter of immigration policy for South/North and South/South

migrations. Collectively, these scholars stretch across the humanities, social sciences, law, public policy, and conflict studies, and include recognized international nongovernmental organization and policymaking experts seeking to broker new conversations, methods, and ideas on one of our most persistent human rights dilemmas. Also distinctive to this volume is the attention paid to linking scholarly critique and moral aspiration with policy, strategy, implementation, and effectiveness. Indeed, some of the most exciting work in the general area of compassionate policy (e.g., the Charter for Compassion and the International Campaign for Compassionate Communities) focuses on how to foster compassion and make it work concretely.

We envision this volume as an important catalyst for various audiences—especially policymakers, legislators, leaders of Civil Society Organizations (CSOs), and those who engage them—on recognizing the usefulness of compassion, not just rhetorically. Several of its chapters focus on how to make compassionate migration real, useful, and enduring, both by showing that it works as a matter of public policy and by providing strategic recommendations or overviews on how to make it work—for example, on how cities and towns can demonstrate compassion toward unauthorized migrants.

The immigration policy landscape is ambivalent insofar as it can in some ways change rapidly while in other ways change comes slowly if at all. Yet because immigration policy always remains subject to political backpedaling and the development of reactionary laws, policies, and practices, there will always be a place for considering compassionate principles and pragmatics. Likewise, concerns about usefulness and sustainability (or endurance) must be carefully balanced so that anticipation of, or response to, immediate change in the policy landscape will be guided by durable, essentially normative principles. Calibrating immigration policy (and laws) according to the twin norms of combating dehumanization and promoting compassion strikes the desired balance, both in long- and short-term, and also opens new avenues for conversation and contribution among stakeholders in regional migration.

A Note on Compassion: We recognize that compassion is a contested idea—politically, strategically, discursively, and legally—both within and beyond the immigration policy context. Today the Americas are at the crossroads between even more restrictive immigration policies and the need to embrace compassionate migration. Recent policy reforms have occurred in Mexico under its *Plan Nacional de Desarrollo 2013–2018* (2013–2018 National Development Plan), the *Programa Especial De*

Migración 2014–2018 (Special Program on Migration 2014–2018), and its immigration agency's *Plan Estrategico del Instituto Nacional De Migración 2013–2018* (Mexico's National Institute for Migration (INM) Strategic Plan 2013–2018). The centerpiece of all these programs is the focus on an orderly migration process to protect migrant rights, including certification and financial support for civil society shelters that have embraced compassionate actions by assisting all migrants, regardless of their legal status. Another key function of these programs is to strengthen the three levels of government, the private sector, and the organized civil society to increase their actions to protect all migrants. The INM's strategic plan embodies a clear commitment to strengthen bilateral and multilateral relations with Central American states to facilitate the legal border crossing of their citizens into Mexico. However, as detailed in this volume, there is still a wide gap between such promises of more compassionate treatment of migrants and the realities of today's migration policies and programs which tend to focus on control, detention, and deportation. Indeed, as one Mexican migrant shelter head observed with regard to Central American transmigrants, Mexico's restrictive enforcement practices are effectively "doing the dirty work for the United States" (Adler 2015).

The recent U.S. experience embodies this gap. Despite the humanitarian nature of executive actions by President Obama, he overshadowed them by overseeing the most aggressive administration in modern times to detain and deport migrants, earning him the moniker "deporter-in-chief." From 2009 to January 2016 the Obama administration deported 2.5 million people, up 23 percent from the previous Bush administration (Rogers 2016). Obama's presidency reflected a tension between tough policies toward migrants and an accompanying rhetoric of compassion. During the 2014 border surge of unaccompanied child migrants, President Obama stated that children in custody would receive the "care and compassion" they deserved. Yet soon after, he pledged to fast track the deportation of those children who dared cross the U.S. border without proper documents. Echoing the dominant dichotomy of "compassionate" discourse accompanied by tough talk, 2016 Republican presidential candidate Donald Trump suggested that he would find a "humane and efficient" way to deal with the millions of undocumented immigrants living in the U.S. (Carrasquillo 2016). Yet he reiterated that "we're going to follow the laws of this country and what people don't realize—we have very, very strong laws" (Deb 2016).

Rather than rely on contradictory messages and double-speak from politicians who have poisoned the well of compassionate policies, we articulate and offer here a definition of compassionate migration that can inform the chapters below and continue the dialogue to forge compassionate migration regimes in the Americas:

Compassionate migration is a concept and praxis that describes how individuals, collectives, organizations, and governments express humanity towards victims of conditions that oblige them to leave behind their homes, countries, families, friends, and livelihoods in search of refuge or a better life for themselves and their families. As a praxis it requires a deep empathy towards others as well as an understanding of the reasons for their often forced migration. Practices of compassionate migration tend to be carried out at the margins of the established legal and policy frames, for many of these existing frames are based on control, punishment, rejection, and repression. Compassionate migration has at its conceptual core a deep sense of humanity which through concrete actions attempts to extend and ensure fundamental human rights, including the right of movement for all individuals, regardless of their nationality or immigration status.

Compassionate migration acknowledges the following key factors that justify its purpose:

- The ongoing criminalization and securitization of migration and borders by transit and receiving states
- The shortcomings and inefficiencies in the development and application of international and domestic human rights laws
- The lack of serious international and regional efforts to establish migration regimes based on a humanitarian approach
- The proliferation and escalation of nativism, xenophobia, hate speech, and physical violence towards migrants, regardless of their legal status
- The impacts that political instability, conflict, trade policies, social injustice, and economic inequality have in forcing individuals to migrate, and
- The impacts of deep economic asymmetries between the North and the Global South on the "push" and "pull" factors of migration

Against these daunting factors, the editors of this volume acknowledge the long and treacherous journey ahead to reach a hemisphere where all

migrants, regardless of their legal status, are treated as human beings and not as "illegals." Mindful particularly of the U.S. role in prompting most migration push factors in the Americas, both of survival and economic migration, this volume concentrates on the humanitarian aim of shaping compassionate migration policy. It leaves to other studies the equally challenging task of how to enable structural change that eases the conditions that prompt and push migrants to abandon their home countries in the first instance.

Overview of Volume Contents

Divided into three parts, this volume addresses the political, legal, and related perils that transmigrants, survival migrants, and migrants of unauthorized migration status, confront on a daily basis within the Americas. Chapters 2–6 detail the ongoing history of deciding when, how, and for whom the U.S. gates should open or close. These chapters demonstrate how compassion and empathy have always been an afterthought in protecting immigrants, particularly those of Latina/o origin. From outright prohibitions on migration such as the Chinese Exclusion Act to the exploitative Bracero Program for Mexican guest workers, followed by Operation Gatekeeper and today's Secure Fence Act and federal enforcement programs like Secure Communities and its successor, PEP, and 287(g) partnerships, the main policy thrust of the U.S. federal government is to keep the gates shut—especially against South/North migration.

Despite the U.S. emphasis in recent decades on policies and laws meant to close and secure the southern border, the socioeconomic conditions of the Global South, particularly in those regions and states hardest hit by failed neoliberal economic policies and drug-related gang warfare, have created the strongest push factors that the Northern Triangle nations of Central America and the southern states of Mexico have experienced since the 1980s, when the region was engulfed in civil wars. Today, countries like El Salvador, Guatemala, and Honduras, as well as Mexican states like Chiapas and Oaxaca, continue to see an exodus of desperate migrants, including large numbers of unaccompanied minors and families with children, who hope to escape severe conditions of physical and structural violence. As Chapter 7–13 examine, nation-states and CSOs south of the U.S.-Mexico border are trying to engage in domestic and regional dialogues to stop the massive abuse of transmigrants perpetrated by gangs,

narcos, human traffickers, and corrupt authorities. Except for intraregional migration in South America's Southern Cone, most hemispheric migration moves from South to North. For those transmigrants who travel without proper documents, the journey is often an odyssey between life and death. Once transmigrants reach their destination (which is usually the U.S.), they confront laws, policies, social attitudes, and structures that compromise their human rights on a daily basis. The authors in these chapters discuss these problems and bring to the fore those positive steps being taken in Mexico and Central America to embrace human rights-driven immigration reforms. Among those positive steps, the authors explore the regional dialogue under the Regional Conference for Migration (RCM) which includes the active participation of the U.S, despite its historically unilateral approach to immigration. As a forum for open dialogue, the RCM is also a space where CSOs play a key role in mapping new routes for regional cooperation and coordination to promote and ensure the human rights of transmigrants. These steps are not devoid of challenges, as the regional approach is still heavily weighted toward the securitization and criminalization of migration, which runs counter to any policy or action of compassionate migration.

Acknowledging that Mexico is a migrant receiving, transit, and sending state, several authors in Chapters 7–13 explore the federal and state institutions established to assist migrants in their full process of migration. Today Mexico counts several immigration laws and policies that under Mexico's immigration enforcement body, the INM, are meant not just to regulate migration but also to assist migrants. Unfortunately, there is still a long way to go for the INM to meet its obligations to assist and ensure the protection of irregular migrants. However, as some authors point out, federal and state bodies exist to monitor and intervene when federal and state authorities violate migrant rights. Yet, the present challenges are of enormous proportions, as these institutions are still incapable of fully protecting migrant rights.

Despite the unfulfilled promises from the Mexican state and the relentless dangers transmigrants encounter along their journeys, some authors directly working with CSOs acknowledge the fundamental role that the growing network of CSOs plays in Mexico and Central America to ease migrant suffering, while also demanding states uphold their constitutional and international obligations to protect migrants. As Chapters 7–13 demonstrate, CSOs are the voice of the migrants vis-à-vis the state as they are the caring hand that with a deep sense of compassion accompanies migrants in their journeys toward a better life.

Counter to the closed-door policies of the U.S., and to a lesser extent Mexico and Central American states, these chapters also explore the advances made in the geography of the Southern Cone. Under regional economic and political integration regimes like the Southern Common Market (MERCOSUR), the Andean Community, and the Union of South American States (UNASUR), South American states are taking bold actions based on open-door policies to ensure that those residing and migrating within the South American space can move freely. These countries are involved in an ongoing process to reform and create laws and policies that protect the human rights of migrants, regardless of their immigration status. The ultimate goal of such bold actions is to forge a common identity under a future South American citizenship.

In spite of the successes and challenges that might seem insurmountable, Chapters 14–19 confront the tasks of how we define and engender compassion, how to enact and translate compassion into policy, and from where the push for compassionate migration policies might or must come. The authors in Chapters 14–19 work within and across the fields of law, public policy, normative political and ethical theory, care ethics, conflict resolution, religious studies, feminist theory, Canadian and American Studies, and the visual arts to provide a complex, humanizing approach to the promise and practicalities of compassionate migration policy. The authors in this rich interdisciplinary tapestry of chapters remind us that there is both reasoned hope and an ethical imperative behind this dream. From faith-based and secular CSOs that literally take care of those migrants who dare cross the Sonoran desert, to the enactment and application of humanitarian law and practices by U.S. state and local governments and compassionate leaders who aim to welcome migrants to their communities, these chapters suggests that, despite the bleak conditions that unauthorized migrants endure, there is room for commitment to human dignity.

Notes

1. Alexander Betts describes “survival migrants” as those migrants who flee because of serious right deprivations but nevertheless fall outside common legal understandings of a refugee. For a full study on “survival migration” see Betts (2013).

2. IOM 2016 "Worldwide Migrant Deaths Top 4,000; Mediterranean Deaths Pass 3,100," https://www.iom.int/news/worldwide-migrant-deaths-top-4000-mediterranean-deaths-pass-3100.
3. IOM 2016.
4. "Irregular migration" is the preferred term in international organizations to refer to those migrants who lack legal status in the transit or host country. "Irregular migration" is synonymous with "unauthorized migration" as well as "undocumented migration" and can be used interchangeably.
5. Donald Trump also targeted Muslims and Syrian refugees, suggesting more broadly he would ban immigrants from any nation with a history of terrorism. One of the first acts of the Trump regime was to temporarily halt entry of Syrian refugees or migrants from several majority-Muslim countries.
6. United Nations 2016. 2015 International Migration Report, 1.
7. UN 2016.
8. OAS-OECD 2011, "International Migration in the Americas: First Report of the Continuous Reporting System on International Migration in the Americas (SICREM)," Washington, DC.
9. The so-called comprehensive immigration reform continues to face an uncertain political future in the U.S., as the momentum for it periodically starts and stalls. When new proposals have emerged during the past two decades, they seem to reinforce rather than ameliorate past dysfunctions and poor policy decisions, escalate anti-immigrant pushback and harsh crackdowns on migration, and reflect the influence of xenophobic politics.
10. See Chapter 5 for discussion of the executive orders and the legal challenge brought by several U.S. states.

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CHAPTER 2

So Far From Compassion: The U.S.-Centric and Exclusionary Framework of Current and Past Immigration Policy

Steven W. Bender

Poor Mexico, so far from God and so close to the United States!
Mexican President Porfirio Díaz (1884–1911)

Amidst the ongoing and oft-failed debate within and outside of Congress toward "comprehensive immigration reform," it is apparent that U.S. immigration policy is far from "comprehensive" (and even farther from compassion) in at least two fundamental respects. First, reform is increasingly focused on measures of border fortification and internal enforcement and deportation, such as through the Secure Fence Act of 2006, rather than on compassionate policy goals recognizing and protecting the human rights of migrants. Second, current reform proposals, in line with past U.S. immigration policy, are U.S.-centric in failing to include or acknowledge the voices and interests of migrants and migrant-sending and transit states, particularly those in the Americas that contribute the majority of U.S. immigrants.

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Before examining the possibilities and sources for compassionate regional migration policy in later chapters, we lay the historical foundation in these Chapters 3–6 of restrictive U.S. immigration law and its administration, both nationally and subnationally. In sum, U.S. immigration law has been patchwork, inconsistent, arbitrary, and demonstrably steeped in racism from at least the late nineteenth century forward. Prompted mostly by nativism (e.g., the Chinese Exclusion Act and subsequent laws and policies excluding Asians from entry discussed in Chapter 3) and compelling employer need for low-wage labor and precarity in the workforce (particularly the Bracero Program addressed in Chapter 6), with only sporadic recognition of higher values,[1] U.S. immigration policy historically and today fails to embody a compassionate ethos that values the dignity and human rights of migrants and their families.

Sources of U.S. immigration policy routinely ignore the need for compassion in the rush to protect and fortify U.S. borders, especially from disfavored immigrant groups—historically encompassing exclusions on racial, national origin, religious, sexuality, and political affiliation grounds.[2] As discussed in Chapter 3, in contrast to the constitutionally sourced power and occasional willingness of courts to intervene to protect civil rights, the Supreme Court's deferral to the plenary power of Congress and the executive in the immigration context can mute its ability to reign in laws that exceed the bounds of compassion and even embody racist ideals. Left to the prevailing political winds, migrants and the human rights needed to protect them have found little Congressional compassion in our immigration history. The disconnection of U.S. immigration policymaking from compassionate principles is even more pronounced in the recent spate of anti-immigrant laws at the subnational level, as addressed in Chapter 4. Although connecting to pre-Civil War participation in immigration policy by U.S. states that, among other things, prohibited the migration of free blacks, within the last few decades U.S. states and local governments have directed their hostility especially toward Mexican and other Latina/o migrants to discourage their residence through a gauntlet of oppressive laws and localized enforcement.

Earlier in the last century, Congress seemingly gave the go ahead for unlimited lawful migration from Latin America, as permitted by the exclusion of Western Hemisphere migration from discriminatory national origin caps under 1924 immigration law meant to target European Jews, Italians, Slavs, and Greeks. Yet federal immigration agencies ensured that prevailing labor demand, rather than the needs, aspirations, and dignity of migrants, controlled who was allowed to enter, and in some instances (such as the

1950s Operation Wetback targeting Mexican residents in the Southwest),[3] who was allowed to stay in the U.S. As Chapter 5 details, executive action by the Obama administration to protect children and families from deportation, aimed at undocumented migrants who came as children, and the undocumented parents of U.S. citizens, among other eligible migrant categories, were among the first overt signs of the legitimacy of compassion in U.S. immigration policy. Yet the vulnerability of executive orders to judicial invalidation, to subsequent regime-changes such as under Donald Trump who is openly hostile to migration, and to the prerogatives of Congress was evident almost immediately in a successful legal challenge brought by several U.S. states against this compassionate executive action.[4]

Feeding a protectionist and restrictive orientation, U.S. immigration policy, rather than being regional in its development and implementation, tends to be unilateral and self-serving. Even the most prominent example of bilateral cooperation between sending and receiving states and a nascent step toward regional migration policy—the Bracero Program that brought millions of Mexican laborers to U.S. workplaces during World War II and subsequent years (until it was ended unilaterally by the U.S. in late 1964), was manipulated by the U.S. to ensure wages were lower than what the Mexican government desired. Once ended, migrant farm workers kept coming under unilaterally enacted immigration visa programs, or more likely, as undocumented immigrants. As shown by this example, the U.S. dictates and manipulates even seemingly cross-border immigration initiatives without the interests of migrants and their families, or of sending states, in mind, and accordingly U.S. immigration policies often are devoid of the precepts of compassion or morality, or any sense of regional vision or leadership.

The upshot of the U.S. immigration policymaking experience detailed in Chapters 3–6 is that U.S. laws, and the processes of their adoption, tend to be inward-looking, unilateral, nativist, and ultimately irrational, rather than acknowledging U.S.-based movements working toward compassionate migration policies, growing regional interests in compassionate migration policy, and the larger global impetus toward incorporating precepts of international human rights into formal immigration policy that later chapters explore.[5]

Notes

1. As examples, family reunification under the 1965 Immigration and Nationality Act and the pathway to citizenship for millions of unauthorized immigrant workers under the 1986 Immigration Reform and Control Act.

2. Bender, Steven W. "Exposing Immigration Laws: The Legal Contours of Belonging and Exclusion," in Alvarez, Sofia Espinoza and Urbina, Martin Guevara (eds) *Immigration and the Law: Race, Citizenship, and Social Control Over Time* (Springfield, IL: Charles C. Thomas, forthcoming 2017).
3. Bender (2016).
4. *U.S. v. Texas*, 579 U.S. __ (June 23, 2016) (a 4–4 decision upholding the appeals court that struck down the 2014 executive order).
5. See Chapter 8.

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CHAPTER 3

The Power of Exclusion: Congress, Courts, and the Plenary Power

Victor C. Romero

Introduction: A Stranger in a Strange Land[1]

When I first arrived in the U.S. from the Philippines as an idealistic international student, I had assumed that the U.S. Supreme Court would scrupulously extend constitutional protections to noncitizens like me regardless of what seemingly arbitrary terms the federal government might impose upon my entry and stay. I believed that the compassion evident in an amended written Constitution, itself the product of a bloody Civil War, requiring that all fifty states extend due process and equal protection to all "persons"—and not just citizens—was an ironclad promise.[2] You see, I had grown up at a time in relatively recent Philippine history when such touchstones of democracy as the separation of powers and the rule of law were sacrificed at the altar of (the Marcos) dictatorship. What ordinary Filipinos saw and heard and read were, by and large, what the regime wanted us to see, hear, and read. I naively thought that a U.S. liberal arts—and then law school—education would be a revelation: an opportunity to learn how the law might capture compassion by embedding it in its founding document, the Constitution.

Having pored over U.S. constitutional immigration law and its effects on noncitizens for many years now, I am bloodied, but unbowed. I remain

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cautiously optimistic that compassion for the individual migrant is possible within our constitutional framework, but it will require a good measure of judicial surveillance. While it is tempting for the political branches to treat noncitizens as second-class denizens because they can, the Supreme Court still finds ways to express its compassion by creatively reining in political excesses that disadvantage immigrants.

In this brief chapter,[3] I explore three important themes in constitutional immigration law. First, as creators and executors of U.S. immigration policy, Congress and the President have virtually limitless power over designating who may enter the country, under what terms, and when they must leave. Throughout our history, that power has been consistently wielded against the "other"—those who the government believed did not fit its conception of the ideal American. From the Irish and the Chinese to the Mexicans and Middle Easterners, different immigrant groups have found themselves excluded by law and by custom depending on their perceived political, economic, or cultural threat to the nation. Second, this *plenary power* over immigration law was created by a complicit U.S. Supreme Court and has never been constitutionally repudiated. Although Congress and the executive created these draconian laws of exclusion, it was the Supreme Court that gave them constitutional validity. As such, the plenary power doctrine enjoyed the Court's imprimatur, reassuring Congress and the President that the judiciary would not second-guess the political branches even if ensuing laws resulted in systemic exclusion based on invidious criteria like race or national origin. And third, notwithstanding this historical deference to the political branches, the Court has provided an essential check on legislative and executive overreaching. Though it is clearly conservative and it has by no means been a consistent ally of immigrant rights, the current Roberts Court[4] has occasionally intervened to thwart egregious excesses in immigration policy and enforcement. Although such intervention is a far cry from compassionate immigration reform, it is still a welcome breath of fresh air in an otherwise often toxic climate of fear and inertia.

The Federal Political Branches: A Long Immigration History of Excluding the Other

During the first one hundred years of the nation, there was little to no federal immigration law. As was true about most laws at the time, any restrictions on migration came from state governments. This patchwork

of laws generally barred from entry any interstate or foreign traveler deemed criminal, infirm, destitute, or racially or ideologically unfit (Neuman 1996, p. 20). Perhaps unsurprisingly, laws reflected the social and racial norms of the majority populace, although interestingly, which groups were included or excluded and by what level of government reflected more subtle, though no less invidious, shades of bigotry and xenophobia.

Whereas the U.S. government's first foray into immigration regulation—the Facilitating Act of 1864—was intended to spur greater importation of contract labor, versions of state exclusionary laws eventually found their way into federal legislation. Although initially valued for their construction of the railroad's westward passage, the Chinese were soon the target of both state and federal anti-immigration laws, culminating in the Chinese Exclusion Act of 1882. Although subject to similar discriminatory statutes in heavily Anglo-Protestant states, Irish and Catholic immigrants survived the Chinese immigrants' fate as the former enjoyed the support of the national German and Irish lobby (Romero 2009, pp. 8–9). Apparently, the English believed the Irish and German newcomers were not white enough (López 1996), but perhaps as Europeans, they appeared to the majority to be more racially and ideologically acceptable than the Chinese.

From 1882 to 1904, Congress expanded the number of anti-Chinese immigration laws, then turned its attention to excluding other major Asian groups. The Japanese, Asian Indians, and Filipinos were all subsequently barred by specific laws. In 1924, Congress simply expanded its list of undesirables to "all aliens ineligible to citizenship," effectively barring all Asian immigrants as none were permitted to naturalize (Chan 1991).

The same racist laws barring "Asiatics" also affected certain European immigrants. Part of the 1924 Act, the National Origins Quota formula set an immigration ceiling of two percent of the number of foreign-born citizens from a particular country already in the U.S. as of the 1890 census. Like the "aliens ineligible to citizenship" language, this quota was framed in race-neutral terms. But just as part of the 1924 law halted Asian immigration, this law severely curtailed eastern and southern Europeans by using the 1890 census as its base point, a time prior to the large influx of migrants who were then considered of racially inferior stock. A contemporaneous House Report supports this reading: "[T]he quota system is used in an effort to preserve, as nearly as possible, the racial status quo in the United States. It is hoped to guarantee, as best as we can at this late date, racial homogeneity" (Hutchinson 1981, pp. 484–485).

Interestingly, Mexican immigrants in the 1930s were treated neither as poorly as Asians nor as well as the Europeans. On the one hand, there was no formal bar to their admission, perhaps due to California landowners' reliance on cheap Mexican labor, a fact still true today. On the other, Mexican workers suffered all manner of Jim Crow-like segregation and discrimination because of their perceived lower racial and socioeconomic status (Guerin-Gonzales 1994). This schizophrenic yet symbiotic approach toward Mexicans may be exemplified best when examining final numbers from the long-running Bracero Program, a migrant labor initiative begun in the 1940s: up to 1964 when the program ended, the number of deportees almost equaled the number of workers, at close to five million apiece (Kanstroom 2000, p. 224).

With the Civil Rights Movement of the fifties and sixties came a brief softening of all laws against the other, including immigration laws. While citizens of color welcomed the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, immigrants celebrated the lifting of the national origins quota system in the Immigration and Naturalization Act of 1965. Subsequent immigrant-friendly legislation followed suit with the 1980 Refugee Act[5] and the Immigration Reform and Control Act (IRCA) of 1986.[6] The 1980 Refugee Act recognized a shift away from geopolitically based relief to more basic humanitarian concerns in an attempt to counter bias in favor of noncitizens fleeing from communist regimes. Similarly, IRCA attempted to shift responsibility for undocumented migration to employers and away from workers, while simultaneously legalizing thousands of workers without papers, many of whom were from Latin America.

Fast-forward to September 11, 2001: The terrorist attacks in New York City and Washington, D.C. led to the return of race, religion, and national origin profiling, this time with noncitizen men of Arab or Muslim descent as the primary targets. Although rather innocently titled, the Justice Department's National Security Entry-Exit Registration System (NSEERS) was anything but that. Most troubling was that NSEERS required certain noncitizens from places like Pakistan, Iran, and Saudi Arabia to register with the federal government in an effort to find links to terrorism. Although not one terrorist suspect was identified through the program, immigration authorities placed thousands in deportation proceedings. Fortunately, the government suspended NSEERS in 2011 (Penn State Law 2012).

Aside from intensifying interior immigration enforcement through NSEERS, Congress and the executive have also fortified the southern border with Mexico, ostensibly linking national security issues to economic concerns

over undocumented migration. Aggravating failed efforts to enact comprehensive immigration reform in the mid-2000s, Congress instead passed and President George W. Bush signed the Secure Fence Act of 2006, authorizing the creation of 700 miles of new fence along the Mexican border despite a lack of funding to implement the same (Romero 2009, p. 90).

One recent bright spot in this sea of anti-immigrant activity has been former President Obama's use of executive orders to defer the deportation of certain groups of undocumented immigrants.[7] The U.S. has long lacked the resources to deport all removable noncitizens. Given this reality, President Obama and his Department of Homeland Security chose to prioritize removals, starting with highest priority cases involving crime and national security, and otherwise creating opportunities for law-abiding undocumented persons who arrived here as children or who are parents of U.S. citizens or lawful permanent residents to continue to remain and be eligible for temporary work permits.[8] Because this was done administratively, Congress may well limit this power, and the courts stymied the most far-reaching of these executive orders.[9]

A quick review of our immigration policy since the Founding reveals a pattern: When fear and xenophobia capture the nation's political imagination, anti-immigrant legislative and executive policies abound. However, when U.S. interests—ranging from the long-recognized economic reliance on cheap labor to the more recent executive desire to keep mixed-immigration status families together—take center stage, the political branches find ways to lift some burdens off the immigrant community. With the recent election of anti-immigrant rhetorician Donald Trump, the prospect of positive immigration reform remains elusive.

But why aren't anti-immigrant policies always verboten? As some readers may recall from their high school civics class, the U.S. Supreme Court has the power to "say what the law is."[10] In expounding upon the Constitution, doesn't the Court have the power to declare racially discriminatory and exclusionary immigration laws—such as the former Chinese Exclusion Act—unconstitutional?

A Court Complicit: The Supreme Court Creates and Affirms Political Plenary Power

Living in a post-*Brown v. Board of Education*[11] world, it is difficult to imagine the Court ever upholding immigration policies that exclude solely on the basis of race or national origin. Indeed, the U.S. Senate issued a

formal apology for the pernicious effects of the Chinese Exclusion Act in 2011, with the House of Representatives following suit a few months after. But why did Congress feel the need to make this symbolic gesture more than a century later? What was the Supreme Court's role in all of this? As this section demonstrates, the Court was complicit in the exclusionary and discriminatory policies adopted by the political branches through the creation of the plenary power doctrine, effectively immunizing Congress and the executive's actions around immigration from judicial review.

Scholars trace the birth of immigration law's plenary power doctrine to a pair of cases arising out of the passing and enforcement of the Chinese Exclusion Act in the late nineteenth century. The first, *Chae Chan Ping v. United States*,[12] involved a longtime migrant laborer of Chinese descent who, before returning to China for a temporary visit, secured a certificate of return from the U.S. government. Unfortunately for Chae Chan Ping, the Chinese Exclusion Act was passed prior to his return; as a consequence, his certificate was revoked and declared void upon his attempted reentry. It mattered not that he had worked in the U.S. for twelve years; the government's decision to exclude all Chinese via federal statute nullified Chae Chan Ping's previously granted permit to return. Showing little sympathy for the excluded Chinese, the Court held that if the political branches saw fit to retroactively apply the Chinese Exclusion Act to bar an individual's sanctioned return, it had plenary power to do so: "If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects."[13] Through this decision, the Court affirmed Congressional power to use any criterion for exclusion—even racial difference—free from judicial oversight.

Xenophobic sentiments also undergird the second plenary power case, *Fong Yue Ting v. United States.*[14] In *Fong,* the Court upheld the deportation of Chinese laborers who could not comply with the exclusion act's "white witness requirement." Inserted purportedly as a safeguard against false testimony, this provision required white witnesses to vouch for Chinese residents' length of residence for them to avoid removal. Notwithstanding the problematic incorporation of racial norms equating honesty with whiteness (and dishonesty with foreignness), the Court upheld the requirement over the deportee's objection, citing *Chae Chan*

Ping as precedent. This decision, then, extended the doctrine of plenary power over immigration from mere exclusion in *Chae* to deportation in *Fong*. Whatever the terms of exclusion or deportation, Congress was free to set these and the executive was free to enforce the same.

During the Red Scare of the 1950s, the Court extended the plenary power doctrine even further, this time including ideological discrimination alongside racial exclusion as a basis for immigration policy. In *Shaughnessy v. Mezei*,[15] the Court upheld the indefinite detention and exclusion of a European immigrant because of his suspected communist ties. Mezei, a twenty-five-year U.S. resident, returned to Romania to visit his dying mother. Upon his return, he was detained on Ellis Island because he had spent nineteen months "behind the Iron Curtain."[16] Notwithstanding the absence of any concrete evidence of espionage or other security breach, the Court upheld this exclusion as if Mezei were requesting entry into the U.S. for the first time, rather than viewing this as the return—á la Chae Chan Ping—of a longtime lawful resident. Citing another Cold War case, the Court noted that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[17] This prompted a passionate dissent from Justice Jackson who quipped,

> Government ingeniously argued that Ellis Island is his "refuge" when he is free to take leave in any direction except west. That might mean freedom, if only he were an amphibian! Realistically, this man is incarcerated by a combination of forces which keeps him as effectually as a prison, the dominant and proximate cause of these forces being the United States immigration authority.[18]

While it is true that in this post-*Brown* world, Congress and the executive have largely denounced racial and ideological exclusionary grounds, the Court's reluctance to second-guess discriminatory policies still remains, especially in cases in which national security interests are invoked. A contemporary example of this is the Court's 2009 decision in *Iqbal v. Ashcroft*.[19] Although primarily viewed as a case about civil pleading rules, embedded within *Iqbal* are the seeds of plenary power that are hidden beneath equally unfathomable equal protection doctrine. Javaid Iqbal was a Pakistani national arrested by federal authorities as part of the post-9/11 sweep; he was detained in a maximum security prison and was beaten by his jailers. Iqbal filed suit in federal court, alleging that then Attorney General John Ashcroft and FBI Director Robert Mueller along with other federal officials designated him a suspected terrorist, leading to his detention and beating,

based solely on his race, religion, and national origin. Although there was no specific evidence linking Iqbal to terrorism—he was allegedly involved in a check-kiting scheme (Romero 2010, p. 1424)—the Court dismissed Iqbal's claim for his failure to prove that Ashcroft and Mueller purposefully targeted him because of his race, religion, or national origin. Like Mezei the presumptive communist, Javaid fit the profile of the proverbial terrorist.

Finally, aside from affirming Congress's power to set policies notwithstanding their discriminatory impacts, the Court has also permitted the executive to enforce immigration policy using race as a factor notwithstanding the Fourth Amendment's mandate against unreasonable searches and seizures. In *United States v. Brignoni-Ponce*,[20] the Court held that border patrol agents may use race as one factor among many in deciding whether a person may be a suspected undocumented immigrant. In this case, federal agents stopped a vehicle near the southern U.S. border, based in part on their perception that the occupants were of Mexican descent. With Pandora's box open, it is no surprise that at least one study has documented how race-neutral justifications for immigration-related traffic stops increased following the Court's decision (Harwood 1984, p. 531).

Although it has never repudiated the plenary power doctrine and has affirmed racial and ideological bases for exclusion and expulsion within immigration law (as well as the use of race within border enforcement), the Court has nonetheless deployed both constitutional and statutory methods of curbing the political branches' excesses. It is the justices' vigilance that gives a glimmer of hope for a balanced, more compassionate U.S. immigration policy in the future.

A Compassionate Court?: The (Occasional) Antidote to Plenary Exclusion

Notwithstanding the Supreme Court's unwillingness to completely dismantle the plenary power doctrine despite its racist origins and its potential for abuse, there have been several recent cases in which the current Roberts Court has ruled in favor of immigrants and against government policy.[21] Common to each of these examples is the Court setting constitutional or subconstitutional[22] protections for noncitizens even within immigration law, notwithstanding the implicit plenary power of Congress and the executive. These are cases in which a majority of the justices has found overreaching on the part of Congress and the executive in seeking to remove noncitizens, some of whom

have resided in the U.S. for a long time. Although the current Supreme Court has not always been consistent in protecting immigrants—nor has it shown any hint of formally overruling the plenary power doctrine—it has, on several occasions, effectively limited the federal government's power to deport.

Perhaps the biggest constitutional decision of the past few years has been the Court's ruling in *Padilla v. Commonwealth of Kentucky*[23] expanding noncitizens' rights to effective assistance of counsel under the Sixth Amendment. In this case, the Court found that a lawyer representing a noncitizen charged with a crime has a constitutional obligation to warn her client of the possibility of deportation following a guilty plea. Although not specifically grounded in any constitutional provision, the Court's decisions in *Vartelas v. Holder*[24] and *Dada v. Mukasey*[25] are similarly noteworthy for the justices' commitment to procedural fairness. In *Vartelas*, the Court limited the immigration authorities' ability to apply the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 retroactively against a longtime lawful permanent resident who was—like Chae Chan Ping and Mezei—briefly out of the country. While the justices did not curtail Congress's plenary authority, it read notions of fundamental fairness into the statutory enforcement scheme to limit the government's power to unfairly trap unsuspecting immigrants. In *Dada*, a deportable noncitizen who had been granted the opportunity to voluntarily depart was deemed to have the right to file a motion to withdraw her voluntary departure up until she was required to actually leave the U.S. Both *Vartelas* and *Dada* seem like commonsense holdings, even for those uninitiated in the law: the government should not be able to retroactively apply laws to exclude a longtime resident (*Vartelas*), nor should it deny a noncitizen an opportunity to change her mind regarding possible deportation options as long as she is still in the U.S. (*Dada*). Yet these decisions seem simultaneously inconsistent with the deferential plenary power doctrine, prompting at least one commentator to wonder whether immigration law has effectively been brought under regular court review by the otherwise conservative Roberts Court (Johnson 2015).

While I am encouraged by these precedents and appreciate the Court's intervention, I am less sanguine about the long-term effect of these decisions and am even less enthused by the justices' unwillingness to simply declare the plenary power doctrine dead. While undoubtedly pro-noncitizen, all the Roberts Court cases cited above involve serious violations of basic legal and societal norms—the right to effective

counsel, the non-retroactive application of the law, and the ability to exhaust remedial options—that should have been sacrosanct and safe from officious intermeddling. That the political branches would attempt to abridge such fundamental freedoms in large part because those affected are noncitizens appears the opposite of pursuing a welcoming immigration policy. And the Supreme Court's reluctance to face head-on the discriminatory roots of the plenary power doctrine and to declare its incompatibility with an increasingly diverse country means that the Court's leadership may be limited to (unfortunately) necessary corrective interventions. Still, if even this conservative Roberts Court can see its way clear to limit the constitutional and statutory powers enjoyed by the political branches within immigration law, then perhaps these pro-noncitizen opinions will someday collectively signal a desire that Congress and the executive move toward a more compassionate approach to migrants in our midst.

Conclusion: It Takes a Village

Although the traditional African quote reads, "It takes a village to raise a child," to adopt a truly compassionate U.S. immigration policy will take a similarly concerted—and perhaps herculean—effort on a far larger political and cultural scale. The recent progressive interventions of the Supreme Court in curtailing aggressive enforcement actions against immigrants give me some hope. While admittedly far from articulating a truly compassionate immigration policy, these opinions may well serve as a catalyst for change if embraced by the rest of our national village.

Notes

1. See Exodus 2:22b ("I have been a stranger in a strange land.") (New International Version).
2. U.S. Constitution, Fourteenth Amendment ("No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").
3. I have written about this history, especially the relevant cases, many times before. See, e.g., Romero (2014), pp. 1–39 and Romero (2009), ch. 1.
4. Despite the death in early 2016 of Justice Antonin Scalia, the 2016 presidential election should continue this legacy.
5. Pub. L. 96–212.
6. Pub. L. 99–603, 100 Stat. 3445.

7. See Deferred Action for Childhood Removals (DACA) (2012), http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) (2014), http://www.uscis.gov/sites/default/files/USCIS/ExecutiveActions/EAFlier_DAPA.pdf.
8. For a thoughtful and comprehensive discussion of prosecutorial discretion within immigration law, see Wadhia (2015).
9. *U.S. v. Texas*, 579 U.S. __ (June 23, 2016) (after Scalia's death, the 4–4 decision upheld the appeals court that struck down the 2014 executive order).
10. *Marbury v. Madison*, 5 U.S. 137 (1803).
11. 347 U.S. 483 (1954).
12. 130 U.S. 581 (1889).
13. 130 U.S. at 606.
14. 149 U.S. 698 (1893).
15. 345 U.S. 206 (1953).
16. 345 U.S. at 214.
17. 345 U.S. at 212 (citing *Knauff v. Shaughnessy*, 338 U.S. 537, 544 [1950]).
18. 345 U.S. at 220 (Jackson J., dissenting).
19. 556 U.S. 662 (2009).
20. 422 U.S. 873 (1975).
21. For a comprehensive study of the Roberts Court's immigration decisions from 2009 to 2013, see Johnson (2015).
22. Hiroshi Motomura refers to these as phantom constitutional norms. See Motomura (1990), pp. 545–613.
23. 559 U.S. 356 (2010).
24. 132 S. Ct. 1479 (2012).
25. 128 S. Ct. 2307 (2008).

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CHAPTER 4

The Subnational Response: Local Intervention in Immigration Policy and Enforcement

Karla McKanders

Introduction

Abusive immigration policies and law enforcement at the U.S. federal level have led some local and state governments to push back through policies recognizing the value of immigrants in their communities, such as through the enactment of "sanctuary cities." Still, localized distrust and even hatred of immigrants, including migrant women and children, set the tone for the dominant and restrictive local responses to immigration that helped coin phrases like "crimmigration"[1] and "Juan Crow"[2] to denote state/local (and also federal) laws criminalizing the migrant body and permanently subordinating the unauthorized migrant population. In recent years, frustration with a perceived lack of border control and internal enforcement of federal immigration laws led several U.S. states and cities to enact their own laws seeking to oppress and oust immigrants or to further the federal prerogative of enforcement. Examples at the state level included Arizona's S.B. 1070 and Alabama's H.B. 56; restrictive local ordinances regulating immigrant livelihood

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included those of Farmers Branch, Texas (housing), and Hazleton, Pennsylvania (English only/housing/employment).[3]

During the Obama administration, the U.S. Department of Justice intervened in this federalism tug-of-war, claiming federal preemption over some localized usurpations of immigration policy and some of the most aggressive sub-federal immigration interventions, yet the Department of Homeland Security continued to deport record numbers of migrants. Arguably, the federal government has focused on pressing its own regulatory and jurisdictional interests through law enforcement and the courts,[4] not on developing legislation and programs to protect migrant populations within its territorial jurisdiction.[5]

Against this background, this chapter examines the history of promise and ultimately failure by the U.S. federal, state, and local governments to develop and implement compassionate immigration policies within their boundaries, as well as the new opportunities for localized compassion presented by the current humanitarian crisis of transmigrant women and unaccompanied youth.

This chapter will proceed in four parts. The first part addresses how, in the face of increased immigration from the Northern Triangle, the U.S. Congress has repeatedly failed to enact comprehensive immigration reform. The federal government's inaction, in part, and increasing xenophobic sentiments gave rise to the proliferation of varied state and local legislation targeting Latina/o immigrants. The second part analyzes compassionate state and local sanctuary laws and policies and the backlash against these laws. The third part examines the inverse of sanctuary laws and policies—piecemeal state and local anti-immigration law. This section addresses how Latina/o immigrants are dehumanized, which rationalizes the passing of xenophobic and discriminatory state and local laws. Part four addresses new strategies that have arisen from 2013 to 2016 with federal executive action perceived as executive lawmaking (Aldana 2016) and the corresponding successful state lawsuit challenging presidential authority on immigration in *Texas v. United States*.[6] This litigation can be seen as an outgrowth of the states' growing frustrations with the failure to create a uniform national migration policy, along with some government opposition parties' political posturing. This section also addresses the future and how we should learn from the proliferation of state and local immigration laws to move toward developing compassionate migration policies that acknowledge the complex realities of migration while developing a form of cooperative federalism.

The Proliferation of State and Local Laws

Migration From the Northern Triangle

The Northern Triangle of Central America (NTCA), including El Salvador, Guatemala, and Honduras, has increasing levels of gang violence, organized crime, drug trafficking, and state-sponsored violence (ACAPS 2014). Women from the NTCA also face domestic violence from which their governments are unwilling or unable to provide protection. Accordingly, NTCA women make up approximately 20 percent of the fleeing population (ACAPS 2014).

NTCA children have also been disproportionately affected by conflict and violence, resulting in a corresponding increase in their forced migration north and to the U.S. Data from the U.S. Border Patrol indicated a marked increase in the presence of minors from the NTCA from 4,059 juvenile detainees in 2011 to 21,537 in 2013 (ACAPS 2014). Armed groups recruit children under the threat of death as informers, drug traffickers, and gang members.

In this context, NTCA transmigrant women and unaccompanied children are forcibly migrating to flee violence. The armed conflict-like zones, rife with violence that targets women and children, have caused an increase in forced migration patterns that began growing in 2006 and peaked during the summer of 2014, resulting in what President Obama labeled a humanitarian crisis on the U.S. southern border. The 2014 Assessment Capacities Project report found a clear linkage between the 2009 rise in violence and the increase in refugee applications from individuals from the NTCA (ACAPS 2014).[7]

It is difficult to understand how these narratives fail to humanize transmigrant women and unaccompanied youth and compel the enactment of compassionate and welcoming laws. In this historical situation, federal and state governments could have seized the moment to act cooperatively and pass legislation to provide a safe haven for women and children fleeing violence.

In response to the humanitarian crisis on the border, the Obama administration opened the Artesia detention facility in a remote area in New Mexico, and, in the first month prior to the intervention of pro bono immigration attorneys, expeditiously deported women who were fleeing violence from Central America within ten to fifteen days (Campbell 2015, p. 1115).

In 2014, the Ku Klux Klan began focusing on the increase of Central American children entering the U.S., issuing a statement that Central American children posed "a threat to a 'white homeland'" (Campbell 2015). Since 2000, the proliferation and influence of xenophobic and racist groups cannot be understated in its impact on the increase in anti-immigrant state and local laws.

Additionally, politicians posture and use unlawful immigration as a platform for garnering votes instead of showing genuine concern for developing ethical laws that truly address *fixing* our immigration matters. For example, the first Latina governor of New Mexico and the U.S., Susana Martinez, in 2010, made it clear she had an anti-immigrant stance.

Part of the issue is the underlying xenophobic rhetoric that hate groups promulgate. This rhetoric is directly correlated with the passing of state and local anti-immigrant laws that began to proliferate in 2006 and continued through the humanitarian crisis in 2014. As Chapter 1 postulates, "U.S. laws, and the processes of their adoption, tend to be inward-looking, unilateral, nativist, and ultimately irrational, rather than acknowledging U.S.-based movements working toward compassionate migration policies, growing regional interests in compassionate migration policy, and the larger global impetus toward incorporating precepts of international human rights into formal immigration policy."

State, local, and federal laws over the past eight years have amplified and legitimized xenophobic social norms that call for the exclusion of Latina/o immigrants (McKanders 2010). The xenophobic reactions and increased hate groups may, in part, be the product of fears that result from demographic statistics that suggest that whites will be a minority population in the U.S. in the near future.

Individuals on both sides of the pro- and anti-immigrant debates focus on humanizing individuals while dehumanizing immigrant groups to justify the inclusion and/or exclusion of immigrant populations (Legomsky 2009).[8] Immigration law scholar Stephen Legomsky argues that, to develop comprehensive immigration policies, "[b]oth aggregation and individualism are necessary conceptions" (Legomsky 2009). He further stresses that responsible policymakers should fairly consider both views. This is the heart of the tension that has led states and localities to intervene and enact their own laws and ordinances with immigrants as their subjects. Their varied responses range from compassionate state and local laws (such as sanctuary laws) while other exclusionary state and local laws reify xenophobic fears.

The Federal Government and the Proliferation of State and Local Anti-Immigrant Laws

In 2016, an estimated 11.7 million undocumented immigrants reside in the U.S. With increased migration, a number of U.S. cities are experiencing growth in new migrant populations (McKanders 2016). While states like California, New York, Texas, and Florida have traditionally had the highest foreign-born populations in the U.S., between 2000 and 2009, the foreign-born populations in Georgia, Washington, Virginia, Maryland, Pennsylvania, North Carolina, Nevada, Colorado, and Tennessee increased significantly. In Georgia, North Carolina, Nevada, and Tennessee, the foreign-born population increased by more than 50 percent (McKanders 2016).

With this increase, the U.S. Congress has repeatedly failed to enact comprehensive immigration reform. Even though the Obama administration has deported more immigrants than any other president in U.S. history, states and localities often focus on the federal government's inaction in restructuring our immigration system as cause for enacting their own immigration-related laws (Dade 2012).[9] Accordingly, since Congress has not played a significant role in restructuring the immigration system, this inaction has resulted partly in the proliferation of state and local laws.

Sanctuary Movement

Across the U.S., various cities, states, and law enforcement officials have adopted sanctuary policies. These laws and policies seek to protect immigrant communities through creating a relationship by not inquiring into an individual's immigration status when providing state or local services including law enforcement. The intent is to create a safe space for immigrants. The concept of sanctuary has evolved to signify a moral and ethical obligation to protect migrants from unjust removal from the U.S. (Villazor 2008, p. 135).[10] Over time, there has been a backlash against sanctuary laws where states and localities have passed anti-sanctuary laws. This has resulted from the association of sanctuary laws with unlawful harboring of unauthorized immigrants.

The sanctuary movement placed in a larger context has religious and non-religious roots. The concept of sanctuary rested "primarily with churches, which offered places of refuge for those accused of crimes and were susceptible to revengeful attacks by their victims" (Villazor 2008,

pp. 138–139). The religious origins of sanctuary imply a certain level of ethics and compassion toward individuals who are displaced from their home countries.

In the U.S., during the 1980s, the term "sanctuary" surfaced in connection with churches and cities providing assistance to asylum seekers from Central America—churches that provided food, shelter, and other assistance to asylum seekers from El Salvador and Guatemala and state and local governments that established their localities as safe havens for the same group of immigrants by, among other things, not inquiring about the immigrants' citizenship status.

In the 1980s, the U.S. ratified the 1951 Refugee Convention and the 1967 Protocol in the form of the Refugee Act. This provision provided asylum for individuals who could establish eligibility. Even with the passing of the Refugee Act, Guatemalans and El Salvadorians were largely not granted refugee status. In response, in 1982, churches provided sanctuary to migrants from El Salvador and Guatemala who they felt qualified for asylum. This became known as the Central American Sanctuary Movement, which "conveyed the moral duty to provide assistance to the asylum applicants" (Villazor 2008, p. 140).

In 2006, another sanctuary movement emerged across the U.S. in response to mass deportations and the anti-immigrant sentiment that pervaded the country. In August 2006, an undocumented immigrant activist took refuge in a church on the west side of Chicago (Lydersen 2006). The immigrant activist was scheduled for deportation after Immigration and Customs Enforcement (ICE) deferred her deportation so that she could care for her sick child. The government denied her request to continue her deferment and ordered her deportation. The church pastor providing her with sanctuary alleged that she was being unfairly targeted because of her activism on behalf of the undocumented immigrant community. She refused to comply with the deportation order and took refuge in the church.[11] Her act and the church's symbolic act of providing her protection is reminiscent of the 1980s sanctuary movement and the biblical foundations of sanctuary.

In its contemporary iterations, sanctuary is still used in reference as a safe place for unauthorized immigrants, but it has expanded from only churches to include state and local governments (Villazor 2008). In the context of state and local governments and law enforcement agencies, the concept of sanctuary has been implemented to place a value on affording protection to the community through policing and social services.

To provide access to these services, states and localities have developed policies prohibiting state and local actors from asking about an individual's immigration status.

State and local sanctuary laws exhibit a tension between policing and protecting the safety of immigrant communities and ICE's goal of removing undocumented immigrants. For example, a 2013 report by the University of California Irvine's Immigrant's Rights Clinic presented data that Orange County referred the largest number of juveniles found delinquent to ICE (UC Irvine 2013). The report alleged that "the agency's policies violate[d] state and federal laws, undermine[d] the rehabilitative goals of the juvenile justice system and d[id] not benefit public policy." In turn, the county stopped placing holds on immigrant juveniles. In response to Orange County's policy, ICE spokeswoman Virginia Kice stated: "When law enforcement agencies remand criminals to ICE custody rather than releasing them into the community, it helps contribute to public safety and the safety of law enforcement. To further this shared goal, ICE anticipates that law enforcement agencies will comply with detainers" (Linthicum 2014). This demonstrates the tension between sanctuary policies to protect immigrant communities and disclosing information regarding immigration status that places immigrants at risk for deportation (McKanders 2016).

In 2015 and 2016, the California state legislature passed most of the proposed Immigrants Shape Legislative Package.[12] This package included a series of laws intended to expand the rights of immigrants in California. The intent of the provisions was to protect the most marginalized in immigrant communities, including young people and victims of crimes, as well as those who have interacted with the criminal justice system. The laws also recognized that: "Undocumented immigrants comprise nearly ten percent of the state's workforce—contributing $130 billion annually to its gross domestic product—concentrated in agriculture, food services, construction, textile, and domestic services."[13] This series of laws included one that codified the Orange County juvenile policy, which "protects immigrant children by safeguarding their records from unauthorized disclosure to federal immigration officials that may result in a child's deportation."[14] Other provisions provided healthcare to all California residents, regardless of immigration status, and created the Ensuring Due Process for Immigrant Defendants law, which requires both prosecution and criminal defense attorneys to contemplate immigration consequences in order to reach a just and fair resolution.[15]

With the increasing number of states and localities adopting sanctuary policies, the term sanctuary steadily developed strong opposition.[16] This is, in part, a result of September 11, 2001, the increase of undocumented immigrants in the country, and rising concerns that terrorists will exploit the southern border to enter the U.S. In 2008, sanctuary became associated with providing "amnesty" for undocumented immigrants.[17] Further, when a city or state adopts sanctuary policies or laws, they are deemed soft on immigration. Immigration scholar Rose Villazor states: "This politically motivated disapproving use of the word sanctuary has unfairly conflated legitimate state and local policies that serve local interests or policies that comply with the Constitution or federal laws with legislation that is intended to supersede immigration law" (Villazor 2008, p. 136).

The backlash resulted in many states considering and passing anti-sanctuary laws. For example, in Florida during the 2015 legislative session, the legislature considered an anti-sanctuary city law to require "state entities, local governmental entities, and law enforcement agencies to comply with and support the enforcement of federal immigration law; [and] prohibiting restrictions by such entities and agencies on taking certain actions with respect to information regarding a person's immigration status."[18] In addition to the Florida bill, in 2015, the state of Texas passed House Bill 11 creating a felony offense of "immigrant harboring" under which individuals can be arrested and prosecuted for providing shelter or renting a home to undocumented immigrants. In 2016, the Mexican American Legal Defense and Educational Fund (MALDEF) filed a lawsuit alleging that the federal Immigration and Nationality Act of 1965 constitutionally preempted the Texas harboring law.[19] MALDEF argued that multiple federal jurisdictions found invalid similar laws that sanctioned immigrant harboring in Arizona, Alabama, Georgia, Pennsylvania, and South Carolina. They cited the 2013 Fifth Circuit case that struck down Farmers Branch, Texas' immigrant harboring law as preempted by federal law.

Similar to the Texas law, in April 2016, the Louisiana legislature passed the Illegal Alien Sanctuary Policy Prohibition Act.[20] This law sanctions cities that do not cooperate with federal immigration officials in detaining undocumented immigrants. The law's purpose is to incentivize compliance with federal immigration rules by banning "sanctuary cities" from receiving bonds from the State Bond Commission. The law, prior to passage, was criticized for its potential to prompt racial profiling of

individuals by allowing state and local officials to ask any person about their citizenship status.

Anti-sanctuary laws demonstrate a marked shift from considering the humanity of individuals through sanctuary policies and contrastingly criminalizing historical acts that were once considered ethical and moral obligations of nation states to protect and provide moral humanity to migrants in need of protection.

Tiered Personhood: The New Juan Crow and Criminalization of Latina/os in America

With increased migration within the U.S. to new destinations, since 2006, there has been a proliferation of state and local laws targeting new immigrant populations. There has also been a corresponding increase in xenophobic attitudes toward immigrant populations—the inverse of the sanctuary movement. As this section demonstrates, the proliferation of state and local laws surfaced from failed congressional and executive policies that coincided with the increase of xenophobic reactions to the increase of Latina/o migration into areas of the U.S. not traditionally inhabited by large immigrant populations (McKanders 2007). Thus, as displayed in this section, there is a symbiotic relationship between anti-immigrant rhetoric and the rise of anti-immigrant state and local laws, which demonstrate frustration with the federal government and xenophobic reactions to increased Latina/o migrants. The backlash against sanctuary states and cities resulted in the creation of "crimmigration" and "Juan Crow," which denotes state/local (and also federal) laws criminalizing the migrant body and permanently subordinating the unauthorized migrant population.

Since 2006, there was a proliferation of state and local immigration laws and litigation challenging the constitutionality of these laws. Examples at the state level include Arizona's S.B. 1070 and Alabama's H.B. 56; restrictive local ordinances regulating immigrant livelihood include those of Farmers Branch, Texas (housing) and Hazleton, Pennsylvania (English only/housing/employment).[21] The trend continues today with even more legislation being passed evincing the continuation in the dichotomy between the ethics of sanctuary and the demagoguery associated with undocumented immigration.

Anti-immigrant laws also encourage and empower anti-immigrant groups who advocate violence and extra-legal activities. They rely on these laws to justify violence against Latina/os. The underlying anti-immigrant sentiment and social conditions evince a growing need to monitor the passage of new anti-immigrant laws as well as the enforcement of existing ones, to ensure that anti-immigrant sentiment is not codified to reinforce the exclusion of Latina/os.

The recent increase in state and local immigration legislation is illustrated by the former mayor of Hazleton who claimed that residents "were afraid to walk down the street" to justify the passing of anti-immigrant ordinances (McKanders 2007). The mayor alleged the ordinances were warranted given "the recent influx of illegal immigrants that allegedly caused increases in violent crime and strained municipal services" (McKanders 2007, p. 8). In 2006, Hazleton passed local ordinances that would sanction landlords who rented to undocumented immigrants; suspend the licenses of businesses that employed undocumented workers; and make English the city's official language. This anti-immigrant rhetoric and the passing of the ordinances caused a large majority of Hazleton's Latina/o population to depart.

The Hazleton ordinances are an example of the criminalization of all Latina/os. Latina/os in Hazleton "strongly oppose[d] the ordinances because they create[d] the presumption that all Latinos are undocumented criminals" (McKanders 2007, p. 11). This criminalization principle was based upon their unlawful presence in the U.S. and also the false presumption that all Latina/os are criminals (Hernandez, 2014–2015).

The federal lawsuit against Hazleton challenged the ordinances on constitutional preemption grounds. The complaint alleged that under the ordinances, "anyone who looks or sounds foreign—regardless of their actual immigration status—will not be able to participate meaningfully in life in Hazleton, returning to the days when discriminatory laws forbade certain classes of people from owning land, running businesses or living in certain places."[22] The complaint implicitly acknowledged a new Juan Crow environment where discriminatory laws excluded Latina/o individuals by attempting to get them to voluntarily leave the city.

The federal district court and the court of appeals found Hazleton's ordinances were constitutionally preempted. The district court's opinion ruled "whatever frustrations officials of the City of Hazleton may feel about the current state of federal immigration enforcement, the nature of the political system in the United States prohibits the City from

enacting ordinances that disrupt a carefully drawn federal statutory scheme."[23] On appeal, the federal Third Circuit affirmed the district court's holding.[24]

Similar to Hazleton's sanctioning of unlawful immigration, Arizona also passed unprecedented state immigration laws. Maricopa County, Arizona's Sheriff Arpaio was at the center of unlawful and discriminatory treatment of immigrants. He made many remarks deriding Mexican border crossers as swine-flu carriers and made references to the "tent city" extension of the Maricopa County Jail as a "concentration camp" (Lee 2013). News stories of him mandating that detainees wear pink underwear and stand outside in the Arizona heat were broadcast around the U.S. In March 2011, Maricopa County Sheriff's Office detention officers turned over 39,800 undocumented immigrants to federal immigration authorities for deportation (Lee 2013). Arpaio's comments ultimately led to the Arizona federal district court finding that his police department disproportionately singled out Latina/os and advanced racial profiling of immigrants within his county.[25] As in Hazleton, anti-immigrant rhetoric and discriminatory treatment of Latina/os culminated with the passage in 2010 and subsequent constitutional challenge to Arizona's S.B. 1070—Support Our Law Enforcement and Safe Neighborhoods Act. S.B. 1070 contained provisions adding state penalties relating to immigration law enforcement including trespassing, harboring and transporting illegal immigrants, alien registration documents, employer sanctions, and human smuggling. At the time, S.B. 1070 was the most far-reaching immigration legislation that any state had passed.

The purpose of Arizona's S.B. 1070 was "attrition through enforcement." Its goal was "to make life so difficult for undocumented immigrants—and their unwanted 'networks of relatives, friends and countrymen'—that they will all leave the state" (McKanders 2013). S.B. 1070 was apparently precipitated by the killing of a rancher in Arizona in an area known for drug trafficking and an immigrant smuggling route (Archibold 2010). The assumption was made that the rancher's death was caused by unlawful immigration.

In 2010, in *United States v. Arizona*, the U.S. Department of Justice filed a lawsuit against the State of Arizona asserting that S.B. 1070 was preempted by the federal Immigration and Nationality Act and was, therefore, unconstitutional. On appeal to the U.S. Supreme Court, the Court found that Arizona's statute was preempted, with the exception

of § 2(B) of S.B. 1070—the "Show Me Your Papers Law."[26] The Show Me Your Papers provision requires:

> a police officer who has conducted a "lawful stop, detention or arrest . . . in the enforcement of any other law or ordinance of a county, city or town or [the State of Arizona]" to make a "reasonable attempt" to determine the immigration status of the person who has been stopped, detained, or arrested whenever "reasonable suspicion exists that the person is an alien and is unlawfully present." (McKanders 2013)

In upholding this provision, the Supreme Court sustained states' and localities' abilities to mandate that police officers take reasonable steps to verify the immigration status of persons during arrests and stops. The concern with the Show Me Your Papers laws is related to the criminalization of Latina/os, which would result in the practice of racial, ethnic, and national origin profiling in violation of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.

Hazleton's anti-immigrant ordinances and Arizona's S.B. 1070 demonstrate the interconnection of how anti-immigrant laws amplify social norms and create a system that perpetuates tiered personhood (McKanders 2010). Despite the upholding of the Show Me Your Papers law, the Supreme Court affirmed that the federal government has preeminent power over immigration and immigration enforcement,[27] which halted the passing of more laws like S.B. 1070.

Executive Lawmaking and State Challenges

More recently, states have begun to directly target federal executive actions on immigration. In 2014, Texas sued the U.S. government based on its expansion of the previously announced Deferred Action for Childhood Arrivals (DACA), and newly announced Deferred Action for Parents of Americans (DAPA) prosecutorial discretion programs for undocumented immigrants. Twenty-six states joined the lawsuit against the federal government.[28] The paradox is that many of the states that joined the lawsuit had enacted favorable immigration policies, including access to state driver's licenses and in-state higher education tuition. Further, as immigration scholar Raquel Aldana acknowledges, the President's executive action on immigration "certainly implies that congressional inaction

constitutes a dysfunction that enhances the legitimacy of the Obama administration's response to act alone" (Aldana 2016, p. 10).

The state of Texas alleged that the announced prosecutorial discretion would permit unauthorized immigrants to obtain state-sponsored benefits to which they otherwise would not be entitled to, such as driver's licenses and unemployment insurance. Texas alleged the President did not follow the Take Care Clause of the U.S. Constitution that obligated him to make sure that laws are faithfully executed, and that the programs violated the federal Administrative Procedures Act because they did not undergo the requisite notice-and-comment rulemaking period.

The U.S. District Court for the Southern District of Texas granted a preliminary injunction finding that implementation would violate the APA's notice-and-comment requirements, and the court of appeals affirmed, finding that Texas had quasi-standing as it would be fiscally impacted by the executive action because it "affects the states' 'quasi-sovereign' interests by imposing substantial pressure on them to change their laws, which provide for issuing driver's licenses to some aliens and subsidizing those licenses."[29] The court stated:

> At its core, this case is about the Secretary's decision to change the immigration classification of millions of illegal aliens on a class-wide basis. The states properly maintain that DAPA's grant of lawful presence and accompanying eligibility for benefits is a substantive rule that must go through notice and comment, before it imposes substantial costs on them, and that DAPA is substantively contrary to law.

The government appealed to the Supreme Court, which affirmed the ruling by an equally divided 4-4 Court. Around twenty-five states filed amicus briefs in support of Texas alleging that the federal government overstepped its executive authority.

The underlying issue of immigrant access to state resources was central to the 2016 Montana Supreme Court case of *Montana Immigrant Justice Alliance v. Bullock*.[30] In this case, the Montana Supreme Court found unconstitutional a voter-enacted law[31] that denied certain state services to unauthorized immigrants including access to state universities, employment with a state agency, student financial assistance, issuance of a state license or permit to practice a trade or profession, unemployment insurance benefits, vocational rehabilitation, services for victims of crime, services for the physically disabled, and certain state grants. Citing the Supremacy Clause of the U.S.

Constitution, the court found that the Montana law was preempted.[32] The court found that the law's provision which permitted state officials to determine whether an individual was lawfully in the U.S. and eligible for state services was "an attempt to regulate immigration, and is also field preempted by federal law." The court held the law would run the "risk of inconsistent and inaccurate judgments issuing from a multitude of state agents untrained in immigration law and unconstrained by any articulated standards." This law was yet another attempt by a state to regulate immigration and deny a broad category of immigrants' access to state benefits and services.

In addition, although unlikely to succeed, in a political move in 2015, many states began to challenge the President's executive authority to resettle refugees in the U.S. Two states, Alabama[33] and Texas,[34] filed lawsuits against the federal government, while Tennessee passed a joint resolution, which the governor did not sign, to file a lawsuit against the federal government. The proposed Tennessee resolution instructed the state Attorney General to sue the federal government over its failure to consult and for coercing the state to spend state resources to provide services to refugees. These lawsuits mark a new political strategy of noncooperation to halt executive action and for the states to attempt to become participants in how immigration is regulated and the development of immigration policies.

Conclusion

The combination of the state, local, and federal tug-of-war on immigration laws without comprehensive immigration reform leaves a gap for new opportunities to reframe localized rhetoric into compassion, which is presented by the current humanitarian crisis of transmigrant women and unaccompanied youth in the U.S. In the face of a historical moment where the U.S. can serve as leader, the Texas litigation against the Obama executive order evinces the continued battle between states and the federal government and signals the need for comprehensive immigration reform. The current discourse and legal challenges between states and localities often occur in a vacuum where those in positions of authority (both state and local government actors, legislative, and executive branches) are unilaterally engaging in lawmaking without including the voice of the migrants for whom the laws target and are utilizing xenophobic ideologies that dehumanize Latina/o immigrants, further polarizing the debates and engaging in noncooperative federalism.

A cooperative model of federalism between the federal and state governments that enforce immigration laws, which upholds the protection of individual rights, is ideal.[35] A cooperative federalism model should consider: (1) the text of the Constitution which gives Congress power over immigration and therefore the power to protect immigrant rights; (2) that migration affects immigrants' ability to remain within a state or municipality when state and local governments assert control over immigrants; (3) the complexity of immigration law; and (4) when determining whether federal law preempts Hazleton-like ordinances, that state and municipal actors have no training to enforce immigration law. Currently a very dysfunctional and noncooperative federalism model exists wherein federal, state, and local governments are acting in silos while furthering their own interests. Current executive action that, in the face of congressional gridlock, attempts to create humane policies to unify families and protect childhood arrivals has been labeled unlawful executive lawmaking, while the executive deports record numbers of unauthorized immigrants. States and localities further the schism through continuing to enact a myriad of sanctuary and anti-immigrant laws airing their frustrations with the current system. This nuanced narrative evinces the need to develop comprehensive (and compassionate) immigration laws that recognize the humanity of migrants, especially in light of increased migration from the Northern Triangle.

Notes

1. The term "crimmigration," coined by Juliet Stumpf, characterizes the convergence of immigration and criminal law and proposes a unifying theory—membership theory—to explain the nature of such convergence and why convergence is of great concern. See Stumpf (2006).
2. The term "Juan Crow" can be traced to Lovato (2008): "Call it Juan Crow: the matrix of laws, social customs, economic institutions and symbolic systems enabling the physical and psychic isolation needed to control and exploit undocumented immigrants."
3. It should be noted that the U.S. federal courts have struck down or prevented from going into effect all, or at least significant parts, of such measures as Arizona S.B. 1070, Alabama H.B. 56, and the Hazleton (PA) Illegal Immigration Relief Act.
4. For example, although almost all of the key provisions of Arizona S.B. 1070 have been declared unconstitutional, it took many years for this to occur and, more importantly, the issues of the appropriate scope, roles, and

activities of subnational and supra-national entities in framing, setting, and operationalizing immigration policy remain wide open.

5. Although President Obama used his executive powers to provide temporary relief from deportation to what could have been as many as 5.2 million unauthorized migrants, a federal court struck down his expansion of the previously announced DACA and the new Deferred Action for Parents of Americans and Lawful Permanent Residents. However, the planned and anticipated executive actions on immigration reform will roll out over years and likely remain contested well into the 2020s. Furthermore, there is no substitute for an immigration reform that takes into account key principles of universal human rights, those from existing agreements protecting all types of migrants, and the establishment of a regional dialogue that could result in a shared vision of how to manage migration at a hemispheric level.
6. *Texas v. United States*, 809 F.3d 134, 170 (5th Cir. 2015), aff'd, *U.S. v. Texas*, 579 U.S. __ (June 23, 2016) (a 4–4 split affirming the lower court).
7. "Comparing the figures of the preliminary UNHCR 2014 report with homicide rates and violent incidents in the NTCA, there is a clear link between increased violence and the substantial increase in asylum applications and in the recognition of refugee status for NTCA nationals (130 percent increase in asylum applications from 2009 to 2013, 31 percent increase in granting of refugee status between 2010 and 2012)."
8. "Those advocating more restrictive positions almost always emphasize the collective effects of the millions of undocumented immigrants on the larger society. Correspondingly, these positions typically evoke mental images of a large mass of human beings. I refer to this twin emphasis on visualizing undocumented immigrants en masse and focusing on their collective impact as aggregation or clustering. In contrast, those who advocate a less restrictive approach tend to evoke the mental image of an individual undocumented immigrant or a family. Consequently, their arguments tend to emphasize the impact of a proposed policy on these individuals and families."
9. See also O'Toole 2011 ("President Barack Obama says he backs immigration reform, announcing last month an initiative to ease deportation policies, but he has sent home over 1 million illegal immigrants in 2–1/2 years—on pace to deport more in one term than George W. Bush did in two"); U.S. ICE, "Department of Homeland Security Releases Year in Statistics," (18 December, 2014), http://www.ice.gov/news/releases/dhs-releases-end-year-statistics ("In FY 2014, DHS conducted a total of 577,295 removals and returns, including 414,481 removals and 162,814 returns. ICE had a total of 315,943 removals or returns, and CBP made 486,651 apprehensions").

10. "Importantly, the use of the word sanctuary conveyed a sense of moral and ethical obligation that churches and, to some extent, the local governments aimed to evoke."
11. Elvira Arellano was eventually deported to Mexico in August 2007. In 2014, she presented herself at the U.S. border asking for asylum.
12. Press Release, "Immigrant's Shape California Fact Sheet," California Senate, http://sd24.senate.ca.gov/sites/sd24.senate.ca.gov/files/Immigrants%20Shape%20California%20Legislative%20Package%20Fact%20Sheet.pdf.
13. Press Release.
14. A.B. 899, 2015 Gen. Assembly, Reg. Sess. (Cal. 2015–2016).
15. A.B. 899 ("AB 1343 (Thurmond) Ensuring Due Process for Immigrant Defendants: Avoids unintended immigration consequences, like detention, deportation, and citizenship eligibility, by requiring defense counsel to provide accurate and affirmative advice and defense against such consequences. Both the prosecution and defense must contemplate immigration consequences in order to reach a just and fair resolution.").
16. Villazor (2008) ("Once dominantly used to convey moral and ethical obligations to include immigrants to the political, legal and social terrains of the U.S., the term today operates to signal strong opposition and rejection to the presence and inclusion of unauthorized immigrants in the country.").
17. Villazor (2008).
18. H.B. 675, 118th Gen. Assemb., Reg. Sess (Fla. 2016).
19. Complaint, *Cruz v. Texas*, 2016 WL 319204 (W.D. Tex. 2016).
20. H.B. 151, 476th Gen. Assemb., Reg. Sess. (La. 2016).
21. It should be noted that the U.S. federal courts have struck down or prevented from going into effect all, or at least significant parts, of such measures as Arizona S.B. 1070, Alabama H.B. 56, and the Hazleton (PA) Illegal Immigration Relief Act.
22. Complaint ¶ 22, *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007).
23. *Lozano*, 496 F. Supp. 2d 477, 555 (M.D. Pa. 2007).
24. *Lozano v. City of Hazleton*, 724 F.3d 297 (3rd Cir. 2013).
25. *Melendres v. Arpaio*, 989 F. Supp. 2d 822, 827 (D. Ariz. 2013) *aff'd*, 784 F. 3d 1254 (9th Cir. 2015); see also Webb (2013).
26. *Arizona v. United States*, 132 S. Ct. 2492 (2012).
27. *Arizona*.
28. Twenty-six states challenged DAPA even though only Texas had standing in the lawsuit. The 26 states include Texas, Alabama, Georgia, Idaho, Indiana, Kansas, Louisiana, Montana, Nebraska, South Carolina, South Dakota, Utah, West Virginia, North Dakota, Ohio, Oklahoma, Arizona, Arkansas, Nevada, Tennessee, Wisconsin and the governors of Maine, North Carolina, and Mississippi.

29. *Texas v. U.S.*, 809 F.3d 134, 152–153 (5th Cir. 2015) ("DAPA would have a major effect on the states' fiscs, causing millions of dollars of losses in Texas alone, and at least in Texas, the causal chain is especially direct: DAPA would enable beneficiaries to apply for driver's licenses, and many would do so, resulting in Texas's injury").
30. *Montana Immigrant Justice Alliance v. Bullock*, 2016 MT 104 (2016).
31. The Montana Legislature sent the anti-immigrant measure to the 2012 ballot, where it was approved by 80 percent of voters.
32. *Montana* at ¶ 28 ("The Supremacy Clause of the U.S. Constitution provides that federal law 'shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding'" citing U.S. Constitution. art. VI, cl. 2. The Supremacy Clause endows Congress with the power to preempt state law).
33. Complaint in *Alabama v. United States*, 2016 WL 92829 (N.D. Ala. 2016) (alleging under the 1980 Refugee Act the federal government breached its consultation duties and obligations of regular and advance consultation with the State of Alabama).
34. *Texas Health & Human Servs. Comm'n v. United States*, 2016 WL 1355596 (N.D. Tex. Feb. 8, 2016) (denying preliminary injunction to Texas Health and Human Services Commission seeking to prevent Syrian refugees from resettling in Texas: "The Court does not deny that the Syrian refugees pose some risk . . . In our country, however, it is the federal executive that is charged with assessing and mitigating that risk, not the states and not the courts. It is certainly possible that a Syrian refugee resettled in Texas could commit a terrorist act, which would be tragic. The Court, however, cannot interfere with the executive's discharge of its foreign affairs and national security duties based on a possibility of harm, but only on a proper showing of substantial threat of irreparable injury and a legal right to relief.").
35. McKanders (2007, p. 43) (criticizing the Supreme Court's framework for analyzing preemption issues and proposing a straightforward express and implied preemption analysis of the issues).

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CHAPTER 5

Federal Regulatory Policymaking and Enforcement of Immigration Law

Bill Ong Hing

Introduction

When the U.S. Congress passes a law regulating immigration, a long established principle is that "it is not the judicial role in cases of this sort to probe and test the justifications for the legislative decision."[1] In fact, the Supreme Court has made clear that "over no conceivable subject is the legislative power of Congress more complete" than in the field of immigration.[2] Thus, Congress's plenary power over immigration has been used to justify exclusion based on race,[3] gender,[4] sexual preference,[5] and speech.[6]

Since the executive branch is charged with the responsibility to enforce immigration laws, the executive has vast discretionary authority to enforce those laws in a manner that is comparable to Congress's plenary power over immigration legislation. For example, the Supreme Court struck down a major section of Arizona's anti-immigrant S.B. 1070 citing the provision's interference with the executive's authority. Section 6 of S.B. 1070 provided that a state officer, "without a warrant, may arrest a person if the officer has probable cause to believe . . . [the person] has committed any public offense that makes [him] removable from the United States." In challenging S.B. 1070, the U.S. Attorney General successfully argued

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that arrests authorized by this statute would be an obstacle to the removal system Congress created. By authorizing state officers to decide whether an alien should be detained for being removable, § 6 violated the principle that the removal process is entrusted to the discretion of the federal government. A decision on removability requires a determination whether it is appropriate to allow a foreign national to continue living in the U.S. In the Court's view, decisions of this nature touch on foreign relations and must be made with "one voice." Allowing Arizona officers (and potentially officers from other states) to decide whom to detain for deportation would disrupt the executive's enforcement plans and goals.[7] The basis for federal policymaking on enforcement is this recognition that the executive is the "one voice" that decides the appropriateness of whether a particular noncitizen should be removed.

A History of Prosecutorial Discretion in Deportation Cases

When I started practicing immigration law at San Francisco Neighborhood Legal Assistance Foundation as a young law graduate in 1974, experienced lawyers at boutique immigration law firms were happy to counsel and advise me. They taught me to be honest and to know the law. But they also pointed out that when the facts were good, I should not be afraid to march into the Immigration and Naturalization Service (INS) district director's office and ask that he do the right thing even if the law was not on my side. In other words, they were all well aware of the vast discretion held by the district director. We may not have called it "prosecutorial discretion" back then, but in those days when the district director made the decision on whether to issue an order to show cause to get the ball rolling on a deportation case, we knew he could stop the clock at any time.

Thus, for example, I recall going to INS District Director David Ilchert to talk about two sisters from the Philippines in the 1980s when the backlog in the sibling immigration category for Filipinos was already quite substantial. Corazon Ayalde became a U.S. citizen several years after she immigrated to the U.S. as a registered nurse to work in a public hospital devoted to caring for senior citizens. When her sister Cerissa, who had remained in the Philippines, became widowed without children, the pair longed to be reunited. Cerissa obtained a U.S. tourist visa, and soon after she arrived, Corazon filed an immigration family

petition for her sister. Corazon was slowly becoming ill, and Cerissa wanted to remain in the U.S. so that she could care for her sister. They had heard about a backlog in the sibling category, but shortly after the petition was filed, immigration authorities mistakenly sent them a notice that Cerissa should come into the local office to complete the adjustment of status process to obtain lawful permanent resident status. Believing that God had answered their prayers, Cerissa dutifully completed the paper work, completed a fingerprint card, obtained photos, made an appointment for an interview, and appeared at the local INS office. However, when they showed up at the interview, the INS agent informed them that a mistake had been made; no visa was available, and he stated that Cerissa would have to leave the country and wait in the Philippines until an immigrant visa became available. Devastated, they came to my legal services office. I prepared an argument based on detrimental reliance on the government's own mistake—a logical argument but not one with great authority at the time. But before the immigration court hearing, I presented the facts and the situation to Mr. Ilchert. After holding the case for several weeks, he called me in and told me that he would simply suspend going forward with the removal case until Cerissa's priority date for a visa was reached. Years later, Cerissa's permanent residence was granted. Corazon felt her "heart being lifted to heaven" as the sisters were permitted to remain together until Corazon passed away a few years later.[8]

Around that time, Leon Wildes, a noted New York immigration attorney, reported on his Freedom of Information Act findings of what practitioners had always suspected—the INS actually had a formal, albeit, secret, process for keeping certain cases with sympathetic equities on hold indefinitely (Wildes 1976; Hing 2004, pp. 226–228, Olivas 2012). Although various INS regimes enforced deportation provisions fairly rigorously, at times the equities or political ramifications presented by certain cases would soften even the most hard-nosed INS enforcement agent. Until the 1970s, U.S. immigration officials maintained a low-profile, almost secret, "non-priority program" where deportable aliens were allowed to remain in the country because of special circumstances. This program was exposed in the midst of the government's attempt to deport John Lennon, the legendary member of the Beatles. After the Beatles broke up, Lennon and his wife, artist Yoko Ono, traveled to New York in August 1971 to seek custody of Ono's daughter by a former marriage to a U.S. citizen. At the time of entry, INS authorities were aware that Lennon had pleaded

guilty to possessing one-half ounce of hashish in Great Britain in 1968. Officials temporarily waived what was deemed to be a ground of excludability because of that conviction. Lennon's temporary visa was eventually extended to February 29, 1972. During his stay, he performed at rallies organized to protest the U.S.'s involvement in the Vietnam War. His activity caught the attention of President Richard Nixon, who ordered INS officials to remove Lennon from the U.S. Soon after Lennon's visa expired in March 1972, deportation proceedings were instituted against Lennon and Ono. Although they had filed applications for lawful permanent residence, INS officials did not act on the applications, choosing instead to seek deportation, in part based on the British conviction, which they had earlier ignored.[9] Lennon and Ono retained Wildes for assistance.

While the proceedings were pending, Wildes brought an action against the INS. He argued that Lennon and Ono should not be deported—that they should be allowed to remain in the U.S. in a manner that Wildes and other immigration lawyers had heard was possible in the discretion of officials. As part of the lawsuit, Wildes filed an FOIA request and discovered the existence of the "non-priority program." Non-priority status essentially halted deportation as a matter of administrative discretion, placing the person at the lowest possible priority for INS action. Traditionally, the status was accorded to aliens whose departure from the U.S. would result in extreme hardship.

What Wildes unearthed about the government's non-priority program was surprising to many. He was allowed to examine 1,843 cases and found that non-priority status could apply in virtually any circumstance where a grave injustice might result from removal. Non-priority had been granted to aliens who had committed serious crimes involving moral turpitude (including rape), drug convictions, fraud, or prostitution. Non-priority had been given to Communists, the insane, the feebleminded, and the medically infirm. Often multiple grounds of deportability were overcome. Family separation, age (both elderly and young), health, and economic issues were important factors that officials considered (Wildes 1976).

After the revelation of the existence of the secret non-priority program, the INS formalized the process publicly, publishing guidelines for requesting "deferred action" from INS authorities. Local INS district directors had the authority to grant a deportable person deferred action, permitting the individual to remain in the country indefinitely. The primary considerations district directors would use in deciding whether to grant deferred

action included (1) the likelihood of ultimately removing the alien, including physical ability to travel, or availability of relief; (2) the presence of sympathetic factors that might lead to protracted deportation proceedings or bad precedent from the INS perspective; (3) the likelihood that publicity adverse to the INS will be generated because of sympathetic facts; and (4) whether the person is a member of a class whose removal is given high priority, such as dangerous criminals, large-scale alien smugglers, narcotic drug traffickers, terrorists, war criminals, or habitual immigration violators.[10] Deferred action in the deportation context today is thus manifested in the exercise of prosecutorial discretion by Department of Homeland Security (DHS) officials (Wadhia 2010).

Prosecutorial Discretion and the DREAM Act Students

Although candidate Barack Obama promised comprehensive immigration reform in the 2008 presidential contest, President Obama was unable to deliver on his promise over the course of his two terms in office. Congress took significant steps toward major immigration legislation twice during the Obama presidency: once after his 2012 reelection, and once earlier—in December 2010, when the House of Representatives passed the Development, Relief, and Education for Alien Minors (DREAM) Act, but the Senate fell five votes short of the needed sixty votes to break a threatened Republican filibuster of the legislation.

The DREAM Act was first introduced in Congress in 2001 by a bipartisan group of legislators that included Dick Durbin, Orrin Hatch, Luis Gutierrez, and Richard Lugar. Various versions of the legislation would provide conditional lawful permanent residence status to certain undocumented individuals (up to age 30 or 35, depending on the legislative version) of good moral character who graduate from U.S. high schools, arrived in the U.S. as minors, and lived in the country continuously for at least five years prior to the bill's enactment. If they completed two years in the military or two years at a four-year institution of higher learning,[11] they would obtain temporary residency for a six-year period. Eventually, the individuals could qualify for lawful permanent residence and ultimately U.S. citizenship.

The DREAM Act reached the Senate floor in mid-September 2010 with support from both parties and the White House. Later that month,

Secretary of Education Arne Duncan declared, "It is no surprise that a common-sense law like the DREAM Act has always been supported by both Democrats and Republicans. There is no reason it shouldn't receive that same bipartisan support now" (Lee and He 2010). As Congress became hyper-politicized during the first two years of the Obama presidency, the DREAM Act suffered an erosion of bipartisan support. When Senate Majority Leader Harry Reid (D-Nev.) included the DREAM Act in the defense authorization bill in September, the bill failed the cloture vote 56–43 without garnering a single Republican in favor. Republican Senators Orrin Hatch and Bob Bennett, both of Utah, had voted in favor of adding the DREAM Act to the defense authorization bill in 2007, but voted against the measure in 2010. Likewise, Senator John McCain (R-Ariz.), who co-sponsored the DREAM Act in 2005, 2006, and 2007, voted against it in 2010.

The DREAM Act faced a substantial political challenge. The legislation occupies a tenuous middle ground: liberals accused it of being too limited in scope and conservatives charged that it is too far-ranging. Kristen Williamson, a spokesperson for the Federation for American Immigration Reform, a restrictionist group, asserted that many Republicans viewed the DREAM Act as "amnesty disguised as an educational initiative." Critics of the DREAM Act alleged that the measure rewards lawbreaking and creates a greater incentive to defy immigration laws. With 2010 midterm elections on the horizon, Republicans also accused congressional Democrats of capitalizing on the DREAM Act "to motivate Hispanic voters in the upcoming elections" (Lee and He 2010). On the other side of the aisle, some liberal Democrats believed that comprehensive immigration reform was still possible and opposed the DREAM Act's piecemeal approach to reform. Marshall Fitz, director of immigration policy at the Center for American Progress, explained, "The expectation that we will only get one shot at an immigration debate during a legislative session suggests that moving forward on a piece like DREAM means it is to the exclusion of other equally worthy pieces" (Lee and He 2010).

However, after the November 2010 elections, the prospects for comprehensive immigration reform grew dimmer. Democrats would lose their majority in the House of Representatives in the next Congress. So in the lame duck Congressional session after the elections, the House passed the DREAM Act with a 216–198 vote on December 8. With Republicans, most of whom opposed the bill, taking over the House in January and

increasing their seats in the Senate from 42 to 47, the measure's chances appeared slim for the next two years at least. The DREAM Act became a top priority of Senate Majority Leader Harry Reid, who won a tough reelection fight with the help of Nevada's large Latina/o community, which strongly supported the DREAM Act. The bill garnered a majority of Senate votes, 55–41, but failed to advance because 60 votes were required to overcome a filibuster.

Four months later, after the new Congress assembled and Republicans took control of the House of Representatives, 22 senators wrote to President Obama asking for deferred action for undocumented immigrant youth who would have qualified for the bill. Led by Senators Durbin and Reid, the senators reminded the president that "the exercise of prosecutorial discretion in light of law enforcement priorities and limited resources has a long history in this nation and is fully consistent with our strong interest in the rule of law. Your Administration has a strong record of enforcement, having deported a record number of undocumented immigrants last year. At the same time, you have granted deferred action to a small number of DREAM Act students on a case-by-case basis, just as the Bush Administration did. Granting deferred action to DREAM Act students, who are not an enforcement priority for DHS, helps to conserve limited enforcement resources."[12]

The Morton Memo

On June 17, 2011, Immigration and Customs Enforcement (ICE) Director John Morton issued an important memorandum on the use of prosecutorial discretion in immigration matters (Morton 2011).[13] The memo called on ICE attorneys and employees to refrain from pursuing noncitizens with close family, educational, military, or other ties in the U.S. and instead spend the agency's limited resources on persons who pose a serious threat to public safety or national security. The Morton memo was a direct result of lobbying efforts by DREAM Act students and their supporters, including members of Congress, to convince President Obama to grant deferred action to DREAM Act students after the DREAM Act failed to pass the U.S. Senate.

A closer look at the Morton memo on prosecutorial discretion revealed an affirmation of the principles and policies of previous guidance on this subject. The memo, however, took a further step in articulating the expectations for and responsibilities of ICE personnel when exercising

their discretion. The memo provided guidance to all ICE officials on the exercise of prosecutorial discretion. Specifically, the memo provided a non-exhaustive list of relevant factors that ICE officers should weigh in determining whether to exercise prosecutorial discretion:

- The agency's civil immigration enforcement priorities
- The person's length of presence in the U.S., with particular consideration given to presence while in lawful status
- The person's immigration history, including any prior removal, outstanding order of removal, prior denial of status, or evidence of fraud
- The person's criminal history, including arrests, prior convictions, or outstanding arrest warrants
- Whether the person poses a national security or public safety concern
- The person's ties and contributions to the community, including family relationships
- The person's ties to his home country and conditions in the country
- Whether the person has a U.S. citizen or permanent resident spouse, child, or parent
- Whether the person or the person's spouse suffers from severe mental or physical illness

The memo further pointed out:

> [ICE] has limited resources to remove those illegally in the United States. ICE must prioritize the use of its enforcement personnel, detention space, and removal assets to ensure that the aliens it removes represent, as much as reasonably possible, the agency's enforcement priorities, namely the promotion of national security, border security, public safety, and the integrity of the immigration system.

The memo went on to provide examples of those for whom prosecutorial discretion is not appropriate: gang members, serious felons, repeat offenders, and those who pose national security risks. The memo also noted that prosecutorial discretion can be exercised at any stage of the enforcement proceedings.[14]

The Morton memo was greeted with fanfare. Some 400,000 pending deportation cases would be reviewed to cull out the low priority immigrants for cancellation of proceedings. The White House and DHS announcements that accompanied the Morton memo in the summer of

2011 made clear that DREAM Act students were one of the primary, intended beneficiaries of the memo. DHS Secretary Janet Napolitano explained that "it makes no sense to expend enforcement resources" on young people who pose no threat to public safety (Pear 2011). Senator Durbin, a primary DREAM Act sponsor, praised the announcements:

> The Obama Administration has made the right decision in changing the way they handle deportations of DREAM Act students . . . These students are the future doctors, lawyers, teachers and, maybe, Senators, who will make America stronger. We need to be doing all we can to keep these talented, dedicated, American students here, not wasting increasingly precious resources sending them away to countries they barely remember. The Administration's new process is a fair and just way to deal with an important group of immigrant students and I will closely monitor DHS to ensure it is fully implemented."[15]

A *Los Angeles Times* headline blared: "Dream Act Students Won't Be Deportation Targets, Officials Say" (L.A. Times 2011). But the broad language of criteria set forth in the Morton memo made clear that other migrants subject to removal were intended to be covered as well. The design was well received by immigrant rights groups and immigration lawyers: "[G]overnment officials and advocates now have a new tool for doing the right thing" (Giovagnoli 2011). Congressman Luis Gutierrez applauded the announcement: "Focusing scarce resources on deporting serious criminals, gang bangers, and drug dealers and *setting aside non-criminals with deep roots in the U.S.* until Congress fixes our laws is the right thing to do and I am proud of the President and Secretary Napolitano for standing up for a more rational approach to enforcing our current immigration laws" (Sweet 2011, emphasis added).

In the months that followed the Morton memo and White House announcements of prosecutorial discretion on low priority cases, the practical reality of implementing the Morton memo began to surface. Low-priority cases should have been covered by the memo, but many were denied deferred action. Relatively few immigrants facing deportation had their cases closed. On May 29, 2012, ICE officials announced they had considered 232,181 cases of immigrants not currently held in detention. Authorities identified 20,608 possible cases for administrative closure (less than 10 percent), although about 12,000 of them were held up awaiting criminal background checks. Since closure itself does not give immigrants

an avenue toward legal status, about half of those offered closure rejected it, preferring to have their cases continue in immigration court perhaps to apply for cancellation of removal or asylum. Authorities also reviewed the cases of 56,180 immigrants held in detention. They offered administrative closure to only about 40 (Immigration Policy Center 2012). The May 2012 update on its review of pending removal cases was DHS's third report on the process. Each time, the percent of cases found eligible for administrative closure in the prosecutorial discretion review fell. In a March 5, 2012, report, 8 percent were eligible for closure; 6.2 percent of cases reviewed between March 5 and April 16 were eligible for closure, and 6 percent of those reviewed from April 16 to May 29 (Immigration Policy Center 2012, p. 3). In all, about 7 percent were found eligible for administrative closure—a rate that was disappointing to immigrant advocates.

In a membership survey by the American Immigration Lawyers Association (AILA), those denied prosecutorial discretion included: a longtime resident with no criminal history, no prior removals, with U.S. citizen relatives (Detroit); a longtime resident with no criminal history, no fraud, with strong community ties, U.S. citizen relatives, including a spouse with a severe illness (San Francisco); and an elderly person who suffers health problems, with no criminal history, no prior removals, with U.S. citizen relatives (New York). On the other hand, those granted prosecutorial discretion included: a longtime resident with no criminal history, strong community ties, U.S. citizen relatives, and few ties to the home country (New York); a person present in the U.S. since childhood with no criminal history, and U.S. citizen relatives (Detroit); a person present since childhood with no criminal history, no prior removals, a U.S. high school graduate, with few ties to the home country (Seattle).[16] The lack of consistency across the country in the application of prosecutorial discretion was apparent from a close look at the survey results.

The AILA survey of attorneys in various parts of the country yielded disturbing information. In the Arlington, Virginia, and Washington, D.C., area, ICE officers stated that the Morton memo does not "mean anything . . . If we can arrest you, we will arrest you." In Atlanta, Georgia, ICE attorneys and officers stated they did not intend to comply with the Morton memo. In Detroit, Michigan, ICE was refusing prosecutorial discretion requests even in "very meritorious" cases, and one attorney was told that prosecutorial discretion was not forthcoming because "resources have already been expended in litigating the case." In Los Angeles, one attorney felt that "less" discretion was being

exercised after the Morton memo. In Orlando, Florida, ICE was not heeding the memo because it was not considered "binding."

Part of the problem with lack of consistency in implementing the Morton memo was resistance from ICE employees and the ICE union. In January 2012, the *New York Times* reported: "In October, [union president, Chris Crane] told Congress the policy was too confusing for agents to understand and would lead to 'victimization and death,' for reasons that were unclear. Mr. Crane has taken his grievances to the hard-right media, complaining to Fox News and Lou Dobbs that his bosses are endangering lives and abdicating their law-enforcement duties" (N.Y. Times 2012). A few days after the Morton memo was issued, the ICE union issued its own press release in which Crane warned: "Any American concerned about immigration needs to brace themselves for what's coming... The desires of foreign nationals illegally in the United States were the framework from which these policies were developed... [T]he result is a means for every person here illegally to avoid arrest or detention; as officers we will never know who we can or cannot arrest."[17] Then a year later, in August 2012, ten ICE agents filed a lawsuit against DHS Secretary Napolitano alleging that the prosecutorial discretion policies announced in the Morton memo prevented them from doing their job and "defending the Constitution" (Foley 2012).[18] The lawsuit was funded by the anti-immigrant organization NumbersUSA, and the lead counsel was Kris Kobach, the architect of several anti-immigrant state laws, such as Arizona's S.B. 1070.

Although the Morton memo of June 17, 2011, did result in the termination of some deportation proceedings involving DREAMers, the removal of many DREAMers with no criminal backgrounds continued. For example, Ramon Aguirre, who had entered the U.S. at the age of seven and became a talented artist in high school, was deported even though he had a four-year-old son. In Denver, a recent high school graduate brought to the U.S. as an undocumented minor by his mother when he was seven years old was first told that he would be granted prosecutorial discretion, but later the local ICE Chief Counsel said there was a "mix-up" and that the young man would not be receiving prosecutorial discretion.[19]

Deferred Action for Childhood Arrivals (DACA)

DREAMers and their supporters were disappointed with the Morton memo results and called on the president to do more. So on June 15, 2012, to make his intent very clear to ICE officials in the field, President Obama explicitly

announced that DREAMers would be granted deferred action and employment authorization for at least two years.[20] Not coincidentally, his decision came after a weeklong protest and sit-in at his campaign office in Denver, Colorado, when he was in the midst of his reelection campaign against Mitt Romney (Hing 2012). Under the directive, deferred action could be granted on a case-by-case basis to individuals who meet the following criteria: they came to the U.S. when they were younger than 16, they have continuously resided in the U.S. for at least five years, and they are in school, have graduated from high school, have obtained a GED, or are honorably discharged veterans of the armed forces. The individuals may qualify if they have not been convicted of a felony, significant misdemeanor offense or multiple misdemeanor offenses, or otherwise pose a threat to national security or public safety. And they must be under age 31.

While President Obama's action on behalf of DREAMers was consistent with the immigration agency's traditional prosecutorial discretion to grant deferred action to sympathetic, albeit, deportable immigrants (Hing 2004, pp. 226–228), the scope was unprecedented. Republican critics argued that he went beyond the scope of his authority. And the president himself, only a year earlier, had denied that he could "just suspend deportations [of DREAMers] through executive order" (Kessler 2014).

Deferred Action for Parents of Americans (DAPA)

As 2010 drew to a close and the DREAM Act failed in the Senate, prospects for comprehensive immigration reform further dimmed as Republicans took control of the House of Representatives. Serious bipartisan immigration legislation was not considered until after the 2012 presidential elections. With the reelection of Obama, many in the Republican Party sensed that if they were ever to retake the White House, Latina/o votes would be necessary, and passing comprehensive immigration reform was a prerequisite.

With much fanfare and relative swiftness, on June 27, 2013, the Senate passed a comprehensive bill that was hammered out by four Democrats and four Republicans. The bill was attacked by the right as providing amnesty for lawbreakers and by the left for being too strict on enforcement and providing an unreasonably long path to citizenship. But the Republican-controlled House never permitted an up or down vote on the Senate bill, casting aside any concern over appeasing

Latina/o voters. Thus, efforts at comprehensive immigration reform failed again in 2013 and 2014, as they had in 2010.

While congressional efforts over immigration reform ebbed and flowed in 2013 and 2014, the ICE enforcement machine did not ease up. Although the DACA program for DREAMers was in full swing and about 750,000 DREAMers benefited, Obama's ICE deportations continued at record pace. Families continued to be separated as immigrant workers and parents of citizens and DACA recipients were removed. Enforcement was so intense that President Obama was dubbed the "deporter-in-chief" by immigrants, their allies, and even the news media.

Thus, in spite of the implementation of DACA for DREAMers, President Obama came under fierce criticism for record deportations. Congressman Luis Gutierrez and the University of Arizona estimated that as many as 90,000 to 100,000 undocumented parents were separated from their U.S. citizen children each year (Medina 2013). Immigrant rights advocates argued that the Obama administration was only "paying lip service to a different strategy" and that the detention of criminal and noncriminal immigrants under the Bush and Obama administrations were essentially the same (Chardy 2010).

With no realistic hope for comprehensive immigration legislation, critics of the continuing deportations demanded that the president act administratively to defer the deportation of anyone who would have been granted protection under the Senate bill that had been passed in 2013. In one well-publicized exchange, DACA recipient Ju Hong interrupted the president's speech, exclaiming: "[O]ur families are separated... Mr. President, please use your executive order to halt deportations for all 11.5 [million] undocumented immigrants in this country right now." The president responded: "[I]f in fact I could solve all these problems without passing laws in Congress, then I would do so. But we're also a nation of laws. That's part of our tradition. And so, the easy way out is to try to yell and pretend like I can do something by violating our laws" (Democracy Now 2013).

In spite of the president's remarks suggesting that he could not act administratively—just as he had previously denied that he could act specifically on protecting DREAMers, on November 20, 2014, the president took executive action to not deport four to five million more undocumented immigrants, primarily the parents of U.S. citizen children or lawful permanent resident children. The DAPA program was another bold action by the president of unprecedented scope—even broader than the action on behalf of DREAMers. On cue, Republicans claimed that the president acted

unconstitutionally, and legal challenges were filed. On the other hand, the immigrant rights community complained that parents of DREAMers should have been included in the order.

The specific question of whether the president's broad deferred action programs are constitutional has not been answered by the Supreme Court. The Court deadlocked 4–4 in *United States v. Texas* (2016) on a related procedural matter, leaving the precise question about the president's authority for a later day.[21] We have learned, however, that states cannot intrude on the executive's broad authority to develop a national enforcement plan.[22] This is important in the face of Congress's failure to pass comprehensive immigration reform that would address the fate of ten to twelve million undocumented immigrants in the U.S. Without Congressional action, presidential authority to develop an enforcement plan should properly include the exercise of broad discretion to decide how to enforce current immigration laws.

Conclusion

There is a long history and tradition of the executive engaging in its own policymaking to enforce immigration laws. Sometimes, the immigration laws passed by Congress go too far or not far enough, and the executive exercises its discretion on behalf of affected individuals. Other times, Congress fails to act, and the executive compensates by acting on its own to soften enforcement on a case-by-case basis. Any of those discretionary actions seem to be appropriate. After all, since the executive branch is charged with the responsibility to enforce immigration laws, the executive has vast discretionary authority to enforce those laws in a manner that is comparable to Congress's plenary power over immigration legislation.

Notes

1. *Fiallo v. Bell*, 430 U.S. 787, 799 (1977).
2. *Fiallo*, 792.
3. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).
4. *Fiallo v. Bell*, 430 U.S. 787, 799 (1977).
5. *Boutilier v.INS*, 387 U.S. 118 (1967).
6. *Kleindienst v. Mandel*, 408 U.S. 753 (1972),
7. *Arizona v. United States*, 132 S.Ct. 2492 (2012).
8. Interview with Cerissa Ayalde.
9. *Lennon v. INS*, 527 F.2d 187 (2d Cir. 1975).

10. Lennon ultimately won his deportation battle with INS and received lawful permanent residence status based on his musical talents. One court had even ordered authorities to grant Lennon non-priority status (Wildes 1998). See also *Lennon v. United States*, 527 F. 2d 187 (2d Cir. 1975).
11. The bill originally required students to attend college or do two years of community service, but the latter option was replaced with a military service option with pressure from the Pentagon (Foley 2010).
12. "Durbin, Reid, 20 Senate Democrats Write Obama on Current Situation of DREAM Act Students," April 13, 2011, http://durbin.senate.gov/public/index.cfm/pressreleases?ID=cc76d912-77db-45ca-99a9-624716d9299c.
13. Director Morton actually issued two memoranda on prosecutorial discretion that day. Morton's second memo focuses on exercising discretion in cases involving victims, witnesses to crimes, and plaintiffs in good faith civil rights lawsuits. That memo instructs "[a]bsent special circumstances or aggravating factors, it is against ICE policy to initiate removal proceedings against an individual known to be the immediate victim or witness to a crime."
14. Morton (2011), 5: "While ICE may exercise prosecutorial discretion at any stage of an enforcement proceeding, it is generally preferable to exercise such discretion as early in the case or proceeding as possible in order to preserve government resources that would otherwise be expended in pursuing the enforcement proceeding."
15. "Durbin Lauds Administration Announcement on DREAM Act Deportation Cases," August 18, 2011, http://durbin.senate.gov/public/index.cfm/pressreleases?ID=46e027e8-fe46-4b62-93e2-7b4c4ea48d2b.
16. American Immigration Council, "American Immigration Lawyers Association, Holding DHS Accountable on Prosecutorial Discretion," November 2011 (on file with author) (hereafter "AILA report").
17. "ICE Agent's Union Speaks Out on Director's 'Discretionary Memo' Calls on the Public to Take Action," June 23, 2011, http://iceunion.org/news/ice-agent's-union-speaks-out-director's-"discretionary-memo"-calls-public-take-action-click-her.
18. In addition to the Morton memo, the lawsuit challenged the deferred action program specifically for DREAMers that was announced on June 15, 2012 by the Obama administration.
19. Email from Violeta Raquel Chapin to immprof@listserv.unc.edu, April 9, 2012.
20. When the Morton memo was issued, supporters of same-sex couples sought explicit assurances from DHS and the White House that the foreign-born partner of a U.S. citizen would be granted prosecutorial discretion. Administration officials had stated that being in a same-sex relationship would be considered in the context of the "community contributions" and "family relationships" factors in the Morton memo. But activists and Democratic lawmakers sought additional assurances that bi-national same-

sex couples would not be left out. Finally, more than a year later, DHS Secretary Napolitano announced: "In an effort to make clear the definition of the phrase 'family relationships,' I have directed ICE to disseminate written guidance to the field that the interpretation of the phrase 'family relationships' includes long-term, same-sex partners" (Leitsinger 2012).

21. See *United States v. Texas*, 579 U.S. __ (2016) (equally divided court upholds the lower court preliminary injunction against the DAPA executive order going into effect).
22. *Arizona v. United States*, 132 S.Ct. 2492 (2012).

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CHAPTER 6

Short-Hoeing the Long Row of Bondage: From Braceros to Compassionate Farm Worker Migration

Gilbert Paul Carrasco

Introduction

Systematic human rights abuses have inhered in U.S. guest worker programs from the advent of the Bracero Program in 1942 through its termination in 1964, as well as in its progeny, the subsequent H-2 guest worker programs currently in place. While Congress has repeatedly enacted reforms to modify the U.S. immigration system, abuses of the rights of migrant workers have remained a constant. This chapter examines the history of U.S. guest worker programs, explores the variety of abuses that has attended those programs, and considers contemporary legislative proposals with potential to reduce those abuses.

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Background: The Bracero Program

The Bracero Program, a series of bilateral agreements between Mexico and the U.S. through which the U.S. permitted Mexican farm workers to provide seasonal labor to U.S. growers, began in August 1942 as a result of informal negotiations between Mexico and the U.S. against the backdrop of purported labor shortages. Originating from fear that an agricultural labor shortage would undermine U.S. national defense, a treaty on braceros was signed, the "Agreement between the United States of America and Mexico Respecting the Temporary Migration of Mexican Workers," whereby "up to two hundred thousand Mexicans would work on American farms, railroads and so on, replacing labor absorbed by the army and other war-related activities" (Camín 1993, p. 192). The U.S. farm labor supply was further eroded when thousands of Japanese American farmers were sent to wartime internment camps. During the course of this Emergency Farm Labor Program (infamously known as the Bracero Program), the U.S. government transported five million migrant farm workers from Mexico to provide labor to farmers and ranchers in 24 states (Bickerton 2001, p. 897).

Demand for bracero contracts exceeded the available jobs through the program, leading to a flow of undocumented workers over the border (Cohen 2001, p. 113). Braceros were supposed to be selected through lottery, but the high demand for bracero contracts (there were an estimated 20 aspirants for each contract available) led to widespread bribery (Fitzgerald 2006, p. 274).

The initial 1942 bilateral agreement made the U.S. government the employer, and the U.S. government, rather than the individual growers, was responsible for upholding the agreement terms. The agreement required sanitary housing conditions, payment of the prevailing wage to workers, and the return of migrants to Mexico in time to attend to Mexican fields. Under the 1942 agreement, Mexico successfully negotiated several conditions to protect its own economic interests, including a requirement that part of the migrant workers' wages would be withheld and returned only upon the migrants' return to Mexico.[1] Mexico also obtained worker protections, such as a prohibition on discrimination, collective bargaining rights, and guaranteed unemployment benefits for workers not employed for the full duration of the contract.

Congress allowed the Bracero Program to expire at the end of 1947. However, from 1948–1951, direct grower-to-bracero agreements replaced the government-to-government agreement under which the program had

formerly operated. Without a government-to-government agreement, the U.S. was not responsible for oversight of the braceros' contracts, and enforcement of regulations was consequently lax.

In 1951, against the backdrop of renewed labor shortages resulting from the Korean War, Congress enacted Public Law 78, granting authority to the U.S. government to effectuate the provisions of a bilateral agreement to provide migratory labor. This statute limited the use of braceros to regions where the U.S. Secretary of Labor certified: (1) there was a shortage of domestic workers; (2) there would be no adverse impact on the wages and working conditions of similarly situated domestic workers; and (3) the employer had attempted unsuccessfully to hire domestic workers with the same wages and hours offered to the braceros. A proposal in the 1951 bill that would have penalized farmers who knowingly hired Mexicans who were illegally in the U.S. was rejected, however, because of farmers' adamant opposition to it (Carrasco 2004).

Pursuant to Public Law 78, the U.S. and Mexico entered into a new bracero agreement, which included provisions that Mexico had successfully negotiated to address its concerns with the earlier Bracero Program. The agreement was more detailed than the prior 1942 agreement and included increased worker protections, such as wage guarantees, workers' rights to join U.S. labor unions, and a requirement that employers provide adequate housing to workers. Although the 1951 agreement provided increased worker protections, as compared to previous agreements, the U.S. government nonetheless failed to enforce those protections (Bickerton 2001, pp. 908–09).

The U.S. thwarted its cooperation with Mexico in the interest of keeping domestic farm wages low, which gave growers access to cheap exploitable labor. First, under Public Law 78, the Secretary of Labor did not properly certify the lack of domestic labor because those determinations were made using surveys conducted two weeks or more before the season could start when there was no prevailing wage at that time. Compounding this deficiency, unreliable data, such as growers' recommendations and data from the previous years, were used. The Secretary of Labor also did not prevent an adverse impact on wages because of heavy reliance on the representations of growers associations, which wanted to fix wages.

Further, despite the requirement to attempt to hire domestic workers first, many growers made farm jobs unappealing to such workers by setting low wages. This ultimately gave growers the ability to request exploitable

guest workers while suppressing any rise in domestic wages. Guest worker importation in Texas even caused large numbers of domestic workers to migrate northward because of depressed wages. The effect could also be seen in California, where domestic workers had no choice but to accept depressed wages.

In 1954, when the Bracero Program was awaiting renewal, negotiations between the governments of Mexico and the U.S. crumbled. In response to Mexico's demand for better worker protections, the U.S. again manipulated the negotiations by allowing in more undocumented workers to put pressure on the Mexican government to accept the poor protections, and threatened to institute a unilateral labor program without the input of the Mexican government. As a result, another "bilateral" agreement was reached between the U.S. and Mexico in 1954.

Because of the opposition of American trade unions to Mexican workers (Camín 1993, p. 194), the U.S. government terminated the Bracero Program in 1964 to reduce the systematic exploitation of migrant workers that it engendered. However, the agricultural industry's broad access to Mexican workers during the years of the Bracero Program had led growers "to become dependent on the low wages and work conditions that the Braceros accepted" (Bosworth 2005, pp. 1101–02). After 1964, when the Bracero Program ended, "the demand of agricultural enterprises and certain companies in the United States continued, as did the flow of braceros, who were now illegal [sic] and without any official mechanism to offer them protection" (Camín 1993, p. 194).

The H-2 Program

In 1952, while the Bracero Program was still in effect, Congress enacted the Immigration and Nationality Act (INA) of 1952. The 1952 INA established the H-2 visa, intended as a nonimmigrant visa "to allow workers to enter the United States to perform temporary labor or services when the [Department of Labor (DOL)] certified that 'unemployed persons capable of performing such service or labor cannot be found in this country'" (Bosworth 2005, p. 1102). While the Bracero Program was in place, few Mexican citizens had participated in the H-2 program because most continued to migrate through the Bracero Program (Stockdale 2013, pp. 758–59) but, once the Bracero Program ended, the agricultural industry turned to the H-2 program to meet its labor needs.

In response to increased pressure to reform the immigration system, including pressure to remedy "problems of worker abuse [that] plagued the H-2 program," Congress enacted the Immigration Reform and Control Act (IRCA) in 1986 (Yasseri 2004, p. 365). The statute revised the H-2 program, dividing it into the H-2A program for agricultural workers and the H-2B program for other laborers and service workers. It "purported to divide the classes of workers in response to the DOL's 'experience with employer abuse of migrant and seasonal agricultural workers' [and DOL's] erroneous belief that H-2A workers had fewer skills and less education, making them more dependent on contractual protections" (Johnston 2010, p. 1128). The employer sanctions provisions of IRCA also increased labor protections for agricultural workers and authorized civil and criminal penalties for the hiring of undocumented workers.

Award of H-2A visas is not currently limited, while H-2B visas were annually limited to 66,000 visas until 2005, when that limit was increased substantially by exempting returning workers from the otherwise applicable limits (Bauer and Stewart 2013). Mexican workers comprise 80 percent of H-2 program participants. The H-2A visas allow temporary or seasonal entry of foreign workers for employment in the agricultural industry in the event of a domestic labor shortage. The most common H-2B visa occupations, according to the DOL, are "landscape laborers, forestry workers, maids, housekeepers, and construction workers." The H-2B visas are valid for one year and can be renewed by the employer.

Employers are required to pay H-2A workers an "adverse-effect wage," which provides a higher rate to H-2A workers than their domestic counterparts to enable domestic workers to remain competitive in the labor market. H-2A workers are entitled to at least three-fourths of the hours provided for in their contract, workers' compensation benefits, and federally funded legal services for employment matters. Upon completing 50 percent of the contract, employers are required to reimburse H-2A workers for transportation and subsistence costs they incurred in travel from their home country to the employment site.

Employers must provide housing to H-2A workers that conforms to applicable standards set by the federal Occupational Safety and Health Administration. Employers are also required to provide meals or free kitchen facilities so that workers can prepare their own meals. Further, employers must provide, at no cost to the employees, transportation to the

job site and necessary job-related equipment. In addition to the legal protections for H-2A workers, collective bargaining agreements negotiated by farm worker unions are intended to protect them.

H-2A visas are connected specifically to a single employer, so the workers are only authorized to be present in the U.S. while employed by that particular employer. If H-2A workers' employment ends for any reason, they lose their visa and must return to their country of origin. Workers' spouses and minor children theoretically may seek H-4 visas to enter the U.S. but are not permitted to work under those visas. As a practical matter, however, because nonimmigrants, including those with H-2 nonimmigrant visas, must have a residence in a foreign country and no intention of abandoning that residence, the families of such guest workers must be left behind.

The statute requires that the DOL only certify farmers to participate in the H-2A program if they comply with terms of employment established by rule. The DOL is required to ensure that employers meet standards related to housing, benefits, and terms of employment, and that employers are not engaging in fraud or willful misrepresentation regarding material terms of workers' employment agreements.

Human Rights Abuses

The Bracero Program subjected Mexican workers to widespread abuse, including "substandard working conditions, meager wages, inadequate housing, and unemployment during contract periods" (Yasseri 2004, pp. 364–65). Despite the legal protections the program purported to provide workers, "many bracero workers were short-changed and abused. For example, employers evaded wage requirements with payroll deductions for meals and by paying with the piece-rate system of crops picked rather than by hourly wage. Braceros sometimes worked overtime without pay, and their working conditions were often dangerous and oppressive" (Bender 2012, p. 123). They were also "compelled to endure poor food, excessive charges for board, . . . discrimination, physical mistreatment, inappropriate deductions from their wages, and exposure to pesticides and other dangerous chemicals" (Carrasco 1997, p. 195). Government enforcement was greatly lacking.

Many of the abuses of the Bracero Program infected the H-2 program as well, and additional abuses have also plagued the H-2 program over time. Both the H-2A and H-2B programs institutionalized poor working and living conditions and abuses of human rights. Both H-2 visas permit

individual entry only, separating guest workers from their families as they enter a foreign country a world away from their communities of origin. Although H-2A workers are legally entitled to some protections, these guest workers are excluded from U.S. labor and employment laws such as the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), the National Labor Relations Act, and the overtime provisions of the Fair Labor Standards Act. Additionally, H-2A workers do not have a private right of action to enforce H-2A program regulations.

H-2A workers are subject to conditions that render them vulnerable to exploitation and abuse. Economic necessity drives H-2A workers to leave their home countries (primarily Mexico and Northern Triangle countries), and their families, and come to the U.S. They typically do not speak English, live in unsanitary substandard housing (Guerra 2004, p. 207),[2] suffer poor health conditions (Guerra 2004, pp. 187–88),[3] lack access to legal recourse for asserting their rights, and lack access to social services (Guerra 2004, p. 187).[4] "Worse still, they are intimidated, manipulated, discriminated against, and vulnerable to violence, assault, and robbery" (Guerra 2004, p. 204). These conditions lead Mexican farmworkers to recognize their subordinate role in an oppressive employment situation and prevent them from "assert[ing] any of the nominal rights afforded to them on paper" (Guerra 2004, p. 204).

Migrant workers from the same families or areas are dispersed to different U.S. farms, making them reliant on their employer to access many social services and community activities. Usually lacking their own transportation, workers may walk miles to access goods and services. Locals often target and assault Mexican farm workers because they know they carry money with them for remittance to their home countries. Their camps are also targeted for break-ins and robberies. Women face sexual violence and sexual harassment throughout the course of their work (Bauer and Stewart 2013).[5]

Various program deficiencies have cultivated a system that abuses and oppresses H-2 guest workers. Some of these abuses may be especially prevalent within either the H-2A or H-2B program, while others characterize both programs. Because of the many deficiencies outlined below, many migrant farm workers prefer to take their chances with *coyotes* guiding them through dangerous terrain on their sojourn to the U.S., with no legal status awaiting their arrival. In many respects, the H-2 scheme is a more recent iteration of the Bracero Program euphemistically known by another name.

Labor Recruiters and Contractors

Under the H-2 system, employers can use contractors for recruitment and employment of H-2 workers and avoid liability for abuses and program violations that the contractors commit. The use of labor recruiters and contractors to provide H-2 workers erodes protections for H-2 workers and makes them more vulnerable to abuses. Labor recruiters in foreign countries charge guest workers exorbitant fees, often thousands of dollars above the actual visa and travel costs, to obtain admission into the H-2 program. As a result, guest workers incur significant debt, in many cases up to $10,000, to pay the necessary fees. Additionally, recruiters often require guest workers to put down collateral, such as a property deed, to ensure that they comply with the terms of their labor contracts. Because they enter the U.S. with significant debt and wanting to reclaim their collateral, guest workers have strong incentives to continue working despite poor living and working conditions.

While H-2B workers are entitled to some protections during the recruitment process under the AWPA, no statutory or regulatory protections apply to H-2A workers. Further, the use of recruiters insulates employers from liability for forced labor and trafficking, and the recruiters themselves are difficult to prosecute because they are located in foreign countries.

Many employers shield themselves from liability for abuses by using labor contractors, who directly hire the workers and then lend them to the employers who need them. Not only does the use of labor contractors shield employers from liability, but it is also difficult to make the contractors amenable to U.S. jurisdiction so that they can be prosecuted for violations of workers' rights.

Poor Enforcement

What H-2 program protections that do exist are poorly enforced, workers often decline to speak to the DOL for fear of losing their jobs, and administrative settlements that greatly reduce fines weaken deterrence when the DOL does conduct enforcement. Enforcement of labor protections by the DOL has generally decreased in recent history, and the H-2 program continues to be beleaguered by the consequences of such poor enforcement. While the H-2A program does provide workers some recourse for violations of their rights, "instances of governmental

neglect... plague the program's complaint procedures" (Yasseri 2004, pp. 371–72). The H-2A system provides for an administrative complaint process, but the regulations governing that process lack requirements that specify when and how the agency must respond to complaints. Additionally, the DOL allows growers to self-investigate in some cases. Although the DOL is empowered to exclude employers from the H-2 program when they commit violations, debarment is rare and the DOL takes little action to prevent the offending employers from importing more guest workers.

Lack of Employment Mobility

Workers in both the H-2A and H-2B programs are bound by the terms of their visas to a single employer. This lack of mobility enables employers to wield significant control over guest workers. Because H-2 workers who face abuses often have as their only option either tolerating the abuses or quitting and returning immediately to their home countries, employers essentially hold removal (deportation) power over their guest workers. Increasing the already significant control that they wield over their guest workers, employers also frequently seize their guest workers' identity documents, such as passports and social security cards, further limiting their mobility and freedom.

Lack of Access to the Legal System

Compounding the impact of poor government enforcement of guest workers' rights, guest workers also experience significant barriers to enforcing their rights themselves through the legal system. Guest workers are often socially, geographically, and culturally isolated, and lack the resources to know their legal rights or to seek legal assistance. When guest workers do seek legal remedies, several barriers severely limit their access to necessary legal resources. Few private attorneys are willing to take on guest workers' cases, and most of the available legal aid services that guest workers could afford are federally funded and thereby subject to conditions constraining the terms of representation. The vast majority of H-2B workers are ineligible, due to their visa status, to access federally funded legal services at all. While H-2A workers may access legal assistance from legal aid offices federally funded by the Legal Services Corporation for employment contract-related matters, they may not seek such assistance for civil

rights or immigration matters. Additionally, H-2A workers must be present in the U.S. to access this representation.

Substantive limitations also restrict guest workers' ability to obtain redress for abuses. No independent cause of action exists under the INA, and workers cannot be compensated for their employers' violations of the H-2A regulations. Department of Labor enforcement actions are only prospective and do not allow for compensation to workers whose rights have been violated. While the AWPA provides a private right of action for other migrant workers, H-2A workers are excluded from the AWPA and are therefore unable to take advantage of this provision.

Wage Theft

In addition to low pay and significant debt, guest workers often face wage theft. Employers unlawfully deduct expenses incurred for the benefit of the employer and subtract exorbitant rent costs from their employees' wages. Workers regularly have to borrow money from their employers to cover the costs of food and basic necessities at the beginning of their employment, leading to wage deductions for their loans. Additionally, employers have unlawfully required employees to pay for their own work-related tools.

Three-Fourths Rule

The INA requires H-2A employers to provide guest workers with at least three-fourths of the wages promised in their employment contracts. Despite this provision, guest workers expect to earn the wages provided for in the contract, and plan accordingly. Because many H-2A employers request more labor than they actually need, to cover for contingencies, the structure of the program puts guest workers at high risk of not recouping the costs they incur in migrating to the U.S.

Retaliation and Blacklisting

In addition to lax enforcement and limited access to legal services, guest workers face threats of retaliation if they take action against employer abuses. Blacklisting is "[t]he most forceful tool used to suppress H-2A worker complaints" (Bacon 2004).[6] H-2A recruiters in Mexico retain lists of workers no longer eligible for employment, which include those who

complain about working conditions or even seek necessary medical services. Word also spreads among other farm workers when a peer is punished, "further reinforcing a code of silence" (Guerra 2004, p. 208). Blacklisting and other forms of punishment augment the control that employers already wield over their workers through the threat of removal from the U.S.

The Short-Handled Hoe and Pesticides

Guest workers have been required to use the short-hoe during the broiling sun with long hours and little pay. Those who used a short-hoe often developed abnormal degeneration and permanent disability to their spine. Some would be bent over all day, which heightened their risk of injury. Since the Bracero Program, guest workers have also been victims of the harmful effects of the unsafe application of pesticides to the farm fields that douse them as farming implements rather than as humans.

Institutionalized Slavery

Despite Section 1 of the U.S. Constitution 13th Amendment's abolition of slavery and involuntary servitude, abuses within the Bracero, H-2A, and H-2B programs resemble institutionalized slavery. In some instances, to prevent guest workers from leaving the farm, employers threaten the worker with physical harm and, in many cases, inflict physical injury.[7] Threats of removal (deportation) and threats of arrests are also common.

Threats can range from physical injury to psychological coercion. In some instances, passports are confiscated, which subjects the guest worker to psychological coercion because the alternative to quitting work is deportation. As a result, the guest worker is forced to succumb to the threat to avoid removal from the country. The growing recognition of psychological and other nonphysical coercion, which implicates slavery and involuntary servitude, demonstrates the vulnerability of migrant workers and the nexus between modern day servitude and global labor migration.

Legislative debates during consideration of the 13th Amendment support the proposition that its Section 2 enables Congress to eliminate badges and incidents of slavery, which can be construed to include the commodification of humans, lack of labor rights, restraints on free movement, exclusion from the political process, and an outright ban on citizenship. Chattel slavery

mirrors the harms imposed on guest workers' human and civil rights. Such abuses led the U.S. Department of Labor official in charge of the Bracero Program, Lee G. Williams, to use the ascription "legalized slavery" (Ontiveros 2007, p. 937).

Partial Solutions

In response to the inadequacies of the existing law in combating modern-day trafficking, Congress passed, and President Clinton signed into law, the Trafficking Victims Protection Act (TVPA) of 2000. Adopting a "victim-centered" approach to addressing trafficking, the TVPA is the first federal law to criminalize trafficking in persons.[8]

The TVPA strives to regulate "severe forms of trafficking in persons,"[9] to thereby address the inadequacies of earlier legislation by criminalizing "modern acts of slavery," including involuntary servitude for labor or services. The TVPA criminalizes "broader forms of coercion, including threats of nonphysical harm and threats to third persons. Conviction of either form of 'severe' trafficking requires a showing of 'force, fraud, or coercion' used by the trafficker to control the victim" (Sheldon-Sherman 2012, p. 452). Under the TVPA, the government expanded prosecutorial tools to pursue traffickers. Victims of human trafficking are also eligible for protections, such as social services and immigration relief. A private right of action, codified at 18 U.S.C. § 1595, provides a civil remedy for any violation of the criminal laws addressing peonage, slavery, and human trafficking.

Amendments to the TVPA in 2008 reinforce the principle that physical force is superfluous for the crime of forced labor. The TVPA prohibits obtaining labor services by: (1) means of force, threats of force, physical restraint, or threats of physical restraint; (2) serious harm or threats of serious harm; (3) abuse or threatened abuse of the law or legal process; or (4) a scheme, plan, or pattern intended to cause persons to believe that they or another would suffer serious harm or physical restraint if they resisted.[10] Section 1589 of the TVPA also provides that "abuse or threatened abuse of law or legal process" means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, to exert pressure to cause a person to take some action or refrain from taking some action. This expanded concept of nonphysical coercion under the TVPA is advantageous

for guest workers, because most guest worker cases do not involve physical abuse but, rather, threats of removal as the main coercive element.

Under the TVPA, obtaining labor by the threat of removal could constitute an abuse of law or legal process. Because of the common use of threats of deportation to control guest workers, an examination of the threats' contextual circumstances is particularly significant to establishing nonphysical coercion. For example, in *Ramos-Madrigal v. Mendiola Forestry Service, LLC*, the court held that Mexican migrant workers sufficiently alleged that employers violated TVPA on the ground that the workers' H-2B visa extension documents were "immigration documents" possessed or confiscated by the employers, who threatened the workers with serious immigration consequences upon leaving work before the end of their contract. This was construed as constituting "threatened abuse of law or legal process" within the meaning of the TVPA, even though the workers possessed their passports and original visa documents, because the workers could not demonstrate lawful employment without the visa extension documents that were issued after their original visas expired.[11]

Because a guest worker's return to his home country may facially appear to be an exit option, guest workers need to present evidence that such a return is not a true option because it would result in psychological, financial, or reputational harm. Guest workers seek out visas to work temporarily in the U.S. and have a strong interest in not returning home early. In a case involving professional guest workers, *Nuñag-Tanedo v. East Baton Rouge Parish School Board*, the court noted that plaintiffs, who were able to establish a claim for forced labor, "not only wanted, but needed to continue working," because of the massive debts they had accumulated to obtain their jobs.[12]

Another significant example is *Camayo v. John Peroulis & Sons Sheep, Inc.*, where the court denied a motion to dismiss claims by Peruvian nationals, who were nonimmigrant guest workers under the H-2A visa program, against sheep ranchers for forced labor in violation of 18 U.S.C. § 1589(a)(3).[13] It was alleged that the sheep ranchers threatened on more than one occasion to have the workers "sent back to Peru, apparently simply to instill fear and promote compliance"; that one rancher bragged to a worker that he called immigration and police about co-workers who left the ranch and that police had found them and they were being returned to Mexico; and that the ranchers had retained important immigration paperwork belonging to the guest workers.

Section 1592 makes it illegal to seize documents to force others to work. By expanding its coverage to false documents as well as official documents, § 1592 recognizes that victims are often immobilized by the withholding of whatever documents they possess, even if the documents are forged or fraudulent.

Further protection exists in a section of the federal Victims of Trafficking and Violence Protection Act. The Act has dual goals of fighting crime and aiding victims, accomplished through the granting of a visa to identified crime victims and offering them legal status in return for their cooperation with law enforcement officials in the investigation of crimes. This "T" Visa grants nonimmigrant status to victims of crime who fall into one of three categories: (1) the worker must be a victim of "severe forms of trafficking in persons" and be under 18 years of age; (2) the Attorney General must consider the victim's continued presence in the U.S. necessary to prosecute the traffickers; or (3) the victim must be willing to assist in every reasonable way in the investigation and prosecution of severe forms of trafficking in persons and must have applied for the T visa.[14] Significantly, "severe forms of trafficking in persons" is defined to include "(B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery."[15] The Act provides for referral to nongovernmental organizations for assistance, work authorization, and permission for the spouse, parents, and children of victims under 21 to join the victim in the U.S., or the spouse and children of victims 21 years or older to do so (provided that the Attorney General deems it necessary to avoid extreme hardship). T visa holders are also eligible to adjust to permanent resident status three years after the visa is granted.

Proposed Reforms

Several proposed legislative reforms in recent years have included policies that could alleviate the human rights abuses that persist in guest worker programs. Another bilateral approach between Mexico and the U.S. should be attempted. Since the Bracero Program ended, Mexico and the U.S. have demonstrated that cooperation through international agreements, such as the North American Free Trade Agreement (NAFTA), is possible, at least for goods rather than humans. Analogous cooperation should regulate future guest worker programs. Government-to-government agreements

can further the success of the program because the parties involved have the responsibility to implement all aspects of the agreement, as opposed to creating conflicts of interest within the agricultural industry.[16]

The Fox Administration of Mexico (2000–2006) marked the first active promotion of emigration since the bracero era, and while his successor, Felipe Calderón, "downplayed his predecessor's vocal expectations of a bilateral migration accord," he was clearly interested in the same goal of "legalized flows" (Fitzgerald 2009, p. 56). The more recent administration of President Enrique Peña Nieto seems to be maintaining a similar stance, defending NAFTA and emphasizing goals like "mutual respect" and "constructive" relations.

Several Congressional proposals have targeted human rights abuses related to the use of third-party foreign labor contractors and recruiters.[17] Significantly, requiring employers to disclose their use of third-party contractors and recruiters, requiring third-party contractors and recruiters to register and make disclosures, and requiring federal agencies to maintain and publicly post information about third-party contractors and recruiters could enhance oversight and monitoring. Effective prohibition of fraudulent and misleading information in recruiting, and requiring labor contractors to provide written disclosures to workers explaining their rights and responsibilities under the law could increase transparency and prevent worker exploitation.

Legislative proposals that could strengthen enforcement include requiring federal agencies to investigate guest worker complaints; precluding noncompliant employers from participation in the program; and permitting guest workers to remain in the U.S. beyond the duration of their contracts for purposes of participating in proceedings to enforce their rights. Additionally, several proposals include prohibitions on blacklisting and retaliation against employees who report noncompliance. A whistleblowing private right of action with strong protection against retaliation, such as treble damages, would add substance to what has previously been statutory lip service.

Proposals to expand AWPA coverage to H-2A workers and to entitle H-2 workers to increased civil remedies, coupled with the proposed expansion of access to federally funded legal services by H-2 workers, would provide guest workers with recourse to address violations of their rights and could produce a deterrent effect to prevent abuses in the first instance. It is essential to lift restrictions on attorneys who work in legal aid offices funded by the Legal Services Corporation to enable farm workers

effectively to assert rights protected by the TVPA as well as the other legal rights intended to protect them. Additionally, one proposal would shield victims of labor abuses and criminal acts from removal.[18]

Other well-advised legislative proposals would make H-2 visas portable so that guest workers would have the opportunity to remain legally in the U.S. after they change employers.[19] Employment mobility could foster increased accountability and less worker exploitation by reducing the barriers that prevent workers from reporting workplace violations and from leaving poor working and living conditions.

Compassionate migration is inconsistent with fostering a family life based on remittances. If the U.S. continues to invite guest workers to toil in our fields, they should be able to continue to enjoy the presence of their spouses and children. "Family values" must be more than a rhetorical aspiration if the U.S. expects not only the global community but U.S. residents as well to give it any credibility in touting such mores. If we are to continue to have guest workers as a component of U.S. immigration policy, the granting of a visa should carry with it a presumption that the grantee will be permitted to bring his or her spouse and children.

Finally, and perhaps most importantly, guest workers should not be denied a light at the end of the tunnel. There must be an opportunity for guest workers eventually to acquire permanent legal residence in the U.S. A program not unlike the Special Agricultural Worker (SAW) provision[20] of the IRCA of 1986 should apply, on a rolling basis, to those admitted as guest workers. After working as a guest worker in the U.S. agricultural industry for at least 90 days in each of four consecutive years, acquisition of lawful permanent residence should ensue (assuming grounds of admissibility are satisfied). It may be that many of those eligible would choose not to leave their native countries permanently. For those who choose to continue their new lives here, though, they should have that alternative. Only then will those who put food on our tables be truly liberated from hoeing the long row of bondage that has characterized our past and present braceros.

Notes

1. A class action lawsuit filed in 2001, but later dismissed, revealed the mismanagement of these funds withheld from the braceros' paychecks but not returned to the workers, as promised, upon their return to Mexico.
2. "Upon arrival, [workers] are presented with cramped quarters with little or no privacy; moldy, worn-out mattresses; water not fit for drinking; filthy

portable toilets or fully exposed and communal toilets; exposure to live electrical wires; and nonfunctional smoke detectors, refrigerators, and stoves."

3. Mexican farm workers face high rates of toxic chemical injuries, heat stress, dermatitis, influenza, pneumonia, urinary tract infections, pesticide-related illness, and tuberculosis. Migrant farm worker children, in particular, face high rates of parasitic infections, malnutrition, and poor dental health. Few farm workers access health insurance to cover the costs of health care (Guerra 2004, pp. 187–88).
4. "Contrary to popular belief, very few farmworkers use, or are even eligible for, public social services such as Medicare, food stamps, or the Women, Infants, and Children Supplemental Nutrition Program."
5. They noted that a 2010 study of 150 California women farm workers found 80 percent experienced some form of sexual harassment.
6. "The U.S. Department of Labor, which certifies employers for the H2-A program, has never taken action to end the practice."
7. See *U.S. v. Booker*, 655 F.2d 562, 563–64 (4th Cir. 1981).
8. The trafficking laws have been largely codified in three main sections of the U.S. Code: Title 18, Chapter 77 (definitions and penalties for trafficking crimes); Title 22, Chapter 78 (monitoring, investigating, preventing, and combating trafficking into and within the United States); and Title 46, Chapter 136, Part O (trafficking prevention in the United States).
9. 22 U.S.C. § 7102.
10. 18 U.S.C. § 1589(a) (1)–(4).
11. *Ramos-Madrigal v. Mendiola Forestry Serv., LLC*, 799 F. Supp. 2d 958 (W.D. Ark. 2011).
12. *Nuñag-Tanedo v. E. Baton Rouge Par. Sch. Bd.*, 790 F. Supp. 2d 1134, 1137 (C.D. Cal. 2011).
13. *Camayo v. John Peroulis & Sons Sheep, Inc.*, 2013 WL 3927677 (D. Colo. July 30, 2013).
14. H.R. 3244, 106th Cong., §107 (e) (1) (C), adding provision (T) to 8 U.S. C. § 1101(a) (15).
15. H.R. 3244, 106th Cong., § 103(8) (2000).
16. One proposal has suggested that "[t]he visas would be distributed by a binational agency managed by the U.S. and Mexican governments, to which aspiring migrants would apply directly, thus getting employers and middlemen out of the self-serving business of labor recruitment and limiting the possibilities for corruption" (Massey et al. 2002, p. 159).
17. See the Fraudulent Overseas Recruitment and Trafficking Elimination Act of 2014, H.R. 4586, 113th Cong. (2014); Border Security, Economic Opportunity, and Immigration Modernization Act, H.R. 15, 113th Cong. (2013); H-2B Program Reform Act of 2009, H.R. 4381, 111th Cong. (2009).

18. Protect Our Workers from Exploitation and Retaliation Act, S. 3207, 111th Cong. (2010).
19. See H.R. 15, 113th Cong. (2013).
20. Section 210A of the INA, 8 U.S.C. § 1160.

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CHAPTER 7

Exploring New Spaces for Dialogue and Regional Cooperation in the Americas to Protect Migrants' Human Rights

William F. Arrocha

Although the U.S. is still the largest migration receiving country in the Americas with the strongest pull factors, migration processes are more complex and diverse than the perceived unidirectional South-North flows. If migration flows are mainly toward the U.S. from Mexico and the three Northern Triangle states (Guatemala, El Salvador, and Honduras), migration flows are intra-regional for most states in the Southern Cone.

This said, Mexico is a particular case as it is a migrant sending, transit, and receiving state, which places it at the crossroads of any regional dialogue between the North and the South. Mexico has also become the main gateway for most global migrants in transit attempting to reach the U.S., including migrants from Asia and Africa.[1] It is also the main gateway through which most illegal drugs and trafficked humans cross into the U.S, as well as the geography of the main turf battles between the most powerful drug cartels and the focus of the concomitant "war on drugs," supported by the U.S. under the Mérida Initiative.

With these factors in mind, Chapters 8–13 deal with the plight of migrants and transmigrants caught in the crossfire of a failed "war" and

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the powerful criminal networks competing for "markets." On the other hand, Mexico's state institutions in charge of managing migration are fixated with a new push to further militarize Mexico's southern border and the routes used by thousands of migrants in transit. Added to this push, Mexico finds itself hard-pressed by U.S. demands to deter transmigrants from reaching its borders. As these complex dynamics take place, the U.S. keeps closing its doors to the millions of migrants who cannot meet its increasingly stringent visa requirements. Additionally, the present U.S. administration keeps deporting massive numbers of undocumented migrants who in large numbers end-up in Mexico, which is clearly not prepared to receive them (Chapter 10).

Throughout the past two decades, the securitization of the U.S. southern border has decreased circular migration and generally increased unauthorized migration in the hemisphere. Two NAFTA participating nations—Mexico[2] and, to a lesser extent, Canada—are significant transmitters of hemispheric migrants; like the U.S, they are also significant receivers. Mexico, in particular, suffers severe forms of social violence that affect the human security of transmigrants who are exposed daily to human rights abuses by state and non-state actors alike. As Rodolfo Casillas argues in Chapter 11, migrants in transit through Mexico are the most vulnerable population, suffering from severe forms of violence including serious human rights violations in the hands of the state. Ana Stern argues in Chapter 10 that such forms of social violence severely impact women and children throughout their process of migration, which can include the return to their countries of origin as a result of deportations or repatriations.

Meanwhile, in the context of the U.S.-Dominican Republic-Central America Free Trade Agreement (CAFTA-DR), all Central American participants are sending nations; three Northern Triangle states contribute the largest number of transmigrants.[3] CAFTA-DR nations continue to suffer deep socioeconomic dislocations caused by policies that decrease the movement of labor even as they increase the movement in goods and services. Yet, of all parties to NAFTA and CAFTA-DR, only Mexico and the Northern Triangle states (including Nicaragua) have signed and ratified the Convention on Migrant Workers' Rights (ICMW).[4] Raquel Aldana suggests in Chapter 9 that the importance of the ICMW relies on its clarity and specificity as it pertains to human rights of working migrants and their families, including certain rights of undocumented migrants. However, she concludes that the key to fully protecting all migrants is to link development and trade to a human-rights migration regime. NAFTA and CAFTA-DR

are clearly far from such a compassionate linkage. Although there are efforts in North and Central America to establish a dialogue where development and a human-rights migration regime can go hand-in-hand, as with the Regional Conference on Migration (RCM) which I explore in Chapter 8, the road to a sustainable model of development within the geoeconomics spaces of NAFTA and CAFTA-DR is very long.

However, the Southern hemisphere offers a glimpse of hope, where the road to a human-rights regime linked to development and trade is getting shorter. In the Southern hemisphere, the dynamics seem to take a different direction than in the North. States in the Southern Cone are working in a coordinated manner through the Union of South American Nations (UNASUR) as well as the Southern Common Market (MERCOSUR) and the Andean Pact, to ensure the proper legal and policy instruments that protect the fundamental human rights of an increasing intra-regional migrant population. Despite efforts toward further regional integration, in Chapter 13 Juan Artola warns us that xenophobia and racism still prevail in receiving states. If the Southern Cone nations are to become a model of political and economic integration with a high level of human rights protections, they must develop compassionate migration policies that can help mitigate, and perhaps one day eliminate, the conditions that trigger social discrimination. As Artola suggests, the Southern Cone nations are on the road toward forging regimes of compassion, but they have not arrived.

As a group, the authors in Chapters 8–13 identify the existing institutional shortcomings throughout the region, specifically the failure to protect transmigrants and unauthorized migrants more generally. They also present policy options that address the lack of dialogue and coordination among sending, transit, and receiving nations in the Americas with an eye toward alleviating unnecessary suffering of those who migrate to escape social injustice and other human rights harms. While the authors in these chapters recognize that the U.S. is likely to continue a unilateralist approach to immigration policymaking and regulation, they focus on suggesting viable policy alternatives to tackle human rights abuses committed by state and non-state actors across the region, including in the U.S.[5]

Finally, the authors urge that all nations involved in the region work together, beyond national security considerations, to implement domestic and regional mechanisms for tracking, assessing, and addressing human security needs of transmigrants and unauthorized migrants, most of them women and children coming from or through Mexico, as one of the most

vulnerable populations in the Americas. Such coordinated efforts should include institutional mechanisms that reflect compassionate principles and human rights norms either as set forth in core international human rights instruments or in national- and subnational-level equivalents.

Regardless of the directions taken to regulate regional migration flows from South to North or within the Southern Cone geopolitical space, there is an uncontested need to explore new ways to implement actions of compassion toward those migrants who suffer the most from a lack of legal protections. Among the most difficult challenges facing all nations in the Western Hemisphere are the growing social and economic inequalities as a result of market-driven policies, accompanied by the dismantling or weakening of the welfare state. The consequences of such policies have been deep social and economic dislocations in receiving and sending states. These dislocations tend to be followed by strong anti-immigrant sentiments among large sectors of the population directly affected by a spiraling decline in their living standards. Immigrants in general, and particularly undocumented migrants, have become the main targets of harsh punitive actions by state and local authorities. As I argue (Chapter 8), along with Rodolfo Casillas (Chapter 11) and Evelyn Cruz (Chapter 12), most undocumented migrants in receiving or transit states have very little legal recourse to protect themselves and their families from laws that exclude them from the communities where they reside and work. Undocumented migrants also have to endure government programs that increase their risk of suffering from harsh detention measures and deportation policies.

Working migrants and their families, as well as an increasing number of women and unaccompanied child migrants, have to confront a set of challenges that clearly surpass the existing state's capabilities to ensure their fundamental human rights. Challenges include the growing number of organized criminal groups operating across all borders of the Americas. Moreover, the so-called "war on drugs" led by the U.S. has pushed many states in the region to increase the use of force on their own populations. Perhaps the most daunting challenge to most states in the region is the increase in power of drug cartels and gangs benefiting from the further securitization of the U.S. border by exploiting the vulnerabilities of undocumented migrants in transit. Another dire consequence of closing the U.S. border, accompanied by U.S. pressure to condition economic support to states in the hemisphere on their success in dismantling cartels and the total elimination of crops linked to drug production, is the increase in corruption of law enforcement, customs, and

immigration officers across the hemisphere, including those in the U.S. Finally, we cannot ignore the never-ending deaths of those who dare cross the U.S.-Mexico border by desert routes.

Compassionate actions and policies under such dire conditions cannot wait long, as the suffering endured by migrant workers and their families, especially women and child migrants, is approaching levels of human insecurity where the existing international and regional agreements to protect their fundamental rights are no longer adequate. As the authors in Chapters 8–13 argue, it is imperative that all states in the Americas come together in a coordinated effort with organized civil society, and the existing regional institutions, to work toward the development of new spaces for dialogue and regional cooperation to protect migrants' dignity as well as their fundamental human rights.

Notes

1. See Associated Press (September 24, 2006) "Mexico Sees Surge of Migrants From Haiti, Africa and Asia" *New York Times*, http://www.nytimes.com/aponline/2016/09/24/world/americas/ap-lt-mexico-haitian-immigrants.html?_r=0.
2. Mexico remains, by far, the largest source of migrants to the U.S., mostly through the migration of Mexican nationals but also through the transmigration of Central Americans across Mexico to the U.S. In 2010, Mexican nationals comprised the highest percentage of immigrants in 33 U.S. states; a century ago, Mexican nationals predominated only in Texas, Arizona, and New Mexico.
3. After Mexican nationals, migrants from Caribbean and Central American nations comprised the next largest groups of U.S. immigrants in 2010, including predominant representation by Dominicans in New York and Rhode Island, Cubans in Florida, Jamaicans in Connecticut, and Salvadorans in Maryland and Virginia.
4. As of December 2013, 47 nations have either ratified or acceded to the ICMW, and another 15 nations are signatories without ratification or accession. Most of these countries are primarily migrant-transmitting nations. No primarily migrant-receiving nation of the global North (Western Europe, North America, Russia), or the more prosperous nations of the Middle East and Pacific Rim (with exception of Indonesia), have signed, ratified, and/or acceded to the ICMW.
5. This includes the fact that the U.S. is not likely to sign or ratify in the near future those core international human rights instruments which it has so far chosen not to adopt, including the ICMW. However, it is possible that

national- and subnational-level equivalents can be adopted, and likewise compassionate policies can be implemented and advanced on those levels as squarely within the ambit of immigrant regulation (such as immigrant integration). It is, therefore, crucial that as sending nations press for hemispheric implementation of core human rights instruments, so too must sub-federal and transnational actors (primarily civil society organizations) continue to work toward compassionate migration on their own and in coordination with other actors, both within and beyond U.S. borders.

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CHAPTER 8

The Need for a Compassionate Migration Regime for North and Central America: Restoring and Extending Universal Human Rights to Migrant Workers, Their Families, and "Survival Migrants"

William F. Arrocha

Migration per se is not and should not be seen as a problem that requires a solution; it is an inevitable part of the human condition.

Amnesty International (October 31, 2005) *Written Submission to the CMW Day of General Discussion on Protecting the Rights of all Migrant Workers as a Tool to Enhance Development.*

The reality of migration . . . calls for international cooperation and a spirit of profound solidarity and compassion. Cooperation at different levels is critical, including the broad adoption of policies and rules aimed at protecting and promoting the human person.

His Holiness Pope Francis (August 15, 2014) *Message of his Holiness Pope Francis for the World Day of Migrants and Refugees.*

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Introduction

When reviewing the Inter-American Commission on Human Rights (IACHR) 2013 report *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, it is hard not to reach the conclusion that today's mixed migration[1] within Central America, Mexico, and to the U.S. is an urgent humanitarian issue. The report describes how large numbers of migrants suffer from "episodes of large-scale abductions, extortion, sexual abuse, murders and disappearances" (IACHR 2013, p. 4). The report also states that "public security in Mexico has been severely eroded by the intense violence generated by organized crime and the battle being waged against it" (IACHR 2013, p. 2). Regarding the impacts that this violence has on migrants, it states that "[W]hile the severe insecurity that Mexico is now experiencing has had profound effects on the Mexican population, it has also revealed just how vulnerable migrants in Mexico are, particularly migrants in an irregular situation in transit through Mexico" (IACHR 2013, p. 2). Although the IACHR's 2015 report *The Human Rights Situation in Mexico* has a less alarming tone, it reiterates that migrants in transit continue to suffer from "assaults, abductions, sexual violence, various forms of people trafficking, murders and disappearances" (IACHR 2015a, p. 125). What is more disturbing is the conclusion reached by the IACHR stating that "[M]ost of these crimes are allegedly perpetrated by organized crime gangs, but there is also information on many cases involving the active participation of members of the National Migration Institute and of the police at the municipal, state and federal level" (IACHR 2015a, p. 15).

For any regional migration dialogue to succeed, the Mexican state is a key actor, as it is the state that experiences all forms of migration flows: as a country of origin, transit, and destination. As the IACHR states: "Mexico is the necessary gateway of mixed migration flows, which include thousands of migrants, asylum seekers, refugees and victims of human trafficking which have the United States as their main destination and, to a lesser extent, Canada" (IACHR 2013, p. 1).

The Human Rights Watch (HRW) 2016 report, as well as Amnesty International's (AI) 2015/2016 report, reach the same conclusions as the 2013 and 2015 IACHR reports. The 2016 HRW report is categorical on the failure of the Mexican state to protect Central American refugees and children, with migrants, transmigrants, and asylum seekers in Mexico finding closed doors (HRW 2016). The AI's 2015/2016 report reiterated

that "Migrants and asylum-seekers passing through Mexico continued to be subjected to mass abductions, extortion, disappearances and other abuses committed by organized crime groups, often working in collusion with state agents" (AI 2015/2016).

Concerning the main receiving states, the latest Organization of American States/Organisation for Economic Co-operation and Development (OAS/OECD) report, *International Migration in the Americas*, continues to confirm that Canada and the U.S. are the most desired destinations for most migrants in the Americas, with the U.S. receiving by far the largest share of immigrants, with the largest numbers from Mexico and Central America (OAS 2011, pp. 5–7). Despite being such a magnet for immigrants, the U.S. is closing its doors to mixed migration. In the IACHR 2015 report on U.S. migration policies toward mixed migrants titled *Human Rights Situation of Refugee and Migrant Families and Unaccompanied Children in the United States of America*, the picture is far from uplifting: it confirms the punitive and repressive nature of the U.S. immigration system which has almost no room for compassion, particularly toward the more vulnerable migrants of families, women, and children. The report states that "[F]or all the sub-groups identified . . . the Inter-American Commission is concerned over allegations of sexual, physical, and verbal abuse by U.S. border officials committed while migrant and refugee children and families are in the State's custody as well as the inadequate detention conditions at border and port of entry stations and family immigration detention centers" (IACHR 2015b, p. 10). The Commission is also "deeply concerned over expedited processing of these groups and the lack of access to legal representation in the immigration proceedings initiated against them" (Inter-American Commission on Human Rights 2015b, p. 10).

The Amnesty International 2015/2016 report confirms the 2015 IACHR report on the abusive treatment that migrants, unaccompanied migrant children, and refugee seekers suffer in the hands of U.S. immigration officers (Amnesty International 2016), and the HRW 2016 report states that "Central American migrants who had fled to the US fearing for their lives were deported without sufficient opportunity to seek protection" (HRW 2015).

Today the U.S. southern border is one of the most perilous and dangerous borders for undocumented migrants longing to reach their dream, resulting in a large number of migrant deaths. According to the International Organization for Migration (IOM) 2014 report on migrant deaths, *Fatal Journeys: Tracking Lives Lost during Migration*, more than 6,000 deceased migrants were found on the U.S. side of the U.S.-Mexico

border between fiscal years 1998 and 2014 (IOM 2014, p. 54). The human rights abuses and unnecessary deaths suffered by thousands of migrants as a result of the securitization of migration in the U.S., Mexico, and Central America cannot continue, particularly when such mixed migration flows are structural and cannot just be eradicated by building higher fences, or through more police border presence and internal policies focused on the control, detention, and deportation of irregular migrants. The result has been an increase in state violence, the further criminalization of irregular migration, and the relaxation of domestic and international human rights obligations. To understand the causes of growing mixed migration, it is fundamental to recognize its structural nature.

Causes of Regional Structural Migration

Migration in the Americas is structural[2] as its push and pull factors are linked to a regional political economy where investment, trade, and labor are integrated through a complex web of bilateral and multilateral agreements supported by neoliberal policies under the so-called Washington Consensus. The result has been an unprecedented dependency on U.S. capital, the loss of state autonomy, and deep social and economic dislocations at a regional level (Massey et al. 2006).

One of the major outcomes of such dependency has been the further expansion of the regional division of labor where a larger number of high-skill workers with higher wages remain in the North while unskilled and low-paid jobs make up the majority of the labor force in the South (Massey et al. 1994; Massey 2009). From the assembly line system or *maquiladoras* on the northern border of Mexico to the Special Economic Zones in Central America and the denationalization of extractive industries, such as oil, natural gas, and the agriculture sector, foreign direct investment (FDI) accompanied by a strong U.S. demand for low-cost goods and services have established themselves as the major sources for regional economic development (Bucciferro 2010; Spotts 2005). The existing trade and investment agreements have undermined the role of the state in determining the nature and location of FDI as well as the terms of trade, causing deep internal and regional development inequalities (Bucciferro 2010). The lack of control over FDI also undermines the state's ability to control and manage the push-and-pull factors of migration, which are linked to shifts in regional labor markets that react to changes in investment patterns (Castles and Miller 2009).

Besides such structural dependency, most states south of the Rio Grande are suffering from severe conditions of human insecurity exacerbated by a relentless decline in the welfare state where the rule of law has been historically weak. Moreover, their public safety and national security forces are carrying out with almost total impunity a regional "war on drugs" dictated by the U.S. government. State and social violence have intensified, particularly in Mexico and the Central American states of the Northern Triangle, as they are confronted with a real epidemic of regional organized criminal networks, unrestrained gang violence, and state corruption and repression (Renwick 2016). The result has been a decline in economic development, an increase in structural violence, and an unusually large number of "survival migrants"[3] (World Bank 2011, 2014).

In receiving states such as the U.S. the "pull" factors have not ceased to expand as new economic sectors have added new jobs labeled as 3D jobs (Dirty, Dangerous and Demeaning) (UN-Human Rights Council 2014). As the demand for these jobs proliferates, the state has a harder time regulating them, which in turn has increased the levels of exploitation to the point of creating conditions "close to slavery," as the largest U.S. study conducted by the Southern Poverty Law Center concluded (SPLC 2013).

Working conditions close to slavery are not unique to the U.S.: migrants in Mexico and other Central American states suffer from similar forms of exploitation. In Mexico's southern state of Chiapas there is a long history of seasonal migrant workers from Guatemala, including women and children who are exposed to harsh labor conditions and discrimination in their access to adequate housing, education, health services, and legal resources, regardless of having Agricultural Visitor work permits (IMUMI/ONU Mujeres 2014). According to a study conducted by the Non-Governmental Organization *Sin Fronteras* and the Instituto Centroamericano de Estudios Sociales y Desarrollo (INCEDES), the lack of fundamental human and labor rights for most working migrants in Central America and Mexico is critical (Sin Fronteras/INCEDES 2013). Working migrants and their families, even including those migrants with work permits, suffer from: "Extremely low pay, high labor intensity, long hours and permanent expectations of unemployment... This is accompanied by other problems associated with insecurity, discrimination, stigmatization of migration and violence. Workers are required to be productive, but neither socially or culturally desirable" (Sin Fronteras/INCEDES, p. 53). For those migrants who transit through or work in Mexico, they risk kidnapping, extortion, torture, rape, assault, aggression, and murder, with women and children being the most

vulnerable (Sin Fronteras/INCEDES 2013; IACHR 2013, 2015a; AI, 2015/2016, HWR 2016).

The Pressing Need to Deepen the Existing Regional Dialogue on Migration

It is clear that the root causes of structural and mixed migration have not been addressed effectively. Yet, the pressing need to deal with these causes became particularly heightened when the presidents of Central America met in 2014 with President Obama as a result of the large number of migrant children from Central America, thousands of them unaccompanied, attempting to cross the U.S.-Mexico border (McGreal 2014). The U.S. Department of Homeland Security apprehended 68,551 children that year compared to 38,759 in 2013 and 24,403 in 2012 (DHS–US Customs and Border Protection). Although such entries have decreased at the U.S.-Mexico border, they have kept quite steady at the Mexico-Guatemala border where the detention of children under the 2014 *Frontera Sur* program has increased from 6,701 in 2012 to 36,000 in 2015 (HRW 2016, pp. 17–18).

The increase of migrant children can only be seen as the result of the deepening human insecurity and violence suffered by large populations in Mexico and the Northern Triangle states. Moreover, the "pull factors" in the U.S. and to a lesser extent in Mexico are structurally bound by domestic and regional political economies based on trade and investment agreements that have created a structural demand for a low-wage labor force. Such interlinked "push" and "pull" factors are under a more complex set of migration policies as most states, particularly where the "pull" factors exist, have securitized and criminalized migration, leaving a narrow space for cooperation. Although bilateral and regional cooperation is taking place, the full application of human rights is still subordinated to national security considerations in which border controls, detentions, and deportations take precedence.

From Bilateral Agreements to a Regional Dialogue on Migration

To understand the limits and reaches of any regional dialogue for migration with the potential of becoming a formal regime based on the principles of the International Convention on the Protection of the Rights of All

Migrant Workers and Members of Their Families (ICMW 1990), it is fundamental to recognize the scope of the bilateral and regional security agreements, as they are the key to any further constructive engagements that include the U.S. Furthermore, the nature of any security agreement between the U.S. and Mexico will impact the negotiations and outcomes with Central American states, particularly those from the Northern Triangle.

The U.S. and Mexico have established an unprecedented level of enforcement cooperation through the Mérida Initiative launched in 2008. The main focus of this initiative was to boost Mexico's "war on the drug cartels" launched by the Calderón regime in 2006 and continued by the regime of Peña Nieto. It is an initiative under tight control by the U.S. as its Congress holds the funding strings. The Initiative has four pillars: (1) disrupting organized criminal groups, (2) institutionalizing the rule of law, (3) creating a twenty-first-century border, and (4) building strong and resilient communities (Ribando and Finklea 2016). It is important to note that the Initiative does not only deal with the modernization and securitization of the U.S.-Mexico border but with the Mexico-Guatemala and Belize borders as well, and has been the cornerstone of Mexico's 2014 *Programa Frontera Sur* (Southern Border Plan) (Ribando and Finklea 2016; Wilson and Valenzuela 2014). One of the key goals of Mexico's Southern Border Plan is to protect migrants crossing into Mexico. However, the second goal of better managing the border and promoting security of the region has taken the center stage with a large increase in border securitization, with the traditional migrant routes under the control of an unparalleled number of military and federal police checkpoints (Isacson et al. 2015). The results have been a record increase in detentions and deportations by Mexico, accompanied by a rise in human insecurity as irregular migrants are forced to choose new and more dangerous routes (Isacson et al. 2015).

The level of the shared securitization of migration under the support of the Mérida Initiative prompted Alan Bersin, Assistant Secretary of International Affairs and Chief Diplomatic Officer for the Department of Homeland Security, to declare that "the United States' southern border is effectively now the Mexican border with Guatemala" (Taylor 2012).

To enhance this regional security strategy, the governments of Central America and the U.S. put forward the *2015 Alliance for Prosperity Plan* which is supposed to improve governance, strengthen security, and promote a deeper regional economic integration under neoliberal policies

with the financial support of the U.S. and the technical as well as financial support of the Inter-American Bank for Development where it was first drafted (IADB 2014; Garcia 2016). The Plan does not mention any support for humanitarian assistance for those who are migrating and it is clearly not a plan based on compassion or the need to uphold fundamental human rights. Rather, it is a security plan like the Plan Colombia and the U.S.-Mexico Mérida Initiative where the control of the funds, and hence the prioritization in expenditures, are in the hands of the U.S. Congress. It is important to note that this Plan is added to the existing Central America Regional Security Initiative that from 2008 to 2015 has been funded with $1.15 billion (Gonzalez 2016). These plans have a dual focus: to further the securitization of migration to stem the flow of irregular migrants while promoting regional infrastructure projects to further facilitate their regional economic integration under a neoliberal frame.

From Security Agreements to a Regional Dialogue on Migration Based on ICMW Principles and Compassionate Migration

Added to these contentious plans to stem the present flow of irregular migration, the Regional Conference on Migration (RCM) or Puebla Process launched in 1996 has played an important role in establishing a forum where states and Organized Civil Society can find spaces for dialogue. The RCM includes all Central American and North American states including the Dominican Republic, which is also a member of the CAFTA-DR. It is a more democratic and equal forum than the *Alliance for Prosperity Plan*, and in its twenty years of operation, it has helped develop a large array of perspectives and strategies to assist states to better manage their migration flows. Yet, it is a forum that leaves every state to decide on how best to manage its migration policies, as its decisions are not binding (RCM 2011, p. 12).

Moreover, the RCM has developed a strong relationship with the Regional Network of Civil Organizations on Migration (RNCOM), which houses more than 550 active members from Canada, the U.S., Mexico, Guatemala, Belize, El Salvador, Honduras, Nicaragua, Costa Rica, Panama, and the Dominican Republic (RNCOM 2014). Added to the former, the RCM has established agreements with the following organizations: the Office of the High Commissioner for Refugees, the Economic Commission for Latin America and the Caribbean of the United Nations/Latin American and Caribbean Demographic Centre, the Inter-American Commission on Human Rights, the IOM, the

Special Rapporteur on Human Rights of Migrants of the United Nations Organization, the Secretary-General of Ibero-American Conference, the Central American Integration System, the United Nations Population Fund, the International Committee of the Red Cross, and the United Nations International Children's Emergency Fund (RCM—General information). These relationships make the RCM the ideal frame to move the ICMW principles at the center stage of the regional dialogue, regardless of the fact that the U.S. and Canada have not yet signed that Convention.

One of the advantages of including the ICMW core principles into all future dialogues at the RMC is the fact that they apply to all migrants, regardless of their legal status, during the full process of migration which includes the "preparation for migration, departure, transit and the entire period of stay and remunerated activity in the State of employment as well as return to the State of origin or the State of habitual residence" (ICMW, art. 1, para. 2). Some of the key protections under the ICMW that would be appropriate and important to consider in such dialogue are: freedom from torture or cruel, inhuman, and degrading treatment or punishment (Art. 10); legal protection against any arbitrary or unlawful interference with privacy (Art. 14); treatment with humanity and respect for one's person and culture when in detention (Art. 17); being treated as an innocent person when in detention (Art. 17); being kept separate from convicted persons (Art. 17); juveniles being kept separate from adults when in detention (Art. 17); freedom from mass expulsions (Art. 22); and recognition as a person before the law (Art. 24). Moreover, "migrants who are detained should have the same rights as nationals for visits by members of their families" (Art. 17). To ensure these rights, "the competent authorities of the state concerned shall pay attention to the problems that may be posed for that person's family, in particular for spouses and minor children" (ICMW).

As mentioned before, one of the advantages of the RCM as the main platform to further foster a human rights approach for migration is its strong ties with RNCOM, which is the largest regionally based network of CSOs. RNCOM embraces human security as it considers "migrant people and refugees subjects with civil, political, economic, social, cultural and environmental rights, integrating gender equity and non-discrimination" (RNCOM 2013). Moreover, RNCOM also has a voice at the UN High-Level Dialogue on Migration and Development, as well as relations with the organizations detailed above.

Within the RCM, RNCOM participates in many forums and at many levels, including the working agendas of the Liaison Officers Networks and at the plenary meeting of the Vice-Ministerial Meetings, the latter being the executive decision-making element of the RCM (RCM—General Information). Moreover, RNCOM has reiterated that it supports and promotes the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW), which is the body of independent experts that monitors implementation of the ICMW (RNCOM 2013).

Although the RCM is mainly a forum for dialogue, policy recommendations can be negotiated at the Ministerial Meetings and adopted by its members. The RCM finds itself in a unique place in time, and with an unprecedented liaison with a network of CSOs guided by compassionate migration, to move a step forward in promoting a deeper commitment from all its members to embrace the core principles of the ICMW. This said, it needs to move toward a consensus to find mechanisms that move it closer to a regime with the institutional capacity to regulate migration flows from a human rights perspective and with the proper mechanisms to resolve disputes on migration matters among its member states. Yet, the RCM needs to acknowledge the serious limitations of its commitments to human rights if the main focus of the present agenda remains to control, detain, and deport irregular and "survival" migrants.

When the ICMW was first drafted in the 1970s and adopted by the UN General Assembly in 1990 it reflected a strong sense of urgency (Gouchteneire et al. 2009, p. 7). Today that sense of urgency is even more acute as most receiving states are literally closing their borders to those who are excluded from the gains of a regional political economy which is highly integrated for the movement of capital yet is inherently unjust and exploitative for the movement of labor. They are shutting the doors to those in desperate need of compassionate migration as they flee from extreme poverty, deeply entrenched violence, and long-lasting political instability.

Conclusion

The flow of migrant workers and their families, asylum seekers, and refugees as well as "survival" migrants, including unaccompanied children, will continue indefinitely. The economies of the South are intricately dependent on

the economies of the North, and the trade and investment agreements that bind their economies are increasing social and economic inequality as well as political instability. The "war on drugs" is failing with an unprecedented cost in human lives and the tearing apart of the social fabrics of entire nations in the South. South-North migration is misperceived as a problem and a threat instead of an opportunity for the survival of millions of people and the betterment of societies and communities. The present humanitarian crisis in the South is a wake-up call for governments to reevaluate regional economic and security agreements that do not respond to the needs of the majority. Migration has been securitized and criminalized, putting in jeopardy human lives and dignity. Yet, we cannot lose faith in the power of solidarity and compassion embraced by hundreds of CSOs that take care of the most vulnerable and must echo their calls for help in any forum where their voices are heard. CSOs have pressed states to open their doors of the dialogue, they now have a seat and their voices are heard; they are also the main force forging a compassionate migration regime for North and Central America. Yet to reach their goal the dialogue must continue, and it will.

Notes

1. For "mixed migration" I am using the IOM definition which states that "[T]he principal characteristics of mixed migration flows include the irregular nature of and the multiplicity of factors driving such movements, and the differentiated needs and profiles of the persons involved. Mixed flows have been defined as 'complex population movements including refugees, asylum seekers, economic migrants and other migrants'. Unaccompanied minors, environmental migrants, smuggled persons, victims of trafficking and stranded migrants, among others, may also form part of a mixed flow" (IOM's Ninety-Sixth Session, Discussion Note: International Dialogue on Migration).
2. By "structural migration" I refer to the fact that the major pull-and-push factors for international migration, particularly related to labor, are structurally built through: (1) Historical patterns of recruitment by employers in highly industrialized states or by governments acting on their behalf through guest labor programs as were the cases of the U.S.-Mexico Bracero Program (1942–1964) discussed in Chapter 6 or the Federal Republic of Germany's *Gastarbeiterprogramm* or guest worker program in the 1960s and 1970s and (2) bilateral, regional, and international political economy agreements and regimes that generate the demand and supply for skilled and unskilled labor as well as the demand for land and resources to

ensure the reproduction of capital within, and beyond advanced capitalist states (Castles et al. 2009; Massey 2009; Piore 1980; Sassen 2014).

3. Alexander Betts describes "survival migrants" as those migrants who flee because of serious rights deprivations but nevertheless fall outside common legal understandings of a refugee. For the full study on "survival migration" see: Betts, Alexander 2013 *Survival Migration: Failed Governance and the Crisis of Displacement*. Cornell University Press.

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CHAPTER 9

The Challenges and Potential for a Universal Human Rights Regime to Manage Migration in the Americas

Raquel Aldana

December 18, 2015 marked the 25th anniversary of the adoption of the International Convention on the Protection of Migrant Workers and Members of Their Families (ICMW). The ICMW is the first comprehensive treaty codifying rights for migrant workers and their families. Until ICMW's adoption in 1990, 12 treaties comprised the universal system of human rights codifying the fundamental rights of persons. These treaties, however, did not settle whether these rights applied equally to all persons present in the territory of a State party, irrespective of immigration status. The ICMW included rights that responded to the particular plight of migrant workers and their families. Largely, however, the ICMW codified much of the same rights already contained in the International Covenant on Civil and Political Rights (ICCPR), affirming the principle that these rights had universal application to all persons irrespective of nationality or immigration status.

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It was, however, much more selective as to the application of rights in the International Covenant on Economic, Social and Cultural Rights (ICESCR), drawing further distinctions between regular and irregular migrant workers and their families. Thus, on the one hand, the ICMW brought greater clarity and specificity to which human rights were fundamental to the protection of a significant group of migrants. On the other hand, the asymmetry between the ICESCR and the ICMW disappointed those who view negative and positive rights as having the same stature as rights (UN-HROHC 2011, pp. 19–22) or, at a minimum, who would apply a nondiscrimination principle and apply rights equally to migrants and nationals alike (Fudge 2012).

The United Nations High Commission for Human Rights (UNHCHR) maintains that it is the entirety of the now more than 18 human rights treaties combined that protect the rights of migrants, including those protected under the ICMW (UNHCHR 2014, p. 12). This position is especially important given the low acceptance the ICMW has received. After 25 years the ICMW has only been ratified by 48 nations, none of which are major receiving nations of migrants.[1] In the Americas, 18 nations are parties to the treaty, except Canada and the U.S. which remain the largest receivers of migration. The ICMW's low ratification is somewhat surprising since it is not a radical departure from the overarching human rights regime applied to migrants; indeed, it is arguably narrower for including fewer rights. Moreover, the ICMW, like other human rights treaties, preserves the core principle of absolute state sovereignty over national borders, at least with regard to the substantive decisions of who may enter and who may stay. What, then, are nations' objections to ratification? What does the fate of ICMW teach us about the future of a human rights regime for migrants?

This chapter attempts to provide some preliminary answers to these questions. First, this chapter examines the content of the ICMW to explore gains and gaps in the treaty. Then, the chapter explores the nature of receiving nations' objections to greater ratification of the treaty. Third, the chapter considers the future of a more transformative vision of migrant rights. Surprisingly, this vision may not occur, if at all, in the traditional human rights regime but rather in the context of a growing vision of migration as an inherent part of a globalized economy. While this trend is not inherently bad, there is reason for some caution. Without a strong human rights framework, pure economic considerations and national security considerations are likely to obfuscate the human dignity dimensions of the migration process.

A Brief Analysis of the Nature and Scope of ICMW

The ICMW does at least two things that respond directly to the concerns of receiving nations. First, the treaty does not codify a transnational freedom of movement regime. To the contrary, Article 34 imposes a duty on migrant workers to comply with all laws of the receiving nation, while Article 35 explicitly states that none of the rights contained in the ICMW should imply any right of the regularization of irregular workers nor should they prejudice in any way international laws' efforts to control the flow of migration. Not unlike previous human rights treaties, any freedom of movement recognized in the ICMW is limited exclusively to the relationship between migrants and their state of origin, and not the receiving states. Article 8, thus, codifies a right to leave, enter, and remain in the state of origin but there is no corresponding right to enter or remain in the territory of another without the sovereign's consent. As such, the ICMW preserves the status quo whereby only those who qualify as asylum seekers or refugees could constrain the right of the sovereign to expel them if doing so would bring them great peril (the *non-refoulment* principle) (UN High Commissioner for Refugees). Second, the ICMW confines itself to the protection of a subgroup of migrants—migrant workers and their families, not all migrants. Further, family members are narrowly defined to include only legal marriages and dependent children (Article 4). It is true that most migration is of working-age persons seeking jobs (International Labor Organization), but this is not exclusively the case. Migration also includes the elderly, unaccompanied minors, and others unable to perform work. Yet these persons are unlikely to be protected under the ICMW. Such exclusion makes a great deal of sense to receiving nations, which are principally interested in the migration of desirable workers who will contribute to the economy through their labor, spending, and taxes. This gap in protection, however, is significant for the unprotected classes who must rely on other human rights treaties to claim protection. Unfortunately, despite a strong rhetoric of the universality of fundamental human rights for all persons, the application of international human rights norms in treaties like the ICCPR and the ICESCR have proven elusive for irregular migrants who, rather than seek legal protection, must hide to avoid detection and removal (Noll 2010).

Despite the ICMW's respect for key concerns of receiving nations, almost all of the rights contained in the treaty apply to all migrant workers and their family members, irrespective of status. This position in the treaty is

a significant departure from the wishes of receiving nations who would have wanted to preserve most rights in the treaty exclusively for regular workers (Bosniak 1991). Chapters 11–15 of the ICMW contains twenty-five provisions with a gamut of rights that apply to migrant workers or their families irrespective of their immigration status. These rights include, with some variations, the traditional civil and political rights also found in the ICCPR, including: the right to life (Article 9); prohibition against torture and other cruel, inhuman, or degrading treatment or punishment (Article 10); protection against slavery or forced labor, exceptions to permit work in prisons (Article 11); freedom of thought and religion (Article 12); freedom of expression (Article 13); the right to privacy and honor (Article 14); the right to property (Article 15); protection against arbitrary detention (Article 16); the right to equality in criminal due process (Article 18); protection of *non bis in idem* (double jeopardy) (Article 19); a prohibition of incarceration for breaking contractual obligations (Article 20); a right to be recognized as a person before the law (Article 24); and the right to unionize (Article 26). Thus, a significant contribution of the ICMW was to define which of the rights contained in the ICCPR applied to migrants, especially those present without status in the territory of a party to the ICCPR.

Some rights in the ICCPR, however, were excluded from Chapters 11–15 of the ICMW. These include the right to peaceful assembly, a broader freedom of association right beyond unions, the right to a family, the right to political participation, and the right to equality before the law. In contrast, the final section of the ICMW expands some rights contained in the ICCPR to regular migrant workers, but again excluding irregular migrant workers. These include the rights to form trade unions (Article 40) and to political participation (Articles 41 and 42), as well as the right to a family (Article 45). Implicitly at least, the differentiation of rights in the ICMW based on immigration status signals a limitation of the ICCPR's universal application to irregular workers.

The ICMW is also important for codifying rights particular to the experiences of migrant workers. Applying equally to all migrant workers, including those in irregular status, the ICMW addresses important concerns related to the treatment of migrant workers in removal proceedings and immigration detention. The ICMW specifies, for example, that migrants must be detained separately from convicted persons, that there must also be separate detention facilities for juveniles, and that

migrants must have equal treatment as nationals in detention (Article 17). In terms of due process in removal proceedings, the ICMW requires that migrant workers be informed of their rights under the ICMW and about the immigration laws that apply to them (Article 33) and that they have access to consular protection for ICMW violations (Article 23). The ICMW also prohibits collective expulsions and requires an individualized hearing by a competent authority in accordance with law with a right to administrative appeal and a right to seek a stay (Article 22). If the decision is to expel, it must be communicated in writing in the language the migrant worker understands (Article 22). The decision to expel must also be executed with certain minimal guarantees, including a reasonable opportunity to settle wages, to seek entry into a third country over the country of origin, a right to compensation in the event of wrongful removal (Article 22), and the right to transfer assets and to gather belongings before having to leave the country (Article 21). All migrant workers also enjoy protection against the confiscation of identity documents (Article 21) and each child of a migrant worker has a right to a name, nationality, and to a birth certificate (Article 29). Article 29 is of particular importance to children born in countries that do not recognize *jus solis* citizenship who may still be entitled to citizenship by the host country if birth outside their parents' place of origin renders them stateless.

Workers with regular status also enjoy additional rights particular to their experiences as regularized workers. Again, however, these are rights not included for irregular workers, which begs the question of whether the ICCPR could be used to extend similar rights to irregular migrant workers. Perhaps most important in this section are the right to freedom of movement within the territory (except those restrictions necessary for national security) (Article 39), and the right to family unification and reunification (Article 44). The exclusion of irregular workers from these protections reinforces again the host country's right to regulate the presence of irregular workers within the territories, perhaps irrespective of the irregular workers' stakes in the country such as children born in the territory, the length of residence in the country, and property. Other special rights limited solely to regular workers in Part IV pertain to the right to be notified of the laws governing the conditions of their employment (Article 37), the right to be allowed temporary absences (Article 38), the right to transfer earnings (Article 47), and the right to equal treatment of taxation (Article 49).

Also of critical importance to the ICMW was the inclusion of at least some social, economic, and cultural rights for migrant workers, some of which apply irrespective of immigration status. Those applying to every migrant worker include the right to equitable treatment in the workplace with regard to pay and other workplace protections (Article 25); either access to social security or reimbursement of any deductions taken for that purpose (Article 27); right to emergency medical treatment (Article 28); and, for children, the right to equal access to basic education (except pre-school) (Article 30). Additional social, economic, and cultural rights applying only to regular workers include access to technical and vocational training (Article 43); a right to choose employment except if the visa is specifically tied to a particular profession (Article 51); a right to access all employment unless specifically restricted by law (Article 52); certain rights of family members to access jobs (Article 53); and equal treatment to national workers with regards to laws on government firing and unemployment benefits (Article 54).

The social, economic, and cultural rights contained in the ICMW—whether for all workers, irrespective of status, or even for regular workers—differ in nature and scope from those rights recognized in the ICESCR. On the one hand, the ICESCR guarantees a greater array of economic rights than does the ICMW. In addition to the rights included in the ICMW, the ICESCR provides the right to work (Article 6), the right to strike (Article 7), and the right to an adequate standard of living including access to housing and food (Article 11). Further, the ICESCR's provisions for the rights to health and education differ in nature and scope and are broader, especially for workers in irregular status. For example, the right to health under the ICMW is limited to emergency health services while the right to primary education is limited to primary education for the children of these workers. In contrast, the right to health under the ICESCR includes "the enjoyment of the highest standard of physical and mental health" (Article 12) while the right to education includes provisions on secondary and higher education (Article 13). On the other hand, unlike the ICMW, the ICESCR grants compliance flexibility to developing nations with regard to these economic rights, allowing them to determine the extent to which their national economies permit the guarantee of these rights to nonnationals (Article 2.3).

The differences between the social, economic, and cultural rights in the ICESCR and the ICMW have produced much analysis by the UN human rights bodies to explain their implications on the rights of migrant

workers, particularly those in irregular status. In 2013, for example, the Committee on the Protection of the Rights of All Migrants and Their Families (CMW), the ICMW's monitoring body, issued a 79-page General Comment No. 2 on the rights of migrant workers in irregular status and their families to expand on the meaning of the civil and political and the economic, social, and cultural rights contained in Part II of the ICMW. In 2014, the UN Office of the High Commissioner for Human Rights (OHCHR) issued a lengthy Report on the economic, social, and cultural rights of migrants in an irregular situation. This Report also takes the position that both the ICCPR and ICESCR are rooted in the principle of nondiscrimination such that any state distinction in the treatment of citizens and noncitizens, or between different groups of noncitizens, must serve a legitimate objective and must be proportionate and reasonable (UN High Office of the High Commissioner for Human Rights (UNHOHCHR) 2014, p. 24). With regard to economic rights, however, the Report acknowledges that Article 2.3 of the ICESCR permits developing nations to make certain distinctions with respect to the economic rights of citizens and noncitizens. However, citing General Comment No. 20 of the Committee on Economic, Social and Cultural Rights (CESCR), it clarifies that a lack of available resources cannot be considered an objective and reasonable justification for a difference in treatment in the economic rights based on nationality unless the state has made every effort to use all resources at its disposition to eliminate discrimination (UNHOHCHR, p. 32) The Report then expands on the practical meaning of the equality principle as applied to certain key economic rights. On the right to health, for example, the Report cites, inter alia, General Comment No. 14 of the CESCR to affirm that all migrants, irrespective of immigration status, have a right to equal access to preventative, curative, and palliative health services (UNHOHCHR, p. 49), and then makes concrete observations on various health concerns (UNHOHCHR, pp. 50–59). The Report then makes similar broad assertions of the equality principle and concrete observations on the rights to adequate housing (UNHOHCHR, pp. 70–73), water and sanitation (UNHOHCHR, pp. 74–75), food (UNHOHCHR, pp. 75–77), education (UNHOHCHR, pp. 87–95), social security (UNHOHCHR, pp. 102–09), and to work (UNHOHCHR, pp. 115–25).

The degree to which the ICMW expands or limits the human rights of migrants given its bifurcated nature and limited ratification remains contested. Within the UN, the push has been to insist that the universal human rights regime applies to migrants with very narrow exceptions.

Nation-states, however, seem to disagree with this position as evidenced by the low ratification of the ICMW, as well as efforts to situate the conversation on global migration governance outside the UN. These two themes are explored in the next two sections of this chapter.

What Are the Objections to the ICMW?

The ICMW's drafting process adopted a consensus model and lasted from 1980 to 1990. During the drafting process, one of the most controversial issues became the rights that would be recognized for workers in irregular status. Not all of the rights codified in the ICMW provoked the same degree of controversy. Some of the basic civil and political rights such as the right to life, the prohibition against torture and slavery, freedom of religion, and the right to privacy and property were adopted without changes. However, others proved controversial. Some of the strongest objections raised pertained to the expansion of rights related to conditions of detention and due process, including, for example, requirements to separate detainees from those convicted of crimes, to separate youths from adults, and the right to a paid interpreter. The most controversial provisions were those regarding the rights of employment, social security, and other economic rights. Ultimately, the objections led to several amendments which paved the way toward adoption (Bosniak 1991).

Despite the lengthy process of the agreement through consensus and the large participation of nations, including the major receiving nations, the ICMW has not been well received. A 2007 UN study on the obstacles to the ICMW's ratification identified that states shared general legal, financial, and administrative reasons as well as particular political reasons for refusing to sign the treaty (Cholewinski and MacDonald 2007). Another more recent study by the European Parliament of the current challenges in the implementation of the ICMW found that EU Member States consider that the ICMW does not distinguish sufficiently between the rights of regular and irregular migrants, limits their ability to decide upon entry and stay of migrants, conflicts with national laws, and represents a substantial financial and administrative burden (European Parliament 2013). Similar observations have also been made about the U.S.'s unwillingness to ratify the ICMW (Lyon 2010). Many of these claims are based on misconceptions about the ICMW rather than reality. For example, most of the rights enshrined in the ICMW are already recognized either in EU and U.S. legislation or in other international

human rights treaties ratified by both (European Parliament 2013; Lyon 2010). Nations that oppose the ICMW's ratification, however, appear to feel more comfortable engaging in migration governance dialogue in processes more connected to their goals and concerns around development. As explored in the next section, within this process, linking human rights and development will be key to ensuring that migration policies remain compassionate.

Some Reflections on the Future of Migration Governance: Linking Development and Human Rights

For several decades, several international organizations—from the International Labor Organization (ILO) (ILO 2014) to the Organization for Economic Co-operation and Development (OECD) (OECD 2006)—have reframed the conversation on migration in terms of development (Castles 2008). In 2006, the UN General Assembly undertook a first High-Level Dialogue on International Migration and Development, whose principal outcome was the establishment of the Global Forum on Migration and Development (GFMD). The GFMD is a voluntary, government-led, nonbinding process which takes place outside of the UN itself. Since 2007, it has become the most visible and high-profile forum for multilateral dialogue on migration (UN Special Rapporteur 2013, p. 49). Meanwhile, in 2013, the UN General Assembly held a second High-Level Dialogue on International Migration and Development, which resulted in the adoption of a consensus declaration widely regarded as a landmark in the multilateral approach to migration (International Labor Organization (ILO) 2014).

Economic communities all over the world have some form of agreement or intention on the free movement of people, including for labor. To date, progress in the area of freedom of movement as part of economic integration has been dominated by regional and bilateral approaches. Bilaterally, there are, for example, an estimated 358 agreements on the migration of low-skilled workers (ILO 2015). Further, Preferential Trade Agreements have begun to include migration related provisions (Orefice 2012). Regional freedom of movement regimes include, among others, those within the EU, the Economic Community of West African States, the Commonwealth of Independent States, and the Common Market of the South. Of these, the EU has the most elaborate systems of

regional migration governance, including a freedom of movement regime for all EU nationals including those from Eastern Europe (Koikkalainen 2011). For now, the multilateral framework covered by Mode 4 of the General Agreement on Trade in Services (GATS) as part of the World Trade Organization (WTO) is limited only to permit the presence of persons of one WTO member in the territory of another for the purpose of providing a service, not for employment or residence (Nielson and Taglioni 2013). However, in 2005, WTO members adopted a Declaration on Mode 4 that called on, among other things, new and improved commitments on categories of persons linked with, as well as de-linked from, commercial presence and the extension of the permitted duration of stay (WTO 2015).

Thus, a potentially positive development that could arise from linking migration and development is that instrumental considerations of economic gain for both sending and receiving nations are likely to transform borders to permit the greater mobility of workers across borders. Economic reports and studies recognize that migration liberalization benefits not only states of origin (in terms of remittances and the transfer of social and cultural knowledge) but also states of destination, which often have labor shortages and rely on migrant workers to fill those needs. (Walmsley et al. 2011; Chang 1998).

There is, on the other hand, the danger that purely instrumental concerns to manage migration could turn migrants into commodities, not persons. In this regime, the most vulnerable are likely to be left out of the equation. Further, when freedom of movement is framed exclusively in terms of trade, concerns such as worker conditions or access to public goods are treated as largely irrelevant. More recently, significant national security concerns arising from the intensification of terrorist acts in Europe and the U.S. are also likely to hamper or dominate the conversation on migration management. For this reason, involvement by UN entities in this dialogue has been mainly to insist on the need to focus on human rights in any discussion of migration governance.

The UN has proactively insisted on an inclusive agenda on international migration that integrates development and respects human rights as it did in the Declaration of the High-Level Dialogue on International Migration and Development (United Nations 2013). In 2006, the UN General Assembly also established the Global Migration Group (GMG), an inter-agency group bringing together heads of

agencies to promote the wider application of international norms related to migrants and to encourage the adoption of a more coherent, comprehensive, and coordinated approach to international migration (IOM-JMDI 2015, p. 10). Other U.N. human rights bodies have also sought to clarify the human rights standards that apply to migrants under existing human rights treaties as previously discussed and also moved to develop specific guidelines that respond to the human rights challenges confronting nations facing irregular migration.[2] Finally, since 2008, the UN Development Program initiated collaborations with local and regional authorities through the Joint Migration Development Initiative to connect migration, development, and rights in a local context (IOM 2015). Similar steps have been undertaken by the ILO, particularly for a human rights framework to protect the rights of migrant workers (International Labor Organization (ILO) 2014 and 2015).

Human rights norms can be integrated into a dialogue on migration management that is driven by development and national security concerns. Effective migration governance is essential to maximize the positive and minimize the negative impacts of migration and national security. Recognition and protection of human rights improve the integration of migrants, which in turn enhances economic benefits. If states were to agree to cooperate more on migration governance, they would be able to maximize and better distribute mutual economic benefits. Further, regulated borders that more realistically account for actual migration flows provide a better model for enhancing national security, in contrast to the clandestine irregular movement of people across borders that is the status quo today. There are also, of course, normative reasons rooted in the fundamental nature of human rights that should govern the application of a human rights lens to the movement of people across borders.

There are models today that provide an interesting example of how states' economic and national security interests can be maintained as part of migration governance while at the same time attempting to engage human rights concerns. For example, the EU has expanded migration policies for third-country nationals (nationals of non-EU countries) to include asylum and refugee policies (Castle 2008). The EU's Stockholm Program adopted in 2009 sets out to improve the regulation of migratory movements while guaranteeing a set of fundamental rights. As such, the EU has also attempted to address the human rights concerns of certain migrants by adopting several

directives concerning third-country nationals on such issues as family reunification, long-term residence, and seasonal workers (European Parliament 2013, pp. 17–23). Further, the European Charter of Fundamental Rights, which has legal binding status on the Member States when implementing Union law, enshrines many of the rights contained in the ICMW (European Parliament 2013, pp. 14–15). These directives have led to some important advances in linking migration and human rights, particularly for regular migrants.

Beyond the EU, the conversation calling for a more global human rights regime on migration that is linked to development continues. In 2015, a task force appointed by the UN Secretary Ban Ki-Moon to deliberate on the next generation of Millennium Development Goals recognized migration for the first time as an important factor in the millennium development agenda (Sutherland 2015). The challenge is whether nations can generate a post-2015 development agenda that transcends the narrow interests of states and of development stakeholders to focus instead on the true desires, needs, and rights of individuals. This requires expanding opportunities for migrants to move across borders legally, to invest their earnings and share their knowledge, and participate in enhancing development in their communities of origin and destination. It also requires reducing discrimination against immigrants and protecting their rights.

In the Americas, Canada and the U.S. as the two most important receiving nations have an important role to play in linking development and trade to a human rights migration regime. So far, unfortunately, the task lags far behind. These nations' push for greater economic integration in the region has not yielded migration policies that embrace the mobility of workers with dignity across borders (Bhandari 2010). The disconnect between these policy choices and the reality of migration in the region, however, plays out daily in the heavy-handed albeit ineffective regulation at and inside the border against migrants. This reality argues for a different model of migration.

Notes

1. United Nations Treaty Collection, Status of Treaties, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en.

2. One such example is the United Nations Office of the High Commissioner for Human Rights, Recommended Principles and Guidelines on Human Rights at International Borders 2014, http://www.ohchr.org/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf.

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CHAPTER 10

The Response of Government and Organized Civil Society to the Nightmare of U.S. Deportations of Mexican Migrant Women

Ana Stern Leuchter

Introduction

The terrorist attacks of September 11, 2001 resulted in a hardening of U.S. immigration policies and a return to nativism and xenophobia. Migration would be further securitized through tougher border controls, the expansion of the border fence, and the creation of the Department of Homeland Security, which oversees the management of migration. Moreover, traditional border controls would expand to the interior through the creation in 2003 of the U.S. Immigration and Customs Enforcement (ICE) that with 20,000 employees and 400 offices across the U.S. has increased detentions and deportations at an exponential rate (Immigration Task Force 2014). Furthermore, the use of force and human rights abuses against migrants have increased to levels not experienced before (ACLU 2008).

The results of the hardening of U.S. immigration policies are an increase in human suffering, particular of the more vulnerable populations

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(women and children), the crossing of migrants through more dangerous routes, and the disruption of circular migration. Additionally, the tightening of border controls, added to the violence caused by rivalries between drug cartels, has registered a significant increase in human trafficking as well as the price charged by human smugglers, known as *coyotes* (Randall 2014; Weden 2016).

As a result of the disruption in circular migration and the securitization of U.S. migration, the *Colegio de la Frontera Norte* has recorded a sharp decrease in U.S. border detentions and deportations from 876,000 to 340,000 between 2007 and 2011 (Guillen 2012). However, the total number, including interior enforcement, has skyrocketed to historic levels with the highest number of deportations reaching 410,000 in 2012 compared to 44,000 two decades earlier (Immigration Task Force 2014).

For those who cross the border, the fear of being detained and deported is constant as they are subjected to interior enforcement programs such as the 287(g) or Priority Enforcement Program (PEP), formerly known as Secure Communities. Under these programs, ICE deputizes state and local law enforcement officers to perform certain functions of immigration officers (American Immigration Council 2012). When undocumented migrants are arrested for a misdemeanor or a felony, local police will contact ICE who will detain them and potentially deport them. It should be noted that under these programs the majority of detentions and deportations are a result of misdemeanors rather than felonies (Alarcon and Becerra 2012).

These programs can destroy families and cause deep trauma to children, particularly those born in the U.S. and therefore U.S. citizens, as they could lose one or both parents and be placed in foster care programs under ICE's Child Protective Services (U.S. Immigration and Customs Enforcement 2016; Gavett 2011). One of the harshest consequences of the criminalization of irregular migration is that deported family members can be barred for ten years from re-entering the U.S., further separating families. For those who have been deported or repatriated, going back to their communities is very difficult as they cannot always find jobs, and are exposed to the same structural causes that made them migrate. This is particularly hard for women, children, and young people.

This chapter draws from primary sources and research involving human subjects for an ongoing project spanning more than four years on women and structural violence. Although this chapter presents excerpts from only three women out of thirty in-depth interviews and testimonials of deported and migrant women at the Centro Madre Assunta shelter in the Mexican border

city of Tijuana, their stories illustrate the nightmares suffered by most deported (IOM 2011a) and repatriated (IOM 2011b) women. These interviews also included staff who are constantly evaluating the needs and care that these migrant women, many with children, receive on a twenty-four-seven basis.

Many of the women interviewed either returned to their places of origin, attempted to cross the border again, or remained in Tijuana until they could raise enough money to hire a *coyote*, regardless of the risks and costs involved with the latter. My human subjects research also included testimonials from twenty deported women who resided for long periods of time in the U.S. Many committed misdemeanors, were arrested for domestic violence, or for selling illicit drugs.

To understand the violence these women experience during their return, I also conducted interviews with staff from CSOs.[1] Moreover, in addition to consulting secondary sources, including those from state agencies, the research included an appraisal of the existing working relationships between state agencies and CSOs.

Finally, this chapter, which is part of my ongoing work with women who are victims of many forms of violence, draws upon Galtung's concepts of structural and cultural violence (Galtung 1990, 1969; and Jácome n.d.), which pertain to situations in which basic needs for survival, well-being, identity, and liberty are threatened as a result of social stratification and not necessarily direct violence. Structural and cultural violence includes exploitation, discrimination, and domination (La Parra and Tortora 2003).

The Impact of Deportations and Repatriations on Mexican Migrant Women: Structural and Gender Violence

Research shows that undocumented women are more vulnerable to direct and indirect violence. As a result, they avoid repeated border crossings because the consequences of being detained by ICE or the Border Patrol can be dire—they can be victims of verbal and physical abuse, including rape (Woo 2004). For mothers who are detained and deported and have to leave their children behind, the emotional impact can be unbearable. They have to deal with a deep sense of loss and anger. For their children these forced separations cause them deep psychological trauma. Additionally, these children do not always have the support of direct or extended family. The majority will end up with chronic health problems, developmental delays, and great difficulties to integrate to society (Gavett 2011).

Although every woman interviewed had a personal reason to migrate, they all shared in some way the following reasons to undertake a journey that could become a nightmare: a lack of economic opportunities due to underdevelopment or gender, family reunification, personal development, or an escape from patriarchal systems of oppression, including domestic abuse. Many women migrate alone, with mothers leaving behind their children as it makes it easier for them to find a job and send remittances to pay for their children's education and other needs. Such separation takes an emotional toll as they face the impossibility of taking their children with them.

Another factor for women to migrate is the structural violence caused by the combination of the cartel wars and the government's "war on drugs." To flee this violence, many women seek asylum in the U.S. While their cases are reviewed by immigration courts, they are detained in ICE centers where many suffer from human rights abuses (UNHCR 2015). Unfortunately, very few asylum cases are accepted[2] (USCIS 2015), as the standards of proof to establish a well-founded fear of persecution can be very difficult to meet, particularly in the U.S. where the burden of proof falls on the claimant who must produce evidence that in many cases is impossible to obtain. According to one of the social workers at the shelter, most women seeking asylum are receiving only Temporary Protected Status, which allows them to remain in the U.S. for a limited time and prevents them from working. As a result, many women get tired of waiting for their cases to be resolved and return to Mexico (Calderón and Andrea 2011).

Many women will use *coyotes* to cross into the U.S. and find themselves abandoned along the desert where they are prone to suffer from heat strokes due to temperatures reaching over 100 degrees (University of Arizona Center for Latin American Studies 2013). Others will use false documents or hide in the trunk of a car or a shipping container. This was the case of an indigenous family from the southern Mexican state of Chiapas interviewed for this study. The family, whose grandmother could not speak Spanish and was the main caretaker of the children, attempted to hide under the seat of a van but was discovered a few miles from Los Angeles. During their journeys to cross the border, or when in the custody of immigration officers, migrant women constantly face gender-based violence such as harassment, verbal and physical abuse, and rape. In many cases, women are kidnapped, "disappeared," or murdered.

The experience of being deported or repatriated can be a nightmare for many women, children, and young people, particularly for those who lived many years in the U.S. Many lost ties to family and friends in Mexico, cannot speak the language, and no longer identify as Mexican, and in many cases have no place to go. Others feel extremely frustrated as they see their "American dream" crumble. Many deported women also suffer from depression as their aspirations to give their children a better life collapse. This was the case of Maria, a woman who used to clean houses in the U.S. She contributed approximately 60 percent to the household income and was even able to purchase a house. When she was deported she was extremely distressed because she feared she would lose her home if she could not earn enough money in Mexico to pay the mortgage. Furthermore, her oldest son who stayed behind with his brothers was a senior in high school and was dreaming of going to college, yet had to care for his brothers. She had to handle all the household affairs from Tijuana, which was extremely stressful.

When I interviewed her for the last time, she had decided to return to California with her children, putting her life at risk or being detained, which could result in a two-year detention, followed by a deportation with a ten-year bar from entering the U.S.

Another difficult case was Esperanza's. She had migrated from Mexico City, leaving her two daughters with their grandmother and stepfather. Her job in the U.S. was a typical so-called 3D job (Dirty, Dangerous, and Demeaning). As a result, she fell into a deep depression, became an alcoholic, and at some point was arrested. She was detained by ICE and flown to a detention center in San Diego from where she was deported. On the flight she was shackled by her wrists and ankles while seated between men, which was terribly humiliating.

Another case was Juliana's—an agriculture worker detained for driving without documents. She was detained in a county jail for three days, then transferred to an ICE detention center, where she was stripped of her belongings with the indication these would be returned when she left the country. However, as occurs in many cases, she never received her belongings. The practice of confiscating the belongings of detained migrants and not returning them is fairly common and has been denounced by the U.S. and Mexican human rights organizations. This practice leaves many migrants defenseless, as many lose their Mexican ID cards to the hands of ICE officers (Estevez 2006). As of today, there have not been any prosecutions of officers involved in these takings.

Finally, there is the case of a young indigenous woman who during her stay at a detention center would be awakened every morning at 4 am by the warden to cook breakfast for all detainees. The cold made her sick and she did not receive proper medical attention. These actions reflect exclusion, discrimination, and racism.

It is clear that gender and cultural violence is present in each of the cases mentioned above, as well as human rights violations, whether they be physical, psychological, or emotional. These violations have a negative impact on women's self-esteem as they infringe upon their rights to freedom, information, private property, and movement. Such violence leaves them with deep physical and psychological wounds. Added to these human rights violations, one must not forget that many migrant women cannot escape structural, gender, and cultural violence, which makes their lives at times a real nightmare.

For many single mothers or parents repatriated or deported to Mexico, the nightmare does not end when they return "home." Many have to leave their children behind with relatives or third parties, and some lose their children to the state if they do not return at a precise date, or if immigration authorities cannot reach them (Jackson 2011). This is a long and burdensome process made even more difficult due to the lack of an adequate family reunification policy in the U.S. from high-demand countries such as Mexico, regardless of the legal status of the parents (Wessler 2014).

According to the Applied Research Center (ARC), between 2010 and 2012, 204,000 mothers and parents of Mexican origin were deported and separated from their U.S. born children (Franco 2013). ARC also reports that until 2011, 5,100 children of migrant parents were reported to be under government custody. Many parents were deported as a result of a court order and barred for ten years from entering the U.S. (Franco 2013).

When deported or repatriated women leave behind family members in the U.S., their desire to reunite with them can be too strong to bear, prompting a new journey to the U.S., even if they have been barred from reentering the country and are conscious of the risks this entails (París-Pombo and Peláez 2015). On the other hand, many will continue suffering from structural, cultural, and gender violence, which will keep their dreams to relaunch their journeys to the North alive, regardless of the nightmares that might lie ahead.

CSOs and the State Working to Protect Deported and Repatriated Women: Progress and Setbacks

When states open their doors to organized civil society, CSOs always find the means to become active participants in the development of public policies. On the other hand, many state institutions have realized that they rely on the knowledge of CSOs to develop more efficient policies. As a result, CSOs were often consulted in the elaboration of the following key plans, programs, and institutions that have an impact on migrants' rights, including specific goals and policies addressing women's needs, including migrant women: (1) *Plan Nacional de Desarrollo* 2013–2018 (PND) (2013–2018 National Development Plan), (2) *Programa Especial de Migración* 2014–2018 (PEM) (Special Program for Migration 2014–2018), and (3) the *Consejo Ciudadano del Instituto Nacional de Migración* (CC-INM) (SEGOB 2015) (Citizen Council of the National Institute for Migration).

Perhaps the most influential CSO that spearheaded working partnerships with the state to reform its immigration policies is the *Colectivo Migraciones para las Américas* (COMPA) (Migration Collective for the Americas). COMPA was founded in Mexico in the first year of the administration of President Enrique Peña Nieto to ensure that his 2013–2018 National Development Plan would include the human rights, development, and gender dimensions of migration. Today, COMPA has extended its work to 11 countries in the Americas, including the U.S., and is one of the largest networks of CSOs focused on migration rights.

The PND is the most important strategic plan of every new administration in Mexico as it sets the policy priorities and goals of the executive branch for the duration of the administration. The PND corresponding to the six-year period of the Peña Nieto presidency marked a radical shift in migration policies and goals, as its framework is based on respect for human rights, sustainable development, gender, culture, and human security. Most government actions that address issues related to migrants and their families are part of Goal Five of the PND, titled Mexico with Global Responsibility. Here the PND (as translated) addresses the need for "a gender approach as being extremely important due to the conditions of vulnerability that migrant women are exposed to." It also states that "a comprehensive policy [on migration] has to include as a priority a gender perspective as almost 46 percent of migrants in the U.S. are

women." Finally, for deported and repatriated migrants, it states that "the increase in repatriations of Mexican citizens obliges the Mexican state to design and implement programs and actions that guarantee their reintegration with dignity and opportunities for their social economic development." The message of the PND 2013–2018 cannot be clearer regarding the need to develop programs that specifically address the needs of deported and repatriated women as well as those children and young people that need to be reintegrated with dignity and better opportunities for their development.

PEM was a result of the demands set out in the PND's goals for a comprehensive immigration policy. PEM coordinates with 35 federal and state agencies dealing with migration issues and the rights of migrants and their families during the migration process. For the first time, Mexico has a national migration policy framework—a framework developed by the *Unidad de Política Migratoria* (Migration Policy Unit of the Secretariat of the Interior (SEGOB), Unidad de Política Migratoria 2012). It deals with accountability, where each agency reports on its progress. It is important to note that among the most important stakeholders jointly responsible for monitoring PEM activities, COMPA is one of the most prominent. Although the relationship between PEM and stakeholders like COMPA can be complicated, their partnership demonstrates an important advancement in the relationship between state and civil society, particularly regarding the advancement and protection of human rights for all migrants, including those who have been repatriated. It is important to mention that PEM is developing, with the assistance of COMPA and other CSOs, a database to identify the number of repatriated migrants, including women and children, who need access to healthcare, social assistance, and employment. These are important advances that could not have been done wthout the help of an organized civil society.

The CC-INM is composed of thirteen Councilmembers whose President belongs to civil society. It includes the Commissioner of the National Institute for Migration (INM) who serves as Technical Secretary, and the Undersecretary of Population, Migration and Religious Affairs from the Secretariat of the Interior, as well as the Head of the Migration Policy Unit as a permanent guest. It is a true citizen council established by CSOs that works as a direct channel to articulate and present their demands, concerns, and proposals to the INM as well as other departments of the Secretariat of the Interior dealing with migration issues. The CC-INM has many policy agendas that include repatriation issues, migrant women, and children, as

well as policy positions to strengthen the work of the INM. However, for this working partnership to be more efficient, social structures and gender roles must be at the forefront of their work (OIM 2014). On the other hand, the *Instituto para las Mujeres en la Migración* (IMUMI) (Institute for Women Migrants) highlights that although, for the first time, PEM incorporates a gender perspective, in practice, migrant women are not being helped, and less so are those who are deported or repatriated (IMUMI 2014). Finally, the CC-INM does not include within its themes a gender perspective in repatriations (Soto 2016).

The Future of COMPA and Its Working Partnerships to Assist Deported and Repatriated Women

COMPA has continued its working partnership with PEM and has made one of its goals to monitor the implementation of PEM's policies and programs with a particular focus on policies that help women and children. COMPA has also continued its work to ensure that the state fulfills its commitments and agreements it has subscribed through the PND, PEM, and the CC-INM.

When viewing the diversity and complexity of migration issues, many CSOs under COMPA have realized the need to develop public policy proposals at the state and local level. To this end, three regional hubs were formed: the central, southern, and northern region hubs. The process of decentralizing COMPA's work will take time but the creation of these independent hubs is a critical move that should be praised, as it will make their work more efficient.

One of the achievements of CSOs under COMPA was modifying the regulation that required a birth certificate with an Apostille and an official translation for U.S.-born children of undocumented parents (DOF 2015). This victory represents a relief for the deported or repatriated mothers who could not enroll their children in Mexican schools. This policy change could benefit around 600,000 U.S. citizen children born to a Mexican mother or father now living in Mexico.

Despite this victory that helps repatriated mothers and their children to integrate in their "new" home, Jorge Bustamante, former UN special rapporteur on migrants' rights, has expressed his concerns regarding the indifference and lack of political will from the Mexican government: "the authorities do not protect the human rights of

thousands of migrant women that each year are deported from the U.S. and separated from their families" (Franco 2013). In turn, Rodolfo Córdova, deputy director of the advocacy CSO *Fundación para la Justicia y el Estado Democrático de Derecho* (FJEDD) and former council member of the CC-INM, has argued that the most important constraints to advance the rights of migrants, including repatriated women, are that "the government is far removed from the people, and there is a disconnect between what the government establishes and the needs of the people and that of civil society. In the case of the deported women, is not only necessary to detect their needs, but also to place them in the center of the policy actions."[3]

Conclusion

It is critical that deported and repatriated woman, children, and young people receive adequate medical and psychological assistance during the process of their return, including the places where they intend to reside, to help them accept their new realities and better integrate into their new communities. In turn, their host communities must accept them without discriminating against or chastising them. Local assistance centers for women and children as well as the church often fulfill this role, yet the state must secure, as stated in the PND and the Mexican Constitution, the well-being of its citizens, and therefore should fulfill its obligation to have special programs for those women suffering from broken families and dreams.

CSOs need to educate women on their rights and how to defend them. They also need to teach them that no form of violence should be considered normal, as violence destroys their dignity and disrupts the peaceful coexistence of communities as it internalizes social resentment. On the other hand, it is important that communities and the state recognize and value the experiences and new skills that women have acquired. These experiences and new skills can be used in a positive way as they empower them to have more economic and social independence as well as to grow personally to better serve their communities.

The ultimate aim of supporting women, mothers, and children through the compassionate and combative work of CSOs is to ensure that the state meets its obligations to fully protect their fundamental rights, so that those women, single mothers, parents, children, and young people building new dreams will be able to look after themselves with dignity and pride. The hope is that they will be able to be empowered to demand the state to

respect their rights to justice, fairness, and equality in the economic sphere. They will also be empowered to demand better working conditions and a place in the political arena of their communities and the country. The state needs to fulfill its obligations to grant them access to health and the well-being necessary for their development as human beings.

Mexico will continue receiving women and children in need of a strong and thriving civil society willing to keep fighting for their rights. They will need a state that does not waiver in meeting its obligations to support them and give them back their dignity, as many will be coming from a real nightmare which might not end as today's conditions of entrenched structural violence do not seem to die out fast.

Notes

1. Staff from the following organizations were interviewed: José Knippen from FUNDAR, Berenice Valdez from IMUMI, Maureen Meyer from WOLA, José Betancourt from MATT, and Rodolfo Córdova from FJEDD.
2. Out of all the countries that sent applications to the USCIS offices in January 2015, Mexico was assigned 9 percent or 536 cases, https://www.uscis.gov/sites/default/files/USCIS/Outreach/PED-2015-01-03-NGO-Asylum-Stats.pdf.
3. Interviewed by author in Mexico City (n.d.).

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CHAPTER 11

Visible and Invisible: Undocumented Migrants in Transit Through Mexico

Rodolfo Casillas

Since 2008, Mexico's southern border has been the ain gateway for the world's undocumented migrants wanting to enter the U.S. Migrants from the Northern Triangle states of Guatemala, Honduras, and El Salvador swell the ranks of undocumented migrants in transit through Mexico. Mexico has also witnessed a new surge of migrants from Cuba, Ecuador, Asia, and Africa coming through its southern border (Berumen et al. 2012). These migration flows are quantified in statistical data and are also mentioned in the work of academic institutions, international agencies, and humanitarian organizations (ITAM 2014). Although it is difficult to quantify irregular migration, it seems that the magnitude of detentions and deportations of irregular migration transiting through Mexico indicates that something serious is occurring.

In 2013, President Obama talked about a humanitarian crisis due to the thousands of unaccompanied children and minors entering the U.S. from the Northern Triangle countries. The Mexican government responded swiftly by closing the train routes and setting roadblocks along the most transited routes. These actions worked and the number of undocumented migrants detained by the *Instituto Nacional de*

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Migración (INM), Mexico's National Institute for Migration, skyrocketed (The Guardian 2015). Regarding the larger human tragedy of these migrants, a scathing 2011 report by the *Comisión Nacional de Derechos Humanos* (National Commission for Human Rights) reported that in the previous six months before the publication of their annual report, more than 11,000 migrants in transit were abducted (CNDH 2011). Moreover, the Mexican Federal Police reports rescuing 71,419 undocumented migrants in transit who were abducted between 2007 to early 2014, and nothing indicates that the Mexican government has managed to reduce the average number of abducted migrants, though it is difficult to obtain precise data (see Table 11.1). At times we know of migrant existence when the media decides to cover their perils or the governments in the region, including the U.S., react through individual or shared communiques. We see their faces when large humanitarian organizations like Amnesty International or the Washington Office for Latin America (WOLA) publish in-depth reports (Amnesty International 2010; WOLA 2014 and 2015). Yet, most of the time these migrants walk through shadows: they are invisible.

This chapter presents an overview of the key migration processes, policies, and hardships suffered by survival migrants who are at times visible yet are too often invisible as they transit through Mexico. The chapter also presents some of the key political reasons behind different Mexican administrations' actions. It will also focus on the kinds of aggressions and human rights abuses that migrants suffer in the hands of Mexican authorities as they travel in a journey where they are victims of abductions, human trafficking, robbery, rape, murder, and other undeserved perils.

The Beginning of a New Migration Process

Even though Mexico has collected data on Central American migration at different periods of the twentieth century, it did not start to quantify this migration in a systematic manner until it started receiving a massive influx of refugees fleeing the civil wars in many Central American states that occurred from the late 1970s to the late 1990s. (Diaz Barrado et al. 2010). Up until the early 1990s Mexico did not have a state policy for undocumented transmigration for three reasons: (1) migration was not quantified; (2) migration flows from certain Central American countries were regarded as a temporary presence that responded to external causes

Table 11.1 Kidnapped migrants rescued by the Mexican Federal Police, by State, 2007–2014*

State	*Number of migrants that mentioned their nationality*	*Number of migrants that did not mention their nationality*	*Total*
Aguascalientes	188	27	215
Baja California	128	54	182
Baja California Sur	89	3	92
Campeche	401	47	448
Chiapas	15,830	2,690	18,520
Chihuahua	1,203	161	1,364
Coahuila	1,281	198	1,479
Colima	4	1	5
Distrito Federal	1,749	83	1,832
Durango	604	16	620
Guanajuato	1,401	459	1,860
Guerrero	44	434	478
Hidalgo	898	2	900
Jalisco	625	521	1,146
Estado de México	1,904	24	1,928
Michoacán	345	48	393
Morelos	78	0	78
Nayarit	876	95	971
Nuevo León	1,722	251	1,973
Oaxaca	3,321	1,457	4,778
Puebla	711	288	999
Querétaro	1,066	211	1,277
Quintana Roo	848	56	904
San Luis Potosí	2,184	304	2,488
Sinaloa	1,857	402	2,259
Sonora	1,781	314	2,095
Tabasco	4,999	1,153	6,152
Tamaulipas	2,767	512	3,279
Tlaxcala	1,871	581	2,452
Veracruz	7,508	1,660	9,168
Yucatán	473	10	483
Zacatecas	545	56	601
Total	59,301	12,118	71,419

*Only includes the months from January to April in 2014

Source: Self-elaboration based on the *National Citizen Observatory*, "Comprehensive Analysis on Kidnappings," 2014

inherent to Central America, and that once these causes were resolved the flows would stop; and (3) these flows did not merge with the traditional flows of temporary agricultural workers in the southern Mexican border. A number of Mexican administrations believed that at the end of the Contra War in 1990 and the 1994 and 1996 peace agreements in El Salvador and Guatemala, political stability would return to the region and the push factors to migrate would ease.

It was not the case. The Northern Triangle states were left with weak institutions and a weak rule of law. Moreover, as the socioeconomic conditions that caused the conflicts did not change and political instability remained unchanged, the desire to migrate to *el Norte* (the North) would become the norm for decades to come. Most Central American states have been entrenched in chronic economic stagnation for decades (Morales 2003), and for the chronically unemployed, migrating became the only escape from a deep and enduring state of human insecurity where the constant struggle to survive has become a way of life for generations (CEPAL 2002). For those who choose to migrate to survive, enormous individual and family sacrifices are made, as their migration carries a heavy personal and family cost. Added to the emotional, financial, cultural, and linguistic challenges they confront during the full process of migration, many have normalized deep hardships as a part of life. They develop a pragmatic approach to life where they learn to fend for their rights from a vulnerable position.

In the late 1980s and early 1990s, the U.S. and Mexico had relaxed their migration policies toward Central America, as they shared the perception that such large flows were a temporary situation stemming from the civil wars. However, new regional security challenges emerged that triggered the securitization of migration in Mexico. As a result, Mexico would redefine its national security priorities with a focus on its southern border, and the U.S. would continue the militarization of its border with Mexico (Delano and Serrano 2010).

On the other hand, the North American continent would see its economic boundaries redefined by the launching in 1994 of a North American Free Trade Agreement (NAFTA) that would encompass Canada, the U.S., and Mexico. NAFTA would focus on the movement of goods, services, and investment, with new visas for the high-paying professions accompanying trade and investment. For those working in the agriculture sector or other low-paying jobs, the doors for migration

would be closed as low wages were considered a comparative advantage for foreign investors.

The bitter awakening for Mexico was when the U.S. administration under President Clinton decided to further close its border with its new "trading partner" down South. Through Operation Gatekeeper in 1994 and the further securitization against irregular migration under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, the U.S. would send a message that migrants from the South were not welcome. These measures affected millions of Mexican migrants and further put the brakes on a circular migration that was already being halted by the 1965 Immigration and Nationality Act that established the first migration quotas for the Western Hemisphere.

The geoeconomic redefinition of North America, added to new national and regional security concerns, explains the creation in Mexico of the INM at the end of 1993, just three months before NAFTA entered into force. The management of migration would be modernized with a stronger focus on border control, detentions, and deportations.

The Politics of Mexico's Immigrant Detention Policies

The Mexican government has developed its immigration regimes and policies through a multi-sectoral approach including the active participation of state and municipal entities. However, this approach is still far from creating an efficient system to evaluate the need for adequate resources, policy performances, and outcomes. Heads of departments and priorities are often imposed by party-line considerations, and planning and budgetary processes are the result of internal political dynamics. These convoluted dynamics have created a complex and paradoxical set of migration management and policy plans that at times do not match institutional goals, particularly those related to the protection of migrants. Yet, such policy plans have been very effective regarding the detention and deportation of irregular migrants and those in transit.

In the late 1990s, the INM decided to prioritize its goals on detentions and deportations. As a result, it built 25 migration centers, and added another 25 in the 2000s. The new migration centers would be spread across strategic migrant routes covering the whole territory.

Table 11.2 Undocumented foreign migrant population returned and rejected by Mexican migration authorities from 1990 to 2000, by nationality

Year	*Guatemala*	*El Salvador*	*Honduras*	*Nicaragua*	*Other*	*Total*
1990	58,845	45,598	14,954	3,039	4,004	126,440
1991	69,991	40,441	18,419	1,265	3,226	133,342
1992	65,304	26,643	25,546	1,682	3,871	123,046
1993	58,910	28,646	26,734	3,438	4,277	122,005
1994	42,961	22,794	32,414	12,330	2,616	113,115
1995	52,051	19,526	27,236	2,521	4,606	105,940
1996	50,497	20,904	31,055	1,878	2,784	107,118
1997	37,837	18,857	24,890	1,172	2,832	85,588
1998	46,088	25,783	35,161	1,854	2,686	111,572
1999	50,924	26,176	44,818	1,394	3,186	126,498
2000	79,431	37,481	45,802	1,960	8,261	172,935
Total	612,839	312,849	327,029	32,533	42,349	1,327,599

Source: Self-elaboration based on the information issued by the General Directorate for Migration Services of the Mexican Ministry of the Interior and the INM

Today the number and size of these centers have proven insufficient to manage the soaring numbers of undocumented migrants in transit who are fleeing extreme poverty and violence in Central America, and who are clearly not welcomed by Mexico, even if many should be considered refugees. The following two tables illustrate this policy of deterrence and containment that at times seems to respond to the U.S. securitization interests (Tables 11.2 and 11.3).

Although detention and deportation practices are quite different in Mexico than in the U.S., the numbers of deportations pale in comparison to those of the U.S. In Mexico, the INM has far more legal limitations and a much smaller force to detain irregular migrants than the massive scale that occurs in the U.S. The constitutionally mandated freedom of movement, the large support network of CSOs that include hundreds of migrant shelters and the work of the Catholic Church, and the INM paradoxical humanitarian units called the *Grupos Beta* who are unarmed and are mandated to assist migrants in transit, tend to slow down detentions and deportations. Moreover, Mexico has seen its migrant flows surge by new waves of migrants from Cuba, Ecuador, Asia, and Africa that are using the more porous Mexican southern border in an attempt to reach the U.S.

Table 11.3 Number of deported and repatriated migrants reported by the INM, based on selected nationalities (2001–2015)

Years	*Total returned population*	*Returned population from Central America,* Cuba, and Ecuador*	*Percentage of selected nationalities in relation to the total returned population*
2001	138,475	134,109	96.85
2002	110,573	106,901	96.68
2003	178,519	173,675	97.29
2004	211,218	204,239	96.70
2005	232,157	222,524	95.85
2006	179,345	172,172	96.00
2007	113,206	108,385	95.74
2008	87,386	84,250	96.41
2009	64,447	62,342	96.73
2010	65,802	63,448	96.42
2011	61,202	59,424	97.09
2012	79,426	77,696	97.82
2013	80,902	78,887	97.51
2014	107,814	81,027	75.15
2015	155,418	151,186	97.28

*The countries included in this category are El Salvador, Guatemala, and Honduras
Source: Self-elaboration based on the Migration Statistical Bulletin of the Center for Migration Studies, http://www.politicamigratoria.gob.mx/es_mx/SEGOB/Boletines_Estadisticos, 2001–2015

This constant and ever-growing flow of irregular migrants, added to a sustained increase in criminal activities at the border with Guatemala, has pushed past and present Mexican administrations to undertake a continuous implementation of new plans built upon the successes and failures of past ones.

The 2001 Southern Plan and Its Impacts on Today's Detention and Deportation Programs

Under the administration of President Fox (2000–2006), the INM would launch in 2001 what would be the first "Southern Plan" (Plan) or *Plan Sur* to manage the growing migration flows coming through Mexico's southern region as well as the intensification and violence of criminal activities carried out by Central American gangs and powerful criminal networks linked to drug and human trafficking (Grayson 2002). The

Plan's main goals were to strengthen the security of the border and control the influx of irregular migrants in Mexico's south and southeastern regions. To meet these goals required five specific action plans: (1) strengthening migrant inspection and control activities across the Isthmus, Gulf, and Pacific zones; (2) increasing interagency coordination to combat human trafficking; (3) utilizing available resources from regional inspection and control stations; (4) increasing the detentions of irregular migrants as well as smugglers; and (5) supporting state and municipal governments in their efforts to curb human trafficking and rampant criminal activities. Other action plans were: (1) reducing multiple reentries of Central American undocumented migrants, something that has not been achieved to date; (2) preventing human rights violations and abuses of power from Mexican and Guatemalan authorities; and (3) reducing the crime rate in the region, which instead has increased exponentially.

The Plan was launched just before 9/11. However, the tragic events of 9/11 relegated the human rights dimensions of the Plan to those of stricter border controls, a stronger presence of armed forces and federal police, as well as a focus on detentions and deportations. What would be a more humanitarian approach to these new waves of migration became a coercive approach that increased human rights violations (Grayson 2002).

Perhaps some of the more positive outcomes of this Plan were the changes in discourse and legal language used to refer to irregular migration. The use of "illegal migrant" was replaced by "irregular migrant," decriminalizing the act of entering the state without proper documents. The result is that irregular migrants who are detained in Mexico are "secured" in a migration station rather than incarcerated, and the facilities where undocumented migrants are detained while their cases are processed are called migration stations, not detention centers.

Unfortunately, these changes seem cosmetic and have been overshadowed by the fact that they have not deterred INM officers, even under the supposedly more humanitarian 2015 *Programa Frontera Sur* (2015 Southern Border Program), from committing human rights violations such as those listed below. The first list refers to violations committed against individuals being "secured" or in contact with other public officers, and the second one refers to the denigrating material conditions and treatment that "secured migrants" are subjected to in migration stations. It is important to note that the author has visited these facilities multiple times in detailing these violations.

Types of Human Rights Violations Committed in INM Detention Stations

Description
Not informing "secured migrants" of their rights or the causes of their detention
Requesting money in exchange for freedom or to avoid being "secured"
Extortion by public officers
Physical or verbal abuse
Requesting sexual favors from women
Delays in the access to justice
Over-extended detentions of a migrants before deportation proceedings

Types of Human Rights Violations in Relation to the Conditions of the Migration Centers As Well As Migrant Mistreatment

Description
Overcrowded facilities
Closed spaces with a lack of fresh air and no spaces for walking or exercising
A lack of accessible drinking water or the blatant denial of water when requested
A lack of three meals a day accompanied by very poor quality food
Dormitories without restrooms or extremely unsanitary lavatory facilities
Denying "secured" migrants the use of restrooms
A lack of first aid and medical facilities as well as denying medical attention when requested
Delays or long periods with no visits from the federal and state Human Rights Commissions, the Mexican Commission for Refugee Assistance (*Comisión Mexicana de Ayuda a Refugiados*, COMAR) or the *Grupos Beta*
Sleep deprivation
Detentions in nonofficial INM facilities such as prisons or safe houses
Cement floors in dormitories with no beds or mats
Unheated dormitories which can pose serious health problems during the winter in high-altitude stations as well as those close to the Northern border
Dormitory and cell roofs constructed of cheap materials and mesh causing water leakages

Alone, but Not So Alone

Central American migration though Mexico has always been accompanied by a complex social process. It is a process plagued with corruption and abuse as well as intricate networks of social actors assisting migrants in their quest to reach *el Norte*, including human smugglers called *polleros* or *coyotes*. In the past, there were always risks in this process, but no uncertainties: migrants would keep walking, and even if they went astray, there was not a systematic loss of life. Today, social violence has increased as a result of a failed "war on drugs" and the proliferation of extremely violent gangs like the Maras Salvatrucha (MS-13) (itself the product of failed restrictive U.S. immigration policies) and more sophisticated and vicious criminal networks. Additionally, persistent conditions of extreme poverty in southern Mexican states as well as the Northern Triangle states have pushed a large number of unaccompanied children and women to migrate, unaware of the perils and dangers they will certainly face. This in turn has triggered more sophisticated networks of human traffickers linked to powerful drug cartels that make the *polleros* or *coyotes* look like one more social actor "assisting" those dreaming to reach *el Norte*.

After 2001, Central American migration in transit through Mexico would become undeniably visible (Redodem 2013, 2014, 2015; Servicio Jesuita a Migrantes 2014): an unwanted "other" for the North; a focus of attention for humanitarian networks; a hope for those who wait in the country of origin; a *modus vivendi* for common criminals; a provider of sexualized bodies to sex trafficking networks; an object of pleasure for vulgar government officials; a market niche for organized crime (Williams 2010); and a source of cheap labor in the country of destination. These are the "others" who increased the demand of smugglers and dealers, already subordinated to major criminal networks; of landlords offering spaces under a roof near the rail yards; of taco vendors by the train; and of the earnings of a fisherman who slides a boat toward the sea with human cargo.

This new wave of migrants has lightened the burden of their governments as the latter no longer need to create jobs for them, offer them public services, wages, and social benefits. Migrants have become the major supporters of their families left behind through the remittances they send when they can. They are also the unconscious monetary agents that increase their country's balance sheets with GDP numbers that hide their failing economies. What cannot be hidden are the hardships that

these survivors and dreamers suffer from the day they leave their homes and embrace hardships they will suffer in their route toward a brighter day. Their dreams can swiftly turn into nightmares that only become visible to us as statistics or on the front cover of local sensationalist newspapers hunting for human tragedies. With these simple yet powerful words we can summarize the aggressions in Mexico that demand urgent responsive actions of compassion:

Description of Aggressions
Constant verbal and physical abuse
Sexual assault, including gang rape
Constant physical and emotional threats
Wrongful seizures of property
Murders never resolved
Kidnappings
Constant bribery
Never-ending pay-offs
Enforced or involuntary disappearance
Destruction of documents
Arbitrary detentions
Ongoing labor exploitation
Extortion
Physical assault
Ongoing sexual harassment
Hate speech
Forced prostitution
Rejected by residents in places of transit
Robbery
Trafficking of children for human organs
Torture
Cruel or degrading treatment
The use of migrants for drug or arms smuggling
Constant xenophobia and/or racism

Main Aggressors and Human Rights Violators of Migrants

Agents of the State Judicial Police
State Public Security
Municipal delegates
Municipal police
Federal Judicial police
Personnel from the INM
Federal Preventive police
Federal Investigation Agency
Members of the Mexican Army
Members of the Navy
Residents of the transit locations
Taxi drivers (bike taxi)
Maras (gangs)
Thieves of the region
Train drivers or guards

The Dark Years of the Calderón Regime (2006–2012)

What happened during the Calderón administration cannot be explained without considering what was left behind during the previous administration of President Fox. The security partnership with the U.S. under the Mérida Initiative deepened the further securitization of migration, which included a re-criminalization of irregular migration and the militarization of borders (Benítez 2011). Under President Calderón, human rights considerations were literally placed on the backburner while he engaged in a "crusade" to destroy the drug cartels, which was not successful and exponentially increased social violence. For irregular migrants, his "crusade" was devastating as human rights abuses and disappearances seemed to have no limits.

The potential dangers regarding migration that were already on the brink of exploding were completely ignored: the kidnappings of migrants in transit that began in the final stages of the Fox era would quickly evolve

into mass kidnappings (CNDH 2011), including unstoppable waves of murders. Migrants in transit from Asia, Africa, as well as Mexican migrants, would be added to the gruesome statistics. Table 11.1 (above) addressing kidnapped migrants that were later rescued by the Federal Police gives a clear idea of the magnitude of this heinous outcome.

Life is in the North

At the end of the Calderón administration, the ongoing processes of migration and transmigration weaved different social fabrics in the geographies where large clusters of migrants converge: the South and Southeastern states of Mexico, its Northern border, and towns along the migrant routes. It is a process accompanied by constant paradoxes that seem irreconcilable. From deplorable abuses of power and human rights violations to unmatched actions of compassion, the dream to reach *el Norte* is unstoppable.

These paradoxes seem to be a constant at Mexico's southern gateway to the U.S. Today, a larger universe of migrants from remote places, with more diverse occupations, age groups, and from a larger spectrum of socioeconomic class, are driven to reach the elusive American Dream. It is a process where the push and pull factors are more complex as social dislocations are affecting more people caught in a political economy that is exacerbating social and economic inequalities. It is a process that demands a multi-institutional and multinational attention (International Crisis Group 2016). At the beginning, international migration responded to economic needs, which in time was nourished by other reasons: family reunification (Fig. 11.1), integration of new generations into the labor market, the prospects of a better life, and women's participation in the labor force. However, when public insecurity deteriorated to the point where states can no longer protect their own citizens, fleeing the country to preserve one's life became the only alternative millions had, including children and minors (Aranzadi 2016).

There seems to be no end to the violence and economic uncertainties that most citizens in the Northern Triangle states of Central America, as well as in many regions in Mexico, suffer. It is therefore an imperative that states work hand in hand with CSOs to develop supportive and inclusive humanitarian and compassionate regimes to protect those who have to cross half a continent to find a place where they can wake up without fear of losing their life or their loved ones.

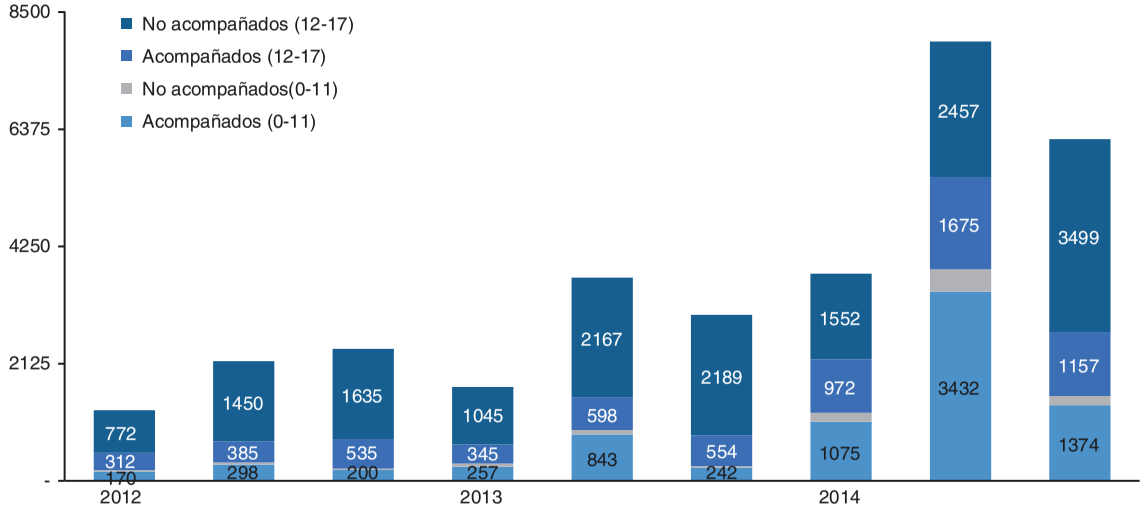

Fig. 11.1 Migrants under age 18 deported by Mexican authorities, according to country of birth and accompaniment situation during the trip, 2012–2014 *Source*: Self-elaboration based on data from statistical bulletins, Ministry of the Interior (SEGOB), for 2012, 2013 and 2014

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CHAPTER 12

Challenges in Building Institutions to Protect Transmigrants' Human Rights: The Mexican Case

Evelyn Cruz

The plight and extensive level of human rights violations faced by irregular migrants in Mexico, including those in transit, have given rise to institutional efforts to provide them with legal instruments and institutional mechanisms to protect them. In addition, migrants, including transmigrants are served by long-standing humanitarian organizations that provide support and advocacy. Despite this support system, abuses against migrants are still rampant. This chapter argues that at the center of this failure lies a top-down and uncoordinated policy-frame from state institutions and programs, which leads to a lack of trust in victims, advocates, and the general public regarding the effectiveness of these institutions and programs. This does not mean that the current institutions should be disbanded. Rather, they need to undergo reforms to be more accessible, transparent, and efficient. This chapter proposes that the best way to redress the gap between the aspirations to protect all migrants and the application of those protections is for the state to ensure all migrants have access to all legal recourses, including direct legal counsel.

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To lay the context of these reforms, the first part of this chapter describes the regulatory and administrative mechanisms at the federal level and their dynamics with state and local institutions as well as non-governmental organizations (NGOs) that assist migrants and transmigrants. In doing so, the picture that emerges is a long-standing and dedicated effort to protect all migrants. As we will see in this chapter, Mexico does not deal with the human rights crisis of irregular migrants and transmigrants alone. International and regional organizations play key roles in the response to such crisis.

Mexico's System of Transmigrant Human Rights Protection

The Constitution of Mexico (C.P.) obliges federal, state, and local authorities to carry out social policies that protect all persons regardless of their immigration status (C.P. art. 102, § B) and Article 11 guarantees freedom of movement to all persons unless otherwise limited by criminal or immigration statutes. Article 30 grants Mexican nationality based on *jus soli* to anyone born on Mexican territory as well as individuals born abroad to Mexican nationals (C.P. tit.1, ch. I, art. 30). Foreigners, defined as individuals who do not qualify for Mexican nationality, enjoy the same human rights as Mexicans (C.P. tit.1, ch. III, art. 33).

In 2011, Mexico's Congress passed a new comprehensive immigration law, which largely codified programs and practices that had been in existence for a number of years. The new law includes important provisions relating to irregular migrants and those in transit (Ley de Migración 2011 arts. 66–76).[1] Article 2 reiterated the country's commitment to human rights and protection of migrants residing or transiting through the Mexican territory. Article 9 prohibits civil servants from refusing to issue marriage, divorce, birth, or death decrees based on immigration status. Article 11 asserts that the "best interest of the child" will be a guiding principle in relation to the treatment of immigrant children. Article 13 provides procedural safeguards such as "know-your-rights" presentations, and Article 14 guarantees access to an interpreter.

Mexico's immigration law provides temporary legal status to foreign nationals, including a "border crossing card" that permits foreign persons to enter Mexico for multiple three-day visits (Ley de Migración 2011 ch.II, art. 52, pt. III). Mexico also has programs like the "border area worker visa," which grants a 1-year work permit to an individual who has employment in the border region (Ley de Migración 2011 ch. II, art. 52, pt. IV).

Mexico also has a temporary humanitarian visa available to crime victims or witnesses (Ley de Migración 2011 ch. II, art. 52, pt. V). Under the terms of the temporary humanitarian visa, a person is allowed to remain in Mexico until the conclusion of proceedings, has the right to enter and exit the country, and has the right to receive work authorization. At the end of proceedings, the person may choose to depart or request another immigration status, including permanent residency if available. The humanitarian visa is also available to asylum seekers, as well as unaccompanied minors. Under the terms of Article 74, authorities must consider the best interest of the child, as the standard guiding principle in issuing humanitarian visas to minors is to provide them with judicial or humanitarian alternatives to repatriation.

Regarding asylum-seekers and refugees, Mexico's criteria are very generous as they provide refugee status to individuals who have been threatened by violence in general, invasion, internal conflict, mass violation of human rights, or other circumstances that have greatly disturbed public order in their country of origin, forcing them to flee to another country (Ley sobre Refugiados, Protección Complementaria y Asilo Político 2011 ch. II, art. 13).

Added to ongoing reforms in immigration laws and policies, the executive branch is required by constitutional mandate to put forth a national development program or *Plan Nacional de Desarrollo* (PND) corresponding to the period of every administration, which is six years. The *Plan Nacional de Desarrollo* 2013–2018 (PND 2013–2018) outlines specific goals to improve society which include the guarantee of the human rights of migrants and refugees, with specific commitments to assist vulnerable populations such as minors, women, crime victims, individuals searching for lost relatives, and the elderly (PND 2013–2018, pp. 96–100).

As a result of the administration's commitments to protect migrants and guarantee their human rights as outlined in the *Plan Nacional de Desarrollo* 2013–2018, Mexico's president announced in 2015 the *Programa Frontera Sur* (Southern Border Migration Program). The program is also supported by the *Centros de Atención Integral al Tránsito Fronterizo* (CAITF) (Centers for the comprehensive care of border transit), which have been added to the customs and border protection stations. CAITFs house representatives of all agencies related to immigration, customs, homeland security, national security, agriculture, and health (Diario Oficial de la Federación 2014).

Unfortunately, the *Programa Frontera Sur* and CAITF have had the opposite impact regarding their commitment to guarantee migrant rights.

According to the Washington Office on Latin America's (WOLA) most comprehensive study on Mexico's Southern border in 2014, these programs have created "belts of control" (Isacson et al. 2014, p. 2). As a result, detentions and deportations have skyrocketed, and the number of crimes and human rights violations committed by authorities against transmigrants has also reached record levels (Isacson et al. 2014).

Migration laws and flows are managed by the *Instituto Nacional de Migración* (INM) (National Institute for Migration), and added to the constitutional rights and those granted by the 2011 Migration Law, all migrants have the right to seek the protections offered by the *Comisión Nacional de Derechos Humanos* (CNDH) (Mexico's national Ombudsman) and its state counterparts. Migrants also have access to the most recent *Ley General de Víctimas* (General Law for Victims), which is a new law to protect victims of crimes and human rights violations. As for migrant children and unaccompanied minors, they can enjoy the protections and services offered by the *Sistema Nacional Para el Desarrollo Integral de la Familia* (DIF) (National System for Integral Family Development) while their cases are being processed. While there are many state programs and agencies that protect migrants, these constitutionally mandated mechanisms are the cornerstone that guarantees the rights of transmigrants, and consequently the focus of the next section of this chapter.

Federal Governmental Agencies Assisting Transmigrants

As mentioned above, the INM is the federal agency in charge of managing and enforcing migration laws and immigration status applications at the border, ports of entry, and within the federal territory. It also creates immigration policies through research and exchanges with stakeholders. The INM is also constitutionally mandated to assist individuals with transit visas. However, many advocates have voiced their concerns that the requirements for these visas are so hard to meet that most migrants in transit end up crossing the country without the proper documentation (CNN México 2012).

Despite the serious setback on issuing sufficient transit visas, the INM has one of the most active humanitarian and compassionate programs under the *Grupos Beta* program. These groups provide assistance to migrants along Mexico's Northern and Southern borders as well as in states close to the Southern border. The *Grupos Beta* units patrol migrant

routes and border regions to provide assistance to migrants in transit who are at risk of abuse, dehydration, starvation, or exposure. They include paramedics, rescue workers, and agents knowledgeable with human rights and domestic protection laws. In addition to providing emergency supplies and medical attention, these units provide transportation to migrant shelters and information on how migrants can assert their rights as well as file legal claims against abuses from local and state authorities. *Grupos Beta* agents, who are not armed, may attempt to persuade transmigrants to self-repatriate by offering them funds for bus tickets or the means to obtain necessary documents to return home. To ensure their humanitarian and compassionate goals, the *Grupos Beta* are not authorized to carry out immigration checks, detentions, or deportations. (INM, n.d)

Regarding the management of refugees and asylum-seekers, the Mexican state created in 1980 the *Comisión Mexicana de Ayuda a Refugiados* (Mexican Commission to Assist Refugees) (COMAR). COMAR is charged with evaluating asylum claims and assisting refugees in Mexico to navigate through society and access social services. One of COMAR's mandates is to distribute within INM detention centers and DIF facilities information about refugee protection and the process to seek asylum. As immigration proceedings in Mexico are administrative and thus carry with them no right to appointed counsel, even in the case of minors, COMAR can grant them legal assistance, though not individualized counsel. While COMAR is mandated to supply informational materials in CAITFs and DIF facilities as well as assist migrants that may require their services, Mexico's national Ombudsman has received multiple complaints regarding a lack of information in CAITFs, a lack of legal assistance, excessive administrative delays in resolving cases, and a lack of sensibility from COMAR's agents (CNDH 2015, p. 2).

As mentioned above, children and unaccompanied minor migrants count on the services and protections of DIF. In 2008, DIF, with support from the United Nations International Children's Emergency Fund (UNICEF), drafted an Integrated Plan to Protect Unaccompanied Migrant Youth (*Plan Integral de Protección Para la Infancia Migrante No Acompañada*). When Mexico's immigration laws were reformed in 2011, the statutes of this protection plan were amended to provide for minor protections akin to those proposed by DIF. As such, any federal and state authorities that come into contact with migrant minors must transfer custody of minors to the INM within two days of contact (Ley de Migración 2011, ch. VII, art. 112). If minors are under 12 years of age they are housed and cared for by DIF

facilities. In situations involving unaccompanied minors between the ages of 12 and 17, the INM has legal custody of them when they are placed in juvenile centers with oversight by personnel from DIF and the Consulates of the country of origin of the minor.

In the juvenile centers, detained minors are provided with the assistance of an *Oficial de Protección a la Infancia* (OPI) (Agent for the protection of minors). OPIs are INM employees whose job is to help minors navigate the legal system by providing them with know-your-rights presentations where they learn about the right to request asylum, the juvenile repatriation program, procedural rights, the civil rights complaint process, and immigration relief. If the minor does not request asylum, the consulate will be notified immediately of his or her presence, and the national Ombudsman will be contacted if the child was a victim of a crime or abuse committed by the authorities (Diario Federal de la Federación 2010).

Mexico provides few remedies to children unwilling to be repatriated. However, minors receive the assistance of OPIs to apply for refugee status or a permanent visa if they are victims of human trafficking or victims or witnesses to an aggravated crime committed in Mexico.

One of the most important instruments that all migrants count on to protect their human rights is the CNDH or Mexico's national Ombudsman. As an autonomous agency charged with investigating human rights by federal agencies and government employees, the CNDH also has a special program to support migrant rights (CNDH—Atención a Migrantes, n.d.). This program monitors, assists, investigates, and issues reports on abuses and violations committed by government agencies as well as the state of migrant shelters, called "albergues," which they visit regularly (CNDH—Atención a Migrantes, n.d). The CNDH and its 32 state counterparts are the designated state agencies for individuals to report human rights violations, to monitor compliance with international human rights treaties, and to publicize such rights to the general public.

Another function of the CNDH is to collect statistics on transmigrant abuses, publish reports, and share them with international organizations, such as the United Nations Commission on Human Rights (UNCHR) and the Inter-American Commission on Human Rights (IACHR), as well as national governmental bodies, such as the INM.

Representatives of the CNDH and its state counterparts visit migration stations, migrant shelters, and places where migrants concentrate or transit to assist transmigrants with filing complaints with the appropriate

authorities. However, prosecution of criminal acts against transmigrants often rests with local authorities, and the power to permit these individuals to remain in the country pending adjudication of their case rests with the INM. Unfortunately, even if the CNDH is able to have the local prosecutor press charges, there is no guarantee that the INM will grant the migrant permission to remain in the country pending adjudication.

In 2013, Mexico adopted the *Ley General de Victimas* to recognize and support the role of victims in the reformed justice system (Ley General de Victimas 2013). This law was an acknowledgment that the Mexican legal system is often inaccessible and opaque to victims of crimes and human right violations. This law established the legal framework for both direct and indirect victims of crimes and human rights violations to play an active role in the investigation and resolution of the crimes committed against them. Pursuant to Constitutional mandate, all migrants are covered under this new law. The law provides concrete actions to guarantee the protection, care, and restitution for wrongs committed against victims. To facilitate the access of victims to support services, the law established the *Registro Nacional de Víctimas* (National Victim Registry). It also promoted the creation of institutions that tend to victims' social and legal needs, including the *Sistema Nacional de Víctimas* (National System for Victims) which supervises all programs related to victims' needs, and the *Comisión Ejecutiva para la Atención de Víctimas* (Executive Commission for the Care of Victims). The law also provides a catalog of victim rights such as the rights to assistance, humanitarian treatment, transparency, expediency, compensation for damages, and involvement in the criminal trial against their aggressors. Further, a fund was established to guarantee compensation for victims (*Fondo de Ayuda, Asistencia y Reparación Integral*) (Comisión Ejecutiva de Atención a Victimas CEAV 2016).

The Role of Local Governments in Migrant Protection

Often prosecutorial jurisdiction for felonies committed against transmigrants lies in state courts. However, in the past couple of years, the southern border states of Campeche, Chiapas, Quintana Roo, and Tabasco are using state Ombudsmen and state prosecutors' offices to create programs to assist migrant victims in state criminal courts. For example, in response to recommendations by the IACHR, all four states have appointed a special prosecutor to handle crimes against migrants called *Fiscalías Especializadas en Delitos Cometidos en Agravio de Migrantes*. In Chiapas, the state ombudsman or

Comisión Estatal de los Derechos Humanos (CEDH-Chiapas) has been training public officials and police that come into contact with transmigrants to understand the vulnerabilities of this population and to better protect their rights. The government of Chiapas also collaborates with federal agencies in identifying transmigrant juvenile victims, connecting them with services, and promoting the use of the state special prosecutor system (Gobierno de Chiapas n.d.).

NGOs Assisting and Advocating for Migrant Protection

Migrants and transmigrants are regularly assisted by a network of CSOs and NGOs that provide shelter, food, as well as medical and legal assistance. These organizations are often the mediator between migrants and the federal or state authorities.

This section focuses on the work of *Sin Fronteras* which is one of hundreds of CSOs and NGOs working under regional and continental collective umbrellas like *El Grupo Articulador Regional del Plan de Acción de Brasil* (GAR-PAB), *La Alianza para las Migraciones en Centroamérica y México* (CAMMINA), and the *Red Regional de Organizaciones Civiles para las Migraciones* (RROCM). These networks assist each other and coordinate their efforts domestically and regionally. Among them, *Sin Fronteras* is one of the most efficient NGOs dealing with the promotion, protection, and defense of human rights of non-citizens in Mexico. They provide direct assistance to migrants, refugees, asylum seekers, stateless persons, and other migrants in need of special protections. They also engage in advocacy and research projects related to migrant and transmigrant human rights. A large bulk of *Sin Fronteras'* work lies in thwarting the abuse of transmigrants and ensuring governmental compliance with national and international human rights principles. *Sin Fronteras* concentrates its programs in four areas: (1) social work, (2) psychological accompaniment, (3) legal issues and documentation, and (4) identity and defense. Its work involves site checks, visual inspection to ensure that policies are followed and that no abuse is taking place, and individual interviews to ensure the same (Sin Fronteras n.d).

Regarding shelters for migrants, Mexico counts on a large network of shelters *or Red de albergues* that are designed to have a local and international impact. This network is made possible by an amalgamated network of compassionate private citizens, NGOs, and the Catholic Church. Acknowledging the number and needs of transmigrants, federal and state agencies fund many shelters.

Despite the varied histories of how each *albergue* was created and funded, they all seek the same goals: To establish a deep sense of empathy with the transmigrants' ordeal and provide, through actions of compassion, relief from their hardships with food, water, clothing, blankets, shelter, and spiritual comfort. Some also provide medical, legal, and psychological assistance. *Albergues* have also developed training programs and written materials to help migrants in transit avoid the perils they encounter in their journey to *el Norte* (the North).

International Actors Engaged in Transmigrant Advocacy in Mexico

Perhaps the most engaged of these actors has been the IACHR, which monitors and reports on the human right conditions within the member states of the Organization of American States (OAS n.d). The Rapporteurship on the Rights of Migrants is an integral component of the IACHR and is headed by one of its seven commissioners. Since 2011, the mandate of the Rapporteurship is to focus on protecting human rights in the context of human mobility (IACHR n.d. (a)). The Rapporteurship engages in activities ranging from monitoring migration issues, promoting human right practices, and engaging with organizations advocating for migration rights. It also works to expand the Inter-American Program for the Protection and Promotion of the Human Rights of Migrants, which was created in 2006 by OAS (OAS 2005). The program envisions robust involvement among the OAS, its member states, and CSOs in establishing minimum human rights protections for migrants in the region (OAS 2005, p. 10).

One of the powers the IACHR relies on is its authority to ask the Inter-American Court of Human Rights (Court) to adopt provisional measures to prevent irreparable harm if human rights of individuals or groups are endangered. Conversely, individuals and organizations lack standing to bring claims before the Court. However, once the Court accepts a case, the victims or their representatives are permitted to present evidence and claim damages. The Court is charged with interpreting the American Convention on Human Rights, and investigating, sanctioning, and monitoring violations of the Convention by the member states. The Court's monitoring powers allow it to periodically request information about the measures states take to comply with the Court's judgment, follow up with interested parties, and hold public hearings on compliance with its judgments. In addition, the

Court like the IACHR has authority to order provisional measures if three requirements are present: extreme gravity, urgency, and the risk of irreparable harm (IACHR n.d. (b)).

As the United Nations agency engaged in children's rights, UNICEF has conducted programs in Mexico for over 60 years. It has a strong record of bringing together federal, state, and local agencies, together with CSOs, to implement programs assisting children. UNICEF's work has been essential in the creation of a juvenile assistance model that has operated for several years in Mexico, as well as the OPI system mentioned above (UNICEF México n.d).

Conclusion

Notwithstanding the diligent work of CSOs, government agencies like the *Grupos Beta*, and regional actors like the IACHR, transmigrants remain an extremely vulnerable population. Mexico's federal and state laws and agencies appear to offer strong instruments and mechanisms to protect the human rights of all migrants. However, there are serious gaps between the aspirations of these instruments and mechanisms and their application. Immigration laws providing humanitarian visas, asylum, and transit visas are under-utilized. According to COMAR, only 3,424 adults and 142 minors applied for asylum in 2015. Of the 2,395 adult cases and 93 juvenile cases adjudicated that year only 940 adults and 44 minors were granted refugee status (COMAR 2015). These numbers pale in comparison with the number of potential beneficiaries identified by CSOs and NGOs. As such it can be surmised that there are serious deficiencies and meaningful attention by the INM and COMAR to those seeking protection from persecution and violence. As to transmigrant victims of crimes and human rights violations, it is difficult to numerically ascertain how successful they have been in obtaining assistance with their claims. In the future, agencies created under the new *Ley General de Victimas* may provide more accurate data.

While quantification may be difficult, the fact that migrants and transmigrants are regularly unable to gain access to immigration relief or see the crimes committed against them prosecuted is well documented. The IACHR conducted an in-depth study of human rights in Mexico in 2015 (IACHR 2015). The IACHR delegation expressed concern over the failure of governmental agencies to safeguard the human rights of migrants and to provide effective means to redress such violations. Further, the delegation recommended the creation of a Special Prosecutor's Office at the federal

level for violent crimes committed against migrants (IACHR 2015). Several states, including the four southern border Mexican states, have instituted said offices; however, their efficacy remains a matter of debate.

A glimmer of efficiency is found in state efforts to provide relief for human rights violations against transmigrants and to pressure the federal government to resolve their cases in a swift manner. For example, the CEDH-Chiapas engages in activities to hold accountable federal, state, and local governments. While these decentralized efforts have positive impacts on human rights protections, not every state has followed Chiapas' lead.

Today there are still deep-rooted problems with institutional indolence, and advocates attempting to assist migrants cannot always do so in an effective way as they lack legal skills and the resources to reach out for legal counsel. It is, therefore, imperative that federal and state governments develop pro-bono legal programs to assist migrants in an irregular situation as they are the most vulnerable population. This is critical given how often migrants are denied access to humanitarian visas or special immigration programs for victims as a result of not having proper legal representation. Today there are successful programs in the U.S. and Europe, such as Pro Bar and The Florence Project, which could serve as models for Mexico's further efforts in closing the gaps between the normative aspirations of its human rights instruments and their applicability.

As Mexico brings to reality the promises of the *Ley General de Victimas* there is a need to continue the legislative process to improve its regulatory frame. Of particular importance is its definition of "serious crime" that is too narrow, and many transmigrants are unable to use this law as it does not include assault, robbery, and extortion, which are the most common crimes committed against them. In enacting the *Ley General de Victimas*, Mexico promised all victims of violent crimes, regardless of their immigration status, prompt and efficient investigation of crimes with full access to due process. The Mexican state can and must deliver on its promise to protect the human rights of everyone within its territory, transmigrants included.

Note

1. Ley de Migración 2011 arts. 66–76. These articles specifically address irregular migrants and transmigrants and include such rights as the right to be informed of charges within 36 hours and the right to receive a know-your-rights presentation.

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CHAPTER 13

Toward a More Compassionate Regional Migration Regime in South America

Juan Artola

For decades South America has experienced a significant migration to the U.S. In 2000, 1.8 million South Americans emigrated to the U.S., while in 2011 the number had increased to 2.7 million, the most numerous from Colombia, Ecuador, Peru, and Brazil. This represented a 46 percent increase;[1] in the same period, Mexico increased by 33.7 percent, Central America by 60 percent, and the Caribbean by 31.5 percent (OI 2012a).

In the past 20 years, South Americans migrated in greater numbers to Europe, particularly Spain and Italy. From the late 1990s until the 2008 global financial crisis, South American migration to Europe quadrupled. In 2011, 3.1 million South Americans were in Europe, of whom more than two million had arrived in the past 15 years. Spain received almost 80 percent (OIM 2012a). Main countries of origin were Bolivia, Brazil, Colombia, Ecuador, and Peru. Flows decreased by 10 percent since the crisis, but they still remained steady.[2]

Contrary to the belief that migration in the Americas is always a South-North phenomenon, in South America there is a significant intra-regional migration, which in 2011 was around two million (OIM 2012a). Traditionally Argentina and Venezuela have been countries of

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destination. Colombia's internal conflict caused an estimated five million displaced persons, many of whom settled in Ecuador and Venezuela (OIM 2012a).

Currently, four countries have become the major recipients of immigration: Argentina (the most important), Brazil, Chile, and increasingly (but in a very small scale) Uruguay. Argentina, whose immigrant population represents 4.5 percent of the total (OIM 2012a), receives mainly Bolivians, Paraguayans, and Peruvians; in previous decades immigrants were mostly Chileans and Uruguayans. Brazil has received mainly Bolivians and Paraguayans.[3] Chile receives Bolivians and Peruvians. There is a large number of Colombian immigrants, with a particularly large number of Colombian students in Argentina, Chile, and Uruguay. Although flows have declined, Bolivia, Colombia, Ecuador, Paraguay, and Peru are still countries of emigration, with Venezuela added in recent years.

Migration policies in the South American region have undergone great changes over the past 15 years, with developments that strive to combine the facilitation of human mobility with the needs for the advancement of human development[4] and economic integration while respecting the rights of migrants.

Visions of Migration in South American Policies

Although there are national particularities and diverse institutional and regulatory frames, migration policies in force in South America[5] share a number of principles. In the first place, they attempt to facilitate the intra-regional mobility of persons within the framework of two major sub-regional integration processes: the Andean Community (CAN) and the Southern Common Market (MERCOSUR). The linkage between migration and regional integration derives from considering migration a social fact with multiple dimensions, causes, and impacts—not just a mere phenomenon determined by economic push-pull factors. As a result, the objective of South American migration policies is to facilitate the regularization of migrants to ensure their legal residence.

Governments in South America have argued that the rights of migrants need to be recognized and promoted as they are considered rights-bearing persons. Therefore, several states in the region define these rights as the centerpiece of their immigration laws and policies. For the full exercise of these rights, states are working toward the social and cultural integration of immigrants in their host country. The regularization of migration is a

necessary condition for their integration, but to be effective it has to be accompanied by policies that guarantee access to basic services and that prevent discrimination, abuse, and exploitation, and to achieve these goals a number of regional and national legal instruments are being developed.

Another common feature among the region's states is to ensure that they maintain their legal and political relation with their citizens abroad. Almost all states have incorporated in their policies their interest to deepen their relationship with their citizens abroad by extending citizen rights and protections beyond state boundaries. This relationship is strengthened by the modernization of consular functions and fostering the creation of well-organized transnational communities abroad.

Finally, almost all countries have organized support systems for the orderly return of their citizens, which saw an increase in the past 15 years and intensified after the 2008 global financial crisis.

Impact on National Policy and Management

The shared principles of CAN and MERCOSUR have pushed states across the region to reform or develop new immigration laws and regulations to promote the orderly regularization of the legal status of new intra-regional flows of migrants. The regularization of the legal status of migrants is particularly important as it ensures immigrants equality of rights and facilitates their employment and social integration.

To harmonize such efforts, almost all South American states have developed special regularization programs. Argentina did so for all nationalities in 1948–1950, 1958, and 1984, and for nationals of neighboring countries in 1958, 1964–1965, 1974, and 1992–1993, and in 2013 the government of Christina Fernández passed an amnesty to regularize the migration status of citizens from the Dominican Republic and Senegal. Brazil also passed an amnesty in 1998, which benefitted some 40,000 foreigners (mainly Argentineans, Bolivians, and Chinese) and the second one in 2009, which benefitted 44,900 people (18,000 Bolivians followed by Chinese and Peruvians). Chile carried out two unprecedented legal regularization processes in 1998 and 2007, with the first benefitting 22,600 immigrants and the second 50,700 migrants (32,400 Peruvians, 5,600 Bolivians, and 1,800 Ecuadorians). Colombia, a country with low immigration, also passed an amnesty in 2008, which benefitted 1,900 migrants and Ecuador approved an amnesty for Peruvians in 2011, which benefitted 1,350 immigrants, and in 2010 a second amnesty for

Haitians. Paraguay approved an amnesty in 2011, which benefitted more than 10,000 people, and finally, Venezuela passed a general amnesty in 2004 and the second one for Peruvians in 2013.

Multilateral agreements to regularize the legal status of migrants are discussed in the relevant sections below. Argentina's implementation of the MERCOSUR Agreement on Residence allowed for the creation of the *Patria Grande* Program, which between 2004 and 2011 granted residency to almost 1.2 million immigrants, of whom 58 percent were Paraguayan, 26 percent Bolivian, and 11 percent Peruvian (OIM 2012b).

Other examples of these policies are the passing and signing into law of new immigration laws in Argentina (passed in 2004 and implemented in 2010), Bolivia (implemented May 2013), and Uruguay (passed in 2008 and implemented in 2009); the ongoing process of legislative reforms in several countries (Brazil, Chile, Ecuador, and Peru and in a more incipient stage in Paraguay); the implementation of laws for the protection of refugees and the prevention and punishment of human trafficking in most countries; the ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (seven South American countries ratified the Convention in the 2000s, while Colombia had already done so in 1995);[6] innovation and improvement made at the institutional level to optimize the management of migration (computerization of points of entry by land or air, facilitation of border traffic, new information systems, improvement of the quality of data of some information sources); the creation of CSO networks that participate in regional migration dialogues with states; concern with the protection and assistance of their nationals abroad through the incorporation of these concerns in new bills and the creation of new agencies that implement outreach programs; greater political participation of citizens abroad by granting them voting rights (approved in Argentina, Bolivia, Paraguay, and Peru and still under discussion in Chile and Uruguay); and the setting-up of national programs across the region to ensure the rights of migrants and combat discrimination and xenophobia.

However, all these immigration laws, regulations, and policies do not arise in a vacuum. On the one hand, we can say that they are the product of a progressive expansion of democracy that from an institutional perspective has contributed to a more positive outlook regarding the scope and application of political and civil rights beyond the traditional notions of sovereignty. In addition, sub-regional integration processes influence today's new immigration approaches and policies.

Developments Within MERCOSUR

The MERCOSUR is a sub-regional economic and political agreement established in March 1991 by the Treaty of Asuncion. Its current members are Argentina, Brazil, Paraguay, Uruguay, and Venezuela, with Bolivia very close to becoming a member and Ecuador in the process of incorporation. Chile, Colombia, and Peru are associated states.

Although progress has been made in the areas of trans-regional trade and investment, the objectives of establishing a common market are far from being met as there are economic asymmetries between its members that need to be resolved. Also, the redefinition of MERCOSUR as a customs union under the 1994 Protocol of Ouro Preto pushed migration issues aside for several years as, contrary to common market custom, unions do not permit the free movement of labor among its members.

Although the movement of natural persons is limited under the 1994 Protocol of Ouro Preto, several side agreements have eased such limitations and ensured many rights to migrant workers including the regularization of the legal status of a large number of migrants. For example, the Multilateral Social Security Agreement (MSSA) signed in 1997 and its ratification by all states in 2005 recognizes the same rights and obligations enjoyed by citizens to migrant workers employed or formerly employed by State Parties. Though progress has been made, its final implementation is still an ongoing process.

In addition to MSSA, the Social and Labor Declaration (DSL) was signed in December 1998, which includes labor right principles and other social rights for migrant workers and their families. Although not binding, several courts have referred to it in resolving labor disputes and several of its principles will likely end up being binding via case law or common law.[7] It is important to note that a revised and expanded DSL was approved in July 2015.

The most significant immigration policy breakthrough occurred in the framework of the Meeting of Ministers of Interior and Justice that in 2002 adopted the MERCOSUR Residence Agreement including Bolivia and Chile. The agreement establishes the following: (a) allows nationals of a member state to reside in another country of the bloc with the simple proof of their nationality; (b) includes natural persons who wish to establish new residence and those who are already residing; (c) is applied irrespective of the migration status of persons; (d) establishes equal treatment between citizens and immigrants regarding civil rights; (e) facilitates the transfer of remittances and family reunification; and (f) ensures the full transmission of rights to the children of immigrants.[8] The agreement also enables State

Parties to grant nationals of member states a 2-year temporary residence, which can become permanent at the end of the 2-year period in accordance with the immigration categories stipulated in their domestic legislation.

The MERCOSUR Residence Agreement set the framework for changes in national immigration policies to facilitate the regularization of the legal status of migrants with the simple proof of their nationality. It is currently incorporated into the immigration legislation of Argentina,[9] Brazil, and Uruguay, and to a lesser extent in Paraguay. Chile has signed it but has not fully implemented it. Under this agreement, broad regularization processes took place in Argentina and Brazil, and more recently, though to a lesser extent, in Paraguay. In June 2011, Ecuador and Peru adhered to the agreement, thus opening the door to adjust their domestic legislation to implement its provisions; with Peru already implementing it. Although a MERCOSUR member since 2012, Venezuela is still adjusting its internal regulations to implement the agreement.

MERCOSUR bodies directly related to immigration are the Working Subgroup No. 10 (SGT-10) for Labor Affairs, Employment, and Social Security,[10] under the Meeting of Ministers of Labor, and the Specialized Forum on Migration (FEM), the latter under the Meeting of Ministers of Interior and Justice. FEM began its activities in 2004 and in addition to its four founding States Parties, it presently includes representatives of Bolivia, Chile, Colombia, Ecuador, Peru, and Venezuela, giving it a de facto South American dimension. Under FEM extensive discussions on potential new regulations have taken place, many of which were subsequently approved by the Meeting of Ministers, although not all had the same degree of effective implementation.[11]

Moving forward with a more compassionate and human rights-based approach, in December 2010, the Action Plan for the MERCOSUR Citizenship Statute was approved. It sets a 10-year plan with specific guidelines for each of the various ministerial bodies and structures. The Plan seeks to implement a set of fundamental rights and benefits related to free movement, equal rights, and equal access to work, health, and education for all nationals of MERCOSUR.

Migration Issues in the Andean Community

In 1968, Bolivia, Chile, Colombia, Ecuador, and Peru signed the Cartagena Agreement, launching the process of integration known as the Andean Pact and in 1997, the CAN was officially established by the Trujillo Protocol.[12]

Today CAN is made up of Bolivia, Colombia, Ecuador, and Peru,[13] with Argentina, Brazil, Chile, Paraguay, and Uruguay as observers. Its highest body is the Andean Presidential Council. There is a General Secretariat, based in Lima, which is responsible for overseeing the implementation of Community Decisions,[14] which supersede national laws.

Migration issues are addressed within three main areas: (a) inter-community movement of Andean nationals; (b) labor migration within CAN; and (c) Andean migration to countries outside CAN. It could be said that there has been significant progress in the first area; with more work needed in the second while the third area has shown a strong momentum toward achieving its goals in a timely fashion. It is important to note that before the formation of CAN, migration issues were already at the forefront of the Andean Pact. For example, the first regulations on labor migration were the 1977 Decisions 116/77 and 113/77. The first created the Andean Labor Migration Instrument (IAML) and the second established the Andean Social Security Instrument (IASS). Both decisions were based on a proposal by the Andean Conference of Ministers of Labor which is still active under CAN. The creation of a community space with an expanded labor market where the free movement of workers would be gradual and orderly, with protective measures for migrants and their families, is the primary goal of IAML. For its implementation and enforcement Labor Migration Offices dependent on Labor Ministries were created. However, to date, only Peru has established such an office.

Following the strong push to increase the movement of people within CAN, in 2000 the Andean Presidential Council stated that "The free movement of people is a goal that will be addressed progressively, starting with the relaxation of national rules."[15] As a response, a new Andean Instrument on Labor Migration was adopted by the Ministers of Labor in 2002. Decision 116 was replaced by Decision 545 and applies to all Andean employees.[16] It includes equal treatment and opportunities for all Andean migrant workers; the right to organize and bargain collectively; protection of the family; the free transfer of funds; the imposition of taxes in the country where the income is generated; access to administrative and judicial bodies for the protection of rights; and access to social security systems and non-discrimination.[17] However, for the full implementation of Decision 545, a set of regulations should be approved, with such approval still in the phase of technical discussion.[18]

The IASS was reaffirmed by Decision 583 and seeks to guarantee to migrant workers the right to receive benefits while residing in another

member country of the CAN, the maintenance of acquired rights, and the continuity of membership among member countries.

Obstacles and Challenges in MERCOSUR and CAN

Past and present developments in MERCOSUR and CAN have created inclusive legal regional frameworks that have triggered deep reforms in national policies and regulations that benefit migrant workers and their families. However, it is important to mention present constraints and shortcomings. There are still legal and regulatory asymmetries that impede the full implementation of the Agreement on Residence of MERCOSUR.[19] Meanwhile, in 2011 the Andean Presidential Council began a process of re-engineering CAN to enable it to cope with current challenges. As Bolivia and Ecuador come closer to MERCOSUR, Colombia and Peru are gravitating toward the U.S. as partners as the Pacific Alliance,[20] unleashing internal tensions with CAN. Although the re-engineering of CAN has concluded, its future as an integration process is uncertain.

Many ministerial decisions are not fully implemented, and national governments are still not carrying out the necessary changes to facilitate migration and the full protection of migrant rights. There are also deeply entrenched administrative and bureaucratic practices that, added to a lack of awareness and proper training of public officials, make the implementation of such directives very difficult. Moreover, countries that receive little immigration tend to focus their efforts more on protecting the rights of their citizens abroad than those of immigrants in their territory.

The principle of national treatment regarding employment and benefits for migrant workers and their families still requires many efforts on the part of governments, together with combating discrimination and abuse by employers and giving attention to social security benefits' portability. Progress in the certification of skills and studies is still insufficient and little attention is given to the intra-regional movement of students and skilled migrants.

Currently, the two sub-regional integration processes are suffering from diplomatic tensions among certain members following political realignments in the region and significant internal political changes in key member states, with Brazil going through a deep political crisis. Moreover, slow economic growth in the two largest economies of the region, Argentina and Brazil, has had negative impacts across the region, forcing an economic impasse in MERCOSUR and hindering progress in key negotiating agendas, including migration.

The South American Conference on Migration

After repeated calls for a United Nations conference dedicated to migration as result of the 1994 International Conference on Population and Development (ICPD), the major-receiving states rejected such calls. As a result, a year later different groups of mainly developing states across geographical regions set up regional consultative processes to define cooperative ways to address specific migration issues, through dialogue and consensus, though with no binding decisions.[21] In the Americas, there are two regional consultative processes: the Regional Conference on Migration or Puebla Process (RCM) in North and Central America, and the South American Conference on Migration or Lima Process (CSM).

The agreement to create the CSM had three basic principles: (1) migration as part of the process of regional integration; (2) the linkage between economic and social development and migration in countries of origin; and (3) ensuring respect for the human rights of migrants regardless of their status. The CSM held its first meeting in 2000. It comprises the 12 South American countries: Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guyana, Paraguay, Peru, Suriname, Uruguay, and Venezuela.[22] The CSM holds annual sessions; national delegations are made up of senior officials from the Ministries of Foreign Affairs and the Migration Offices (or their equivalent) within the Ministries of Interior or Justice.[23]

The 10th CSM (Cochabamba, October 2010) signified a qualitative leap, by approving a Declaration of Migration Principles and Guidelines, designated to set policy guidelines for governments, together with the South American Human Development Plan for Migration (PSDHM) as an action guide for the medium term. Human development of migration has thus been included in the discussions and should be recognized as an important contribution since it defines the concept as the expansion of people's freedom to live wherever they choose without criminalizing their displacements and to seek a better quality of life through migration. Its inclusion has political implications in different areas of social policy, including access to health, education, decent housing, and working conditions.

The final declarations of the latest conferences seem to indicate that the South American states are taking further steps toward a more compassionate regime for migration. The 11th CSM (Brasilia 2011) was called "The Road to South American Citizenship"; the 12th CSM (Santiago 2012) was entitled "Governance of migration in South America from the social, economic and cultural rights of migrants and their families"; the 13th CSM

(Cartagena 2013) emphasized "Migratory regularization as a mechanism to achieve the full exercise of rights of South American migrants and the strengthening of regional integration"; the 14th CSM (Lima 2014) focused on "Migration and inclusion: a challenge for South American integration"; and the main theme of the 15th CSM (Santiago 2015) was "Toward migration governance with justice and equality."

Despite its clear direction toward a human rights-based regime for migration, with strong commitments and policy definitions, the CSM still needs to push harder to ensure their full implementation and the implementation of the PSDHM adopted 6 years ago but still incomplete. Moreover, for an effective implementation of the spirit of the CSM declarations, states require the full participation of CSOs in ensuring that the PSDHM is implemented with the full support of local communities as not to become a hollow plan.

The Union of South American Nations

In May 2008, the Union of South American Nations (UNASUR)[24] was created in Brasilia to replace the South American Community of Nations. The goal of its founding treaty is to further deepen the unity of South American nations and build a regional identity based on their shared history and the principles of multilateralism, the rule of law, and the full respect for human rights and democratic processes.

Two key statements of heads of states of UNASUR (Quito 2009 and Los Cardales 2010) have recognized the construction of a South American citizenship as one of the most important goals in this integration process. The result was Decision No. 8/2012 (2012) that kicked-off the process of building a South American citizenship by prioritizing regional negotiations through an inter-state Working Group (Grupo de Trabajo sobre Ciudadanía Suramericana—GTCS) to develop a roadmap and a concept paper to explore different dimensions for the construction of South American citizenship.

In the 7th Regular Meeting of the Council of Heads of State and Government of UNASUR, which took place in Paramaribo, Suriname (2013), all heads of states reaffirmed the importance to continue the work to construct a South American citizenship as a major goal of UNASUR. A preliminary version of the GTCS concept paper (2014) includes the principle of complementarity in which South American citizenship is an addition to and does not replace the national citizenship, the principles of convergence and gradual process, the goal of transcending

what has been achieved by sub-regional processes, and the importance of the Agreement on Residence for Nationals of MERCOSUR states, plus those from Bolivia and Chile.

The work to define the legal and political boundaries of a South American citizenship is a long-term ongoing process with multiple levels of negotiations involving all UNASUR member states and CSOs. The goal to achieve a South American citizenship is still a priority for the heads of state of UNASUR and has been included as a key agenda in all the Regular Meetings of the Council of Heads of State and Government of UNASUR. The result has been the constant advancement of new rights for all migrants in the region through a more compassionate regime for migration.

Conclusion

Over the past 15 years, South American countries have developed a set of consensus, agreements, policies, and standards that facilitate the free mobility of people within the South American space as well as an orderly regularization of their immigration status. Moreover, South American states are working toward a more efficient inclusion of immigrants in regional and domestic labor markets as they work together to ensure the full respect for their human and labor rights.

This South American vision of inclusion has been forged through the convergence of two sub-regional integration mechanisms, CAN and MERCOSUR, and the CSM. The CSM, in particular, has succeeded in establishing a common agenda and discourse, and developments within UNASUR have given a new impetus within the regional dialogue to materialize, in a foreseeable future, a South American citizenship.

These developments are particularly important at a time when almost all major migrant-receiving countries have securitized and criminalized their migration policies often in detriment of the rights of migrants. These restrictive and punitive policies have triggered anti-immigrant feelings, the return of nativism and xenophobia, and in some cases outright racism. What is unfortunate and deeply concerning is how these anti-immigrant feelings are often manipulated by political parties and exploited for electoral purposes.

From this point of view, it could be said that the "South American vision" establishes and promotes a different logic, one where migration is embraced as a positive phenomenon rather than a problem or a threat. It is a vision that embraces the right to migrate and to ensure the human rights of all migrants throughout their full process of migration. It is a view that

reaffirms regional integration versus concerns over national borders and absolute sovereignty; it is a view that embraces the complementarity of labor markets versus the policies of closed doors.

Despite the advancements made under the "South American vision," its ultimate goals are still far from becoming a reality. There is a charted path but it is not clear of political and economic roadblocks. Moreover, there are still persistent acts of discrimination toward certain migrants and deeply entrenched bureaucratic practices and unchecked abuses of power by state authorities.

Regardless of the present roadblocks, there is a well-founded hope that with a strong political will and a deeper cooperation between states and civil society, added to the progress reached at regional levels, the nations of South America will succeed in building a better future for the region and its people as they forge a common identity based on a more compassionate and human rights based regime for migration.

Notes

1. In this period Venezuelans almost doubled from 96,000 to 189,000 (OIM 2012a).
2. Since the 2008 crisis, many South Americans migrated to Germany and the Nordic countries, although many were forced to return to their countries of origin (OIM 2012a).
3. In 2010, Brazil created a humanitarian visa for Haitians. In 2014, there were about 70,000 Haitians in Brazil, more than half of them residents. Many Haitians try to reach Brazil through Peru and Bolivia, facing problems with the immigration authorities (OIM 2014).
4. Human development is a concept introduced by the United Nations Development Program. It is an approach that focuses on people, and their opportunities and choices, rather than just on economic growth as the main factor for development. See http://hdr.undp.org/en/humandev.
5. In this chapter, the term South America excludes Guyana and Suriname, because although they are part of the South American region and the UNASUR, the author does not know in detail the evolution of their migration policies.
6. Brazil, Guyana, and Suriname are the only South American countries that have not yet ratified the Convention.
7. Article 1 of the DSL says: "All workers are guaranteed effective equality of rights, opportunity and treatment in employment and occupation, without discrimination or exclusion based on race, national origin, color, gender or

sexual orientation, age, creed, political or trade union opinion, ideology, economic status or any other social or family status, in accordance with existing laws" (Ventura and Perotti 2009).

8. Parliamentary procedures and internal bureaucracy delayed its entry into force, which occurred in 2009 after ratification by Paraguay, but other countries began implementation long before this date.
9. Argentina's Migration Act of 2004 and its Regulation in 2010 are considered the most complete and emblematic implementation of the MERCOSUR Agreement on Residence (OIM 2012b).
10. The SGT-10 is a tripartite body with representation from governments, workers, and employers, which provides for some particular features (and limitations). It is unique to the five State Parties of MERCOSUR. It has worked since 1995 in policy assessment and since 2003 has discussed free movement of labor and promotion of workers' rights. In June 2013 the Plan to Facilitate the Free Movement of Workers was approved, still in a very preliminary stage of implementation.
11. www.migraciones.gov.ar/foro_migratorio.
12. For details of CAN and its operation see: www.comunidadandina.org.
13. Chile withdrew from the Andean Group during the dictatorship of General Pinochet, due to incompatibilities with the Chilean economic policy. In September 2006 the country was accepted as an associate member of the CAN. Venezuela withdrew in 2006 due to disagreement with the Colombia-US FTA being discussed.
14. It is important to note that ministerial decisions are binding to the parties that agree to such decision.
15. Lima Declaration, XII Andean Presidential Council, Lima, June 2000.
16. Classified in four categories: individually moving workers, company workers, seasonal workers, and border workers.
17. XI Meeting of the Ministers of Foreign Relations of the Andean Community, Decision 545, 3–5.
18. Since 2010, Peru, invoking the principle of direct applicability, unilaterally implemented Decision 545 with a unique regulation. In 2012, workshops for other countries to familiarize themselves with and replicate the Peruvian experience were organized, but the process was affected by the re-engineering of CAN.
19. It should be mentioned that efforts to facilitate migration and access to residence and work so far target only South American nationals but do not include nationals from other regions.
20. A trade partnership which includes those two countries plus Mexico and Chile.
21. Thirteen regional consultative processes on migration have been established to date; only the Caribbean, Central Africa, and the Middle East are not involved in these processes.

22. Active participation of Suriname has been limited and more so that of Guyana, which has occasionally been represented by Suriname.
23. The CSM is headed by a Presidency Pro Tempore from the host country of each conference. A Technical Secretariat to support the PPT is in charge of IOM.
24. Composed of Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guyana, Paraguay, Peru, Suriname, Uruguay, and Venezuela.

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CHAPTER 14

Envisioning Compassionate Migration: From Canada to Desert Trails and the Cities in Between

Steven W. Bender

The previous chapters established the need for compassionate migration policy, set the context of how and why it has not occurred in the U.S., and articulated the tragic human costs and other consequences within and beyond the U.S. from ongoing failures to protect human rights and promote human dignity. Chapters 15–19 take up the vexing questions of how and in which venues to enact and implement compassionate migration, and from where the push for it might or must come. One source and strategy—operationalizing existing international human rights law—has already been introduced. Compassionate migration receives further strategic and critical attention here. The authors in Chapters 15–19 provide a complex, humanizing approach to the promise and practicalities of compassionate migration policy, as well as consider linkages among governments, CSOs, and individuals through secular and religious ethical frameworks that resonate with international human rights law and the basics of compassionate action. Perhaps most importantly, the authors take us to sites of one-on-one encounter in recognition of common humanity—extending from the migrant trails of the Sonoran Desert (Chapter 18) to celebratory community

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dinners in the once anti-immigrant legal hotbed of Hazleton, Pennsylvania (Chapter 16). Chapter 19 concludes the volume by supplying a blueprint toward compassionate local or regional practices emanating from CSOs or civic initiative.

Notably, Chapters 15–19 look north to Canada for a comparative perspective (Chapter 15) of another "nation of immigrants" and its insights on fostering compassionate migration policies. The focus of many previous chapters has been the plight of undocumented immigrants, both economic and particularly survival migrants, especially those already inside or headed to the U.S. Although the Canadian comparative chapter concentrates on economic migrants lawfully admitted rather than on survival migrants specifically or undocumented entrants generally, its lessons of a favorable and legally reinforced culture of immigrant welcome are relevant for U.S. federal migration policy that must ease stingy admission ceilings for documented migration. After decades of securitization emphasis in the borderlands and beyond, the U.S. is at a policy crossroads of continuing to accelerate migration enforcement or instead moving toward more compassionate policy to open its gates to additional entry of both economic and survival migrants, and their families. This avenue toward compassion would start with offering a pathway to regularized status and eventually citizenship to the millions of undocumented migrants living and working in the shadows of U.S. cities and towns and, as detailed in Chapter 19, expand toward reducing the barriers to future migrant entry, such as by a return to the more welcoming pre-1965 Western Hemisphere exemption from per-country migration limits that artificially staunch migration from our Latin American neighbors who have consistently served U.S. labor needs. Alternatively, expanding U.S. admission allowances consistent with labor demand, family unifications, and the needs of desperate survival migrants seeking asylum or refugee status relieves much of the suffering and peril of the migrant journey, so long as the U.S. does not export its repressive migration enforcement southward to stop the arrival of migrants in the first instance, and so long as U.S. cities and towns develop and implement welcoming policies to integrate migrants and their families into their communities as Chapter 16 details.

Equal to the task of determining the likely and appropriate venues of enacting and implementing compassionate policy are the questions of from where and how will compassion toward migrants emerge within the U.S., which is dominated by increasingly rancorous attacks on the humanity of

migrants, some of them detailed by John Shuford in Chapter 16. In Chapter 17, Maurice Hamington examines the ethical readiness of a society to welcome and care for migrants. He posits that merely changing immigration laws and claiming rights for migrants, while important, is incomplete without having a society prepared to care for their humanity. Rather, human rights unaccompanied by community support are hollow rights. In that vein, Shuford's chapter explores the roots of "compassion" as a term and concept and situates the reader in the communities where empathy toward migrants is forged through the celebration of shared and diverse values, identities, and experiences.

Finally, this part completes the search for compassion within the geography of physical space and the human spirit by walking the migrant desert trails. As Rebecca Fowler details in Chapter 18, desert humanitarian organizations such as Humane Borders, the Tucson Samaritans, and No More Deaths, inspired by the philosophical and theological traditions of the Sanctuary Movement, cultivate compassionate migration by working to bring unauthorized migrants, the discursive systems that dehumanize them, and the inhumane conditions of their migration, out of the shadows. If compassion is to begin in the hearts and minds of those who come into contact with desperate migrants, then compassion blooms in the borderlands desert geography that Fowler describes. Whether U.S. cities and towns will embrace this campaign and spirit of compassion, spreading to the U.S. states and ultimately federal policy, is one of the questions of our time.

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CHAPTER 15

Is Canada a Model for Compassionate Migration Policy?

Sasha Baglay

Canada is known as a nation of immigrants. The population is generally supportive of immigration, and multiculturalism is seen as one of the country's most important symbols (Environics 2015). On an annual basis, the country welcomes over a quarter of a million newcomers from some 200 countries (IRCC 2014a) through economic, family reunification, and refugee streams. But does this mean that Canada is a model of compassionate migration? This chapter engages this question in the context of Canada's changing approach to the selection of economic immigrants.

Immigration Regulation in Canada: An Overview

Under the Constitution Act, 1867, immigration is a matter of shared federal-provincial jurisdiction. The federal government has the power to regulate immigration into the whole of Canada and provinces, in relation to their respective territories. However, in case of a conflict, federal law prevails.

For much of the twentieth century, provinces showed little interest in exercising their powers (and the federal government equally considered provincial involvement unnecessary (Vineberg 1987, pp. 305–06)), making immigration regulation de facto a federal endeavor. However, since the

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1960s one observes the development first of asymmetrical immigration federalism (as Quebec seeks greater say in these matters) and since the 1990s, the rest of the provinces follow suit. Quebec considered provincial control over immigration to be instrumental to maintaining its distinctiveness within Canada: it allowed attracting and selecting persons who spoke French and encouraging acquisition of French by newcomers (Rocher et al. 2007). During the 1970s–1990s, a series of agreements with the federal government specified the contours of Quebec's role in selection, reception, and integration of newcomers destined to the province. Subsequently, other provinces sought a role in immigrant selection but for reasons different from those of Quebec. They did not relate to subnational identity politics, but were motivated largely by economic and demographic needs. The federal program, which focused exclusively on skilled workers, was unable to fulfill the needs of some provinces in trades or semi-skilled labor. Moreover, as newcomers tended to settle in Quebec, Ontario, and British Columbia, some provinces did not receive sufficient numbers of immigrants generally. These needs prompted the development of Provincial Nominee Programs (PNPs), which allowed provinces to select applicants with skills in local demand and nominate them for immigration. PNPs are narrower in scope than the Quebec program and only allow for provincial role in selection of economic immigrants (in contrast, Quebec also has full responsibility over settlement and integration). Thus, unlike in the U.S., Canada's immigration federalism was driven by provinces' desire to attract immigrants rather than to keep them out; the very fragmentation of immigration powers occurs in relation to a different aspect of the immigration process—immigrant selection—rather than enforcement.

Currently, Canada's immigration system represents a complex set of federal/provincial programs and interactions. The overall immigration framework is prescribed by federal legislation: the Immigration and Refugee Protection Act (IRPA). An individual can be admitted to permanent residence under economic, family, or refugee class. The federal department of Immigration Refugees and Citizenship Canada (IRCC) is responsible for overall policy development, inadmissibility[1] screening, and decisions on all temporary and most permanent resident applications. Border control and enforcement is centralized and carried out by the federal Canada Border Services Agency. Settlement services are funded by the federal government and are delivered through local IRCC offices (except for Quebec) and nongovernmental organizations.[2] Immigrant integration is also affected by multiple regimes under

provincial jurisdiction such as education, legal aid, social assistance, labor and employment, and workplace safety legislation.

Canada's immigration federalism is most prominent in the area of immigrant selection, particularly of the economic class (see Table 15.1). This class is comprised of federally established streams whereby criteria are set by federal legislation and all processing is done by the IRCC and provincial programs with criteria set by provinces and processing done by both federal and provincial authorities. However, even for PNP applicants, the IRCC conducts inadmissibility checks and makes ultimate decisions on admission. Family and refugee classes are federally regulated and processed, except for those destined for Quebec (Quebec's approval is also required).

Canada is widely known as a country of immigrants (in 2011, more than 20 percent of the population was foreign born (Statistics Canada n.d.)) and can be considered more welcoming to immigrants than some other destinations. Initially viewed as a part of the strategy to develop a national economy post-Confederation (Gagnon and Iacovino 2007, p. 84), immigration has become a defining feature of the nation (Reitz 1994; Smith 1993). Over the past decade, Canada admitted, on average, a quarter of a million immigrants annually (IRCC 2014a; Table 15.2) (or about 0.8 percent of its population). The economic class constitutes the largest share of admissions (60–63 percent) followed by family (25 percent) and refugees (8–9 percent).

Opinion polls consistently show strong (albeit with some reservations)[3] support for immigration and multiculturalism (Soroka and Roberton 2010). Over the past decade, the majority maintained that immigrants were good for the economy (Environics 2015, 2012, 2010, 2006; Harris Decima 2014; CBC 2014) and disagreed that immigration levels were too high (Environics 2015, 2012, 2010, 2006). Overall, in the 2000s, public opinion on immigration is more positive than it was in the 1980s and 1990s (Soroka and Roberton 2010). In a recent survey of 24 countries, Canadians ranked third in their agreement that immigration had a positive impact on the country and fourth in that it had a positive impact on the economy—ahead of Australia, the U.S., and Europe (Ipsos 2015).

The above suggests the existence of an environment favorable to the development of compassionate migration policies. However, public opinion polls and the "nation of immigrants" mythology are only part of the context. The Conservative government's move toward a more business-like "just-in-time" selection model and increased provincial involvement

Table 15.1 Immigration streams

	Subcategories	*Basic selection criteria*	*Processing and decision-making*
Permanent migration			
Economic class	Federal programs: • Federal skilled workers (FSW) • Canadian Experience Class (CEC) • Federal skilled tradespersons (FST) • Business class • Caregivers	• FSW, CEC, FST: work experience in skilled occupation or trade; proficiency in English or French (additional criteria for FSW) • Business class: capital or secured investment; proficiency in English or French • Applicants not inadmissible	Federal: IRCC
	Quebec economic class: • Skilled workers • Business class	• Selection criteria prescribed by Quebec (points system for skilled workers; business experience, capital, knowledge of French for business class) • Applicants not inadmissible	• Provincial: whether applicant meets provincial selection criteria • Federal: inadmissibility screening and ultimate decision on admission
	Provincial nominees (other than Quebec): • Workers • International students • Business people • Strategic recruitment	Streams and criteria vary by province	• Provincial: whether applicant meets provincial selection criteria • Federal: inadmissibility screening and ultimate decision on admission

Family class	• Spouses, common-law and conjugal partners (including same-sex) • Dependent children • Parents • Grandparents • Orphaned siblings • One surviving relative	• Presence of an eligible sponsor (for Quebec—distinct provincial conditions) • Presence of an eligible family relationship between sponsor and sponsored • Sponsored person is not inadmissible	Federal: IRCC (for Quebec—sponsorship approval by provincial ministry of immigration)
Refugee class	• Inland refugee claimants • Applicants resettled from overseas	• Persecution (definition under the *Refugee Convention*) • Risk of torture • Risk to life	Federal: • Immigration and Refugee Board - decision on whether protection should be granted • IRCC—decision on permanent residence (for Quebec—provincial approval also required)
Temporary migration			
Temporary foreign worker program	• High-wage workers (skilled) • Low-wage workers (usually semi- and low-skilled but can also include some skilled occupations) • Seasonal Agricultural Worker Program • Caregiver program	• Job offer • Positive labor market impact assessment • Applicant not inadmissible	Federal: IRCC

Table 15.2 Permanent residents by category 1996–2014

Category	*1996*	*1997*	*1998*	*1999*	*2000*	*2001*	*2002*	*2003*	*2004*	*2005*
Economic Immigrants	125,370	128,351	97,911	109,255	136,299	155,719	137,861	121,047	133,745	156,310
Family class	68,359	59,979	50,898	55,277	60,612	66,795	62,304	65,129	62,260	63,352
Refugees	28,478	24,308	22,842	24,398	30,092	27,919	25,124	25,984	32,687	35,768
Total permanent residents	226,071	216,036	174,195	189,950	227,455	250,636	229,049	221,349	235,822	262,242
Category	*2006*	*2007*	*2008*	*2009*	*2010*	*2011*	*2012*	*2013*	*2014*	
Economic Immigrants	138,252	131,244	149,066	153,489	186,915	156,114	160,795	148,154	165,088	
Family class	70,515	66,239	65,584	65,208	60,225	56,453	65,012	81,843	66,659	
Refugees	32,499	27,954	21,859	22,849	24,697	27,873	23,079	23,831	23,285	
Total permanent residents	251,640	236,753	247,244	252,170	280,687	248,747	257,903	259,023	260,404	

Source: IRCC 2014a

in immigrant selection created new dynamics and gave rise to new questions about the nature of Canada's immigration policies.

Changing Discourses and Policies (2008–2015)

Since 2008, many aspects of Canada's immigration, refugee, and citizenship laws and policies have undergone significant changes. This period falls during the Conservative Party's rule under the leadership of Stephen Harper (first as a minority government and then as a majority from May 2011 to October 2015). In broad brushstrokes, the policies of the Harper government can be characterized as follows: (1) emphasis on neoliberal objectives; (2) support for traditional values and a specific moral order; (3) law and order agenda; and (4) centralization of power, limited transparency and consultation (McKercher and Sarson 2016; Doern and Stoney 2015; Tonon and Raney 2013; Snow and Moffitt 2012). Having branded itself as a "strong steward of Canada's economy" (McKercher and Sarson 2016, p. 353) the government advocated sound financial management; spending controls; a balanced budget, while keeping taxes low; and job creation and growth (which was linked to the establishment of a "fast and flexible economic immigration system") (IRCC 2012a; Tonon and Raney 2013). Fiscal austerity measures resulted in cuts to various programs, many of them undermining equality-seeking projects (Brodie 2008; Bashevkin 2012; Findlay 2015). At the same time, the government emphasized promotion of personal responsibility, discipline, hard work, and self-reliance (Snow and Moffitt 2012). The latter message was reflected even in a revised citizenship guide (Tonon and Raney 2013). Concerted effort was made to "reshape the public symbols and representations of Canadian history, citizenship, and identity" (Abu-Laban 2014; see also Smith 2012). The new image of Canada was one linked to Britishness, monarchy, and a strong military power (Tonon and Raney 2013). In the area of foreign policy, Canada pursued "economic diplomacy" focused on relations deemed to bring most economic or commercial benefits (McKercher and Sarson 2016). While advancing the trade-first approach, Canada regressed from its traditional leadership role in the area of human rights, foreign aid, and active participation in the UN (Amnesty International 2012; Clark 2013, p. 5; McKercher and Sarson 2016). Domestically, the government positioned itself as a "moral crusader" for Canada's traditional values and protection of the safety and security of Canadians from external and internal threats (Prince 2015).

The government tended to have a contentious relationship with the CSOs and academics who expressed concern about the directions of government policies. Such dissenting voices were often accused of doing a disservice to Canada (Snow and Moffitt 2012; Kenney 2012b).

Government Discourse on Immigration

The neoconservative agenda was prominently featured in the immigration discourse. First, in line with its image as the steward of the economy, the government focused on creating a "fast and flexible economic immigration system" (IRCC 2012a). Economic and labor force needs were made the central focus of Canada's immigration efforts, targeting selection of young "best and the brightest" migrants who had the highest potential to quickly integrate in the labor market and become self-sufficient. Second, reflecting the undertones of the law and order agenda, the government created a moral panic that Canada's generous immigration system is being abused and measures must be taken to protect it.

While maintaining the usual references to nation-building and immigration, the speeches of immigration ministers tended to focus mostly on the economic class and its role in growth and prosperity: "[Immigration]...is about nation-building, in that the future of our country depends on getting the economic mix right, economic policies right, the skills set of our workforce right" (Alexander 2013a, see also Kenney 2012a; Alexander 2015a, 2015b). Immigrants' contribution to Canada was framed mostly in terms of their participation in the labor force. In contrast, non-economic immigrants such as elderly sponsored relatives were presented as burdensome and unproductive: "Why should we limit the number of parents and grandparents sponsored to Canada? Well, let me state the obvious reason. Elderly people place a much greater burden on the public health care system, a public health care system that is already in crisis..." (Kenney 2013a).

Immigration ministers repeatedly mentioned "billions" of people wishing to immigrate to Canada (Kenney 2013b; Alexander 2013a, 2013b), but stressed that spaces for admission were limited. Minister Kenney likened Immigration Canada to an airline that has only a quarter of a million available seats in its inventory (Kenney 2013b). Further, as emphasized by a subsequent immigration minister, "we need to *select* immigrants, not just wait for whoever may decide to apply, to join the queue, to join the inventory of applications" (Alexander 2013b). Most

recently, this selection has been improved through the Express Entry—a "just-in-time fast and flexible system" for application management (Kenney 2013b, 2012a) (see discussion below). While portraying Canada as a wildly attractive destination, the Conservative government also created a sense that the country's generous immigration system was abused: marriages of convenience, fraudulent citizenship applications, bogus refugee claims, crooked immigration consultants, and foreign criminals evading removal. A range of legislative and regulatory changes sought to protect the system—conditional permanent residence for sponsored spouses; faster removal of inadmissible persons; fast-tracking of refugee claims from "safe" countries; reduction of healthcare for refugee claimants and refugees; increased requirements for naturalization and new citizenship revocation grounds—just to name a few. While no allegations of abuse were made in relation to economic immigrants, the above government rhetoric created an environment not conducive to the discussion and development of compassionate policies. In fact, many advocates believed that the Conservative government's measures increased vulnerability of migrants and fueled negative sentiments against them (Bhuyan et al. 2014; Goldring and Landolt 2013; Faraday 2016).

Interestingly, the overall public support for immigration has not changed much since 2012 and even somewhat increased (Environics 2015). However, government rhetoric seemed to shift public opinion in relation to refugees and immigrant criminality. A spike in concerns about "bogus" refugees coincided with the 2010 "reform" to address alleged abuse of the refugee system. In 2010, 59 percent of respondents agreed that the majority of refugee claims were not legitimate (Environics 2010), but by 2015, this number decreased to 47 percent (Environics 2015). Since 2008, the public also feels more confident that the government is doing a good job keeping "foreign criminals" out of the country (Environics 2015, 2010)—coinciding with government's tough responses to "boat" arrivals, introduction of increased penalties for human smuggling, and streamlined removal of immigrants with a criminal record.

Federal Changes to the Economic Stream

The economic stream is comprised of federal and provincial programs. Federal programs include: FSW, CEC, FST, businesspeople, and caregivers. Since the 1960s, FSW has been the main avenue for economic immigration to Canada. However, only applicants in occupations classified

as "skilled" (i.e., managerial and those requiring a university or a college degree or apprenticeship training (Government of Canada n.d.)) are eligible. Selection is based on a points system, which considers human capital factors—age, education, work experience, language proficiency, arranged employment, and adaptability—as predictors of applicants' ability to adjust to the ever-changing labor market. Nevertheless, recent studies questioned the success of the model, as economic outcomes of recent immigrants were lower than of their predecessors (Picot and Hou 2003; Picot and Sweetman 2005; Reitz 2007). In addition, the system accumulated a significant FSW application backlog: in 2008, it stood at 640,000 (IRCC 2012a) and processing could take as long as seven or eight years. This raised concerns about high attrition rates and the lack of connection between applicants' skills and current labor market needs. Coupled with a long-standing concern that applicants with advanced credentials were often unable to find jobs in their occupations (the proverbial "PhDs driving taxis"), Canada faced very real challenges in immigrant selection.

The Conservative government implemented a range of measures to create a new "fast, flexible, just in time immigration system" that would be more responsive to the labor market needs (IRCC 2012a). For the purpose of our discussion, only four key developments will be highlighted. First, language proficiency, job offers, and Canadian work experience were given more weight—under the points system and otherwise. A new CEC steam established in 2008 allowed international students and foreign workers to transition to permanent residence as long as they demonstrated one year of skilled work experience in Canada and language proficiency. CEC was touted as a key element of the fast, flexible, and responsive economic immigration system (IRCC 2012b).

Second, IRCC undertook interventionist application management by imposing annual caps, eligibility requirements, and pausing or cancelling some immigration programs. This was achieved through the new power of the IRCC Minister to issue instructions to immigration officers. Since 2008, only three major changes in the economicis class happened through regulatory amendments; others were made through 18 Ministerial Instructions (MI). The MIs had fundamental impact on applicants' access to immigration. For example, in the past, all individuals with experience in a skilled occupation could apply, but as of 2008, access was limited to selected groups of skilled workers. Eligible categories changed several times, but usually included persons with arranged employment or with occupations in demand. Overall, during 2008–2015, only applicants with job offers from Canadian employers had steady access to

FSW. In 2010, IRCC started imposing annual caps on FSW, which ranged from 20,000 in 2010 to 5,000 in 2013 with an increase to 25,000 in 2014. CEC was also subject to caps: 12,000 in 2013 and 8,000 in 2014.

Third, in 2012, the government took an unprecedented step of terminating FSW applications that were made before February 27, 2008. Some 280,000 persons were affected (IRCC n.d(a)) with over 90 percent of the terminated files originating in Africa, the Middle East, Asia, and the Pacific (Tabingo 2014). In 2014, pending investor and entrepreneur applications were terminated affecting 65,000 applicants (most of them from China) (Canadian Press 2014). Despite the potentially dire consequences for applicants, both the termination of applications and interventionist application management were deemed necessary to pave the way for the "faster and more flexible economic immigration system" (IRCC 2012c).

Fourth, the application process was made competitive. In 2015, IRCC introduced a new application management system for FSW, CEC and FST—Express Entry—a "just-in-time system that recruits people with the right skills to meet Canada's labour market needs" (IRCC 2012a). First, applicants fill out an online "expression of interest" to immigrate to Canada. On the basis of set factors, they are assigned a score and are ranked against other applicants in the pool. Out of a possible 1,200 points, 600 can be awarded for a job offer alone; the remaining 600 points can be scored on a combination of applicant's education, language proficiency, age, and work experience. IRCC conducts periodic draws from the pool: applicants with the highest ranking are invited to apply for permanent residency. The cutoff score at initial rounds was high—near 800s—and only persons with job offers made the cut. However, it subsequently decreased to 450–489 (IRCC 2015).

Unlike in the past, applicants are no longer evaluated on the basis of their qualifications alone, without comparison to other applicants. Previously, as long as the applicant met the basic requirements, he/she would likely be approved for immigration. Currently, merely meeting the requirements may no longer be sufficient: applicants compete with each other and only those with the highest scores will make it. It is harder to predict one's chances of success as much depends on the strength of the pool.

Provincial Nominee Programs

By 2007, all provinces and two territories established PNPs. These programs are based on federal-provincial agreements that outline the scope of provincial responsibility for selection of economic immigrants destined for

a given province. Initially, PNPs were intended as niche, small-scale programs, which complemented federal streams: only several hundred nominations per year were expected. However, they gradually became major sources of economic immigrants: from approximately 500 (or 0.9 percent of the economic stream) in 1999 to some 47,000 (or 18 percent) in 2014 (IRCC 2014a). For 2015, the admission target for provincial nominees was almost the same as for FSW: 46,000–48,000 (vs 47,000–51,000 for FSW) (IRCC 2014b).

In most cases, provinces were given much latitude in establishing their nominee criteria and streams. As a result, by 2009, there were some 50 streams under various PNPs (Auditor General of Canada 2009). All provinces usually have streams for skilled workers, international graduates, and businesspeople. PNPs are largely econocentric, prioritizing either specific occupations or persons with job offers or local work experience (Dobrowolsky and Ramos 2014). However, some provinces that sought population growth also allowed nominations based on non-economic indicators such as family or community support. For example, Ontario, which already receives a large share of immigrants through federal programs, has a small PNP (under 1,000 nominations a year between 2007 and 2012, although the target was gradually increased to 5,500 in 2016 (Government of Ontario 2016)), and closely mirrors the federal focus on skilled workers. In contrast, Manitoba, which was unable to secure sufficient immigrant arrivals through federal programs, made PNP a key recruitment tool. It allowed for nomination in all occupations and attracted between 9,000 and 12,000 nominees in 2012–2014 or 68–75 percent of all newcomers to the province (Government of Manitoba 2014).

In the past few years, the federal government became concerned about unconstrained growth of PNPs and sought to impose some baseline requirements on them. For example, PNP agreements that were re-negotiated after 2012 provide for federal approval of provincial streams and criteria; specify that non-economic factors (such as family or community ties) cannot be used for nomination; and prescribe factors for selection (job offer, language ability, work experience, and education). This is likely to create more convergence in the selection approaches of federal and provincial programs, keeping the focus on candidates with more advanced credentials. In the past, some provinces recognized the importance of family support for successful economic establishment and allowed applicants with somewhat weaker qualifications to get a nomination as long as they could show the

existence of such support. Under new agreements, this will no longer be possible and, thus, may result in shrinking of immigration opportunities for some applicants.

Compassionate Canada?

Canada is often considered a success story of immigration. Nevertheless, its policies need frequent adjustment and re-evaluation in light of the changing domestic and international environment. From the Conservative government's perspective, application backlogs and insufficient responsiveness to the labor market needs were the major impediments to Canada's ability to reap most economic benefits from immigration. But did the strong neoliberal agenda leave any room for a compassionate approach?

As defined in this volume's introduction, compassionate migration policies seek to prevent dehumanization of migration and promote human dignity and social justice. In the context of economic immigration, the presence/absence of these values can be detected using the following markers: definition of a "desirable" immigrant; accessibility of immigration options; tone of government discourse on immigration; and transparency of policy-making.

Definition of a "Desirable" Immigrant

Canada traditionally defined a "desirable" economic immigrant as a skilled worker, that is, one in a managerial occupation or an occupation requiring advanced post-secondary education. In 2013, the definition was slightly expanded by allowing for immigration of skilled tradespersons. Some PNPs, in a piecemeal fashion, have further expanded the notion of desirability through nomination of semi- and low-skilled workers. However, such nominations are available only for selected occupations, reflecting current labor market needs rather than a principled approach, which transcends the low/high-skilled dichotomy.

Throughout history and to a large extent today, workers in semi- or low-skilled occupations did not have an opportunity for independent immigration to Canada. For example, the Seasonable Agricultural Worker Program has been in place since the 1960s to address the continuous labor shortage in this area. In the past five years, more than 35,000 agricultural workers came to Canada annually (IRCC 2014a),

many of them repeatedly year after year. They clearly are essential to the economy, but are not considered "desirable" candidates for permanent admission. Yet, it is exactly these workers that are usually most in need of permanent resident status to reduce their vulnerability to abuse and exploitation (stemming from temporary and employer-dependent status) in Canada or to improve their overall well-being by allowing them to pursue a new life in Canada. The question of transition to permanent residence is becoming even more compelling in light of the dramatic growth of the temporary foreign worker program: from some 50,000 in 2005 to nearly 110,000 new admissions in 2014 with a 10-fold increase in lower-skilled occupations from 4,000 in 2005 to 41,000 new admissions in 2014[4] (IRCC 2014a). In 2014, the overall population of temporary foreign workers stood at 567,977 (Faraday 2016, p. 5).

Accessibility of Immigration Options

Since 2008, nearly all streams under the economic class have been subject to changes: new selection or eligibility requirements, annual caps, and abolished programs. Immigration to Canada became a moving target: immigration opportunities that existed in the past may no longer be available in the future, although new opportunities could emerge as well. Although Express Entry brought some stability to the selection requirements, it did not eliminate the uncertainty about one's chances to obtain permanent residence: in this lottery-like system much depends on the strength of the pool.

With the establishment of new streams such as CEC, FST, and PNPs, the number of immigration channels has increased, but they did not necessarily improve the overall accessibility of the system. First, the programs show preference for candidates with arranged employment or Canadian work experience. Effectively, successful economic immigration is becoming a two-step process: first, an individual is admitted as a foreign student or worker and then can transition to permanent residence. In fact, 78 percent of applicants approved through Express Entry were already in Canada (IRCC 2015). Second, the increased competition among applicants under the Express Entry may create additional barriers for less advantaged applicants. Third, the costs of immigration likely increased. The more complex system is harder to navigate and more applicants may need a lawyer. Mandatory language proficiency and education credential assessments under Express Entry involve additional fees payable to IRCC-

recognized third-party organizations. Applicants under PNPs have to pay not only federal, but also provincial processing fees. Thus, accessibility likely has improved mostly for the more advantaged applicants, while potentially creating more barriers for the less advantaged.

Tone of Government Discourse

Since 2008, the discourse revolved almost exclusively around the question of how to make immigration work for Canada. It translated into interventionist and dramatic measures that advanced this agenda at all costs: discarding of applications, which affected some 300,000 individuals who may have forgone other immigration opportunities or otherwise put their lives on hold awaiting a decision (Globe and Mail 2012); changing eligibility requirements, caps, and pauses on application intake that often instantaneously eliminated immigration opportunities for certain groups of applicants; and a new competitive Express Entry, which resembles an application for a job rather than immigration to a country. Further, the language of business referring to "inventory" and a "just-in-time" system was dehumanizing by treating applicants as commodities—as cogs in the system designed to advance the growth and economic prosperity of Canada.

Transparency of Policy-Making

MIs and PNPs allow for an increased power of the executive in immigration regulation. Unlike legislative or regulatory changes, which require consultations with stakeholders and involve a more transparent process, MIs can be issued by the Minister of Immigration without prior notice or consultation. PNPs, which are based on federal-provincial agreements, are also not subject to public debate and are negotiated by the executive behind closed doors. Most provinces do not have immigration legislation and, thus, PNP nomination criteria are established and changed by executive action. In fact, provincial audits revealed irregularities and even corruption in some PNPs (Auditor General, Prince Edward Island 2009; Auditor General, Nova Scotia 2008; Auditor General, Newfoundland and Labrador 2009). This trend of executive-dominated and less consultative policy-making left less opportunity for the injection of any compassionate perspectives into the design of immigration programs and criteria.

Future

In light of the above, Canada appears much less compassionate than the mythology of the "nation of immigrants" suggests. It may still have more open immigration policy than many other countries, but the strong neoliberal focus of recent measures made immigration less accessible and exacerbated the precarious status of some groups, particularly of lower-skilled temporary foreign workers (Faraday 2016; Goldring and Landolt 2013). Further, the overall political climate was not particularly welcoming to meaningful discussion of diverse perspectives and evaluation of advantages and shortcomings of the previously taken directions.

The election of the Liberal Party to power in October 2015 provided an opportune moment for reflection about the future of Canada's immigration policy. In fact, the new government launched a public consultation on immigration, a parliamentary study of the temporary foreign worker program, and promised to reverse some of the restrictive measures introduced by the Conservatives. Although no major changes in relation to economic immigration have been proposed yet, several other developments suggest a shift toward a more inclusive and compassionate policy. First, the Liberal government has shown international leadership in its response to Syrian refugees. Between November and the end of December 2015, 25,000 Syrian refugees were approved for resettlement (IRCC n.d(b) #WelcomeRefugees)—a move that sharply contrasts with the Conservative government's commitment to resettle only 1,300 Syrians in 2014 (Liew and Galloway 2015, pp. 240–242). This step and accompanying government discourse signal a revival of a more compassionate Canada after years of restrictive Conservative practices. Refugee resettlement is portrayed as both an homage to the tradition of humanitarianism, which has long been considered a feature of Canada's national identity, and as good for the economy, highlighting refugees' contribution to society (McCallum 2016h–i).

The humanitarian focus was maintained in the 2016 immigration targets: the refugee stream was increased to 17 percent (from the usual 8–9), the family class also saw a slight increase, while the economic was reduced to 54 percent (McCallum 2016a). Second, there has been a significant change in the tone of discourse on immigrants and refugees. In multiple speeches, the new Immigration Minister McCallum urged to do away with the traditional dichotomy between economic and non-economic classes: "It makes no

sense to say one is economic and everybody else is non-economic, which means non-productive, does it? . . . Maybe we'll call it independent immigrants or something else, but it's not that there's one productive class and everyone else is unproductive" (McCallum 2016b–f). He advanced a position that "[e]very immigrant is an economic immigrant" (McCallum 2016b–f), acknowledging that individuals who come to Canada under non-economic streams—sponsored relatives and refugees—also end up participating in the labor force. This inclusive message is also reflected in the minister's emphasis that "refugees are important to building a stronger and better Canada" (McCallum 2016h). This is a welcome change of tone, but it remains to be seen how it will impact specific immigration procedures and requirements.

It also remains to be seen whether this more compassionate direction will enjoy the support of the majority of Canadians. While the resettlement of Syrian refugees prompted remarkable community engagement, isolated anti-refugee incidents have also been reported (CTV 2016; Global News 2016). Public opinion on the issue has fluctuated: in November 2015, only 41 percent of respondents approved of the government's plan to resettle 25,000 Syrian refugees, but this figure increased to 48 percent in December (CBC 2015) and to 52 percent in February 2016 (National Post 2016). However, a vast majority (70 percent) did not support the idea of taking in more than 25,000 refugees (National Post 2016). According to a poll conducted in October 2016, 79 percent of respondents believed that Canada's immigration policies should give priority to economic over humanitarian considerations (Angus Reid and CBC 2016). It is also worth noting that over the past decade, between 60 and 70 percent of respondents expressed concern that many immigrants are not adopting Canadian values (Soroka and Roberton 2010; Environics 2015) and nearly 68 percent would like immigrants to do more to fit the Canadian mainstream—an increase from 57 percent 23 years ago (Angus Reid and CBC 2016).

Conclusion

The main themes of this volume resonate strongly with Canada as it finds itself at the crossroads: what values and principles should guide its future immigration policies? Questions of social justice and human dignity have long been at the core of the migrants' rights movement, but they have not found a receptive response from the Conservative Party. While the current

policy environment seems to be more inclusive and collaborative, the fundamental questions remain: can immigration law, whose key function is to screen, differentiate, select, and exclude, meaningfully incorporate social justice values? How can ideas of compassionate migration enlighten a country's approach to immigrant selection? Is it possible to design policies that both achieve economic objectives and respect the values of compassionate migration? In a speech at the UN Summit on Migrants and Refugees, Minister McCallum stated that "[i]n formulating a cooperative approach to migrants and refugees, we must recognize their inherent dignity" (McCallum 2016g). Thus, perhaps Canada is off to a good start, but there is much work ahead to ensure this principle is implemented in practice.

This task seems even more formidable in light of Canadians' divided opinions on immigration. While supporting immigration generally, they worry that immigration placed too much pressure on public services (Ipsos 2015), that immigrants do not sufficiently integrate, and consider current intake of 250,000 "about right" (Ipsos 2012, 2015). At the same time, according to some projections, annual admissions will have to steadily increase to 407,000 by 2030 to meet labor market needs and maintain economic growth (Conference Board of Canada 2016). The government is already taking steps in this direction, having increased the 2016 target to 305,000 (McCallum 2016a). Thus, the future will likely bring more intense debates over the direction of Canada's immigration policies.

Notes

1. Inadmissibility refers to grounds which prevent an applicant's temporary or permanent admission to Canada. They include: security, criminality, serious criminality, organized criminality, international and human rights violations, misrepresentation, health, finances, inadmissible family member, non-compliance with immigration legislation, and cessation of refugee protection.
2. The federal government consults with the provinces (other than Quebec), but retains the final say over funding decisions. In Alberta, however, the federal and provincial governments jointly decide what settlement projects will be funded.
3. For example, over the past years, approximately 30 percent of respondents tended to agree that immigrants take jobs from Canadians and 60 to 70 percent worried that immigrants were not adopting Canadian values (Environics 2015, 2010, 2006; Soroka and Roberton 2010). EKOS

(2014) and CBC (2014) polls showed that Canadians had mixed feelings about immigration and the EKOS poll suggested that the opposition to immigration has increased.

4. The 41,000 does not include seasonal agricultural workers, but is comprised of all other workers in lower-skilled occupations.

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CHAPTER 16

The Compassion of "Compassionate Migration"

John Shuford

Introduction

The phrase "compassionate migration" carries social significance and implies moral criteria. This notion should provide means of reviewing, envisioning, and developing laws, policies, and practices for how we engage noncitizens and build political community within wider human relations. Yet "compassion" is an elastic concept not reducible to a single definition, and competing discourses and practices in its name reveal conflicting meanings, assumptions, and orientations. Those wishing to shape the meaning of "compassionate migration" must navigate these dynamics to form consensus. Furthermore, "compassionate migration" needs criteria upon which it too is evaluated, including how the notion evolves and what practical results it produces or inspires, such as social cohesion, immigrant integration, strengthened community, and societal transformation. This chapter, which draws chiefly from moral psychology, social/political philosophy, conflict resolution, and hate studies, highlights these issues in service of meeting those aims. Bookending a conceptually driven discussion are two

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recent case studies in the immigration debate—Donald Trump's odd rhetoric of "compassion" and Hazleton, Pennsylvania's normative shift from a locus of "enmification" toward a community of "Thanksmas."

Compassion and Enmification

In a presidential campaign noteworthy for surreal moments (Kirk et al. 2016), one of the more noteworthy came during Ivanka Trump's speech at the 2016 Republican National Convention, when she touted her father's "kindness and compassion" (Trump 2016b). What made it surreal, at least for many critics of the future president-elect, is that throughout his campaign Donald Trump drew condemnation for making offensive statements suggestive of a narcissist, authoritarian, misogynist, racist, nativist, nationalist, xenophobe, protectionist, cynic, demagogue, huckster, and provocateur. For example, during the speech in which he announced his candidacy, Trump (2015) referred to Mexican immigrants as "rapists." A rhetoric of fearmongering and chauvinistic stereotyping ensued, as he called repeatedly for a closed, securitized society fortified by robust immigration enforcement. Trump promised mass deportation of unauthorized migrants (Passel and Cohn 2016)[1] and a border wall to keep out "the bad ones" from Mexico and elsewhere. His oft-repeated "illegal immigration" punch lines slandered millions of people as deviants, violent criminals, job thieves, and general drains on communities, public coffers, and the country. Trump also derided opponent Hillary Clinton's promise of comprehensive immigration reform as "radical and dangerous," involving "mass amnesty, mass immigration, and mass lawlessness," and "uncontrolled immigration" (Trump 2016a). In other words, Trump displayed great skill in *enmification*.[2] Whither *compassion*?

A closer review of Trump's campaign rhetoric reveals that he sought to seize the term "compassionate" and apply a politico-legal notion of "compassion" to some of his positions. Trump self-described as the "candidate of compassion" and labeled his stance on health care reform and some other policies as "compassionate." During his Presidential nomination acceptance speech, he again reached for this rhetoric, presenting a veneer of something universal in scope yet sliding in scale according to citizenship status and calibrated by law enforcement:

> On January 21st of 2017, the day after I take the oath of office, Americans will finally wake up in a country where the laws of the United States are

> enforced. We are going to be considerate and compassionate to everyone. But my greatest compassion will be for our own struggling citizens (Trump 2016a).

Trump later appeared, briefly, to soften this stance when meeting with a group of GOP-supporting Latina/os who want immigration reform based in "compassion" (Gamboa 2016), but a few days later his unreformed ideas drew disappointed reaction. Jacob Monty, a Houston-based Latino attorney whose firm specializes in immigration compliance for businesses and industries with large Hispanic workforces, called the plan "not realistic and not compassionate" (Lockhart 2016).

Ultimately, what "compassion" means to Donald Trump is a moot question: it is futile to speculate on the contents of a consistently inconsistent person's head and heart, let alone try to determine what relationship may exist among his beliefs, speech, and conduct. Even now, after his unexpected Election Day victory, none of us knows what the "Trump moment" means let alone what is behind his anti-Latina/o, anti-Mexican, and anti-immigrant invective[3] and (or) his self-styled rhetoric of "compassion." Conversely, it is easy to imagine why Trump would want to *claim* the mantle of "compassion" alongside that of "law-and-order." "Compassion" is a clarion call for many longtime "compassionate conservatives"[4] and other political influences whom Trump needed to court (Beinart 2014), and cursory reviews of political history, science, and strategizing may reveal other self-interested reasons.[5]

Compassion: An Elastic Concept

Even if none of these rationales should happen to describe Trump's mindset, ample reason exists to support a weak claim that he is mistaken about the nature and function of compassion, and perhaps a stronger one about whether his immigration stance is "compassionate." Yet this chapter steps away from headline-fueled debates. There is a more interesting matter to explore here for those concerned with advancing "compassionate migration," as raised by this example: *compassion is an elastic concept with multiple meanings, manifestations, and applications in a wide array of discourses and contexts.*

Political campaigns, policy debates, and community conversations often feature competing *notions* of compassion, not just competing *uses*

of the same word. For want of better (or any) analytical descriptions and normative criteria, these situations can bog down in (or never rise above) finger-pointing, kneejerk reaction, emotivism, crass branding strategies, talking past each other, unarticulated assumptions, and the like. Those interested in the notion of "compassionate migration" should anticipate such dynamics and attempt to address them forthrightly. The scope and substance of immigration reform, especially regarding unauthorized migrants, remain complicated and contentious even as millions of people (most of whom are women and children) face the hostilities and dire conditions described in this volume. The reforms of law, policy, and practice that "compassionate migration" requires will involve consensus building and effective organizing.

Beyond serving prudential concerns, intellectual honesty requires acknowledging the conceptual elasticity of compassion, and this may mean proceeding without rigid definitions, principles, and standards of "compassionate migration" too. The latter notion begs semiotic and existential questions as to the meaning of the former, none of which will be settled through inflexible assertions. No one has exclusive control over the concept of compassion, its content, and practices in its name or as motivated by it. The same will hold true for "compassionate migration" because it seeks to be an open-source, crowdsourced, normative social movement, not a political slogan or private brand. This volume would be remiss without acknowledging and opening inquiry on conceptual complexities, contested meanings, definitional disputes, as well as political wrangling and practical challenges.

So, this chapter opens several such inquiries: what relation compassion has to positive law and jurisprudence[6] in general, and to immigration law and policy, specifically; how various limitations (such as logistics and "compassion fatigue") might affect compassionate action; how to address sociocultural or attitudinal variances in compassion orientations; whether (and, if so, how) to craft alliances with organizations that tout "compassionate migration" yet have produced human misery in other contexts; whether compassion is necessarily imbued with social power imbalance; and whether compassion can ever be made systematic (let alone institutional and administrative).[7]

To explore the conceptual elasticity of compassion does not require endless quandary over definitions and definition-types. For example, we need not examine here whether "compassion" may be a "fuzzy concept" (Dietz and Moruzzi 2009; Haack 1996) or even an "essentially contested"

one (Gallie 1956; Gray 1977); we need only accept that the concept is dynamic, evolving, manifold, and informed by competing conceptualizations and practices. "Compassion" is shaped by how we think and talk about our ideas, how and why we put them into practice, what results they produce, what we identify or deny as instantiations, and many other contextual factors. This rich fluidity presents great opportunity for "compassionate migration" to grow and produce social change, for what "compassionate migration" means will emerge not from academic debate but instead through interpersonal encounter, institutional practice, community-level action, and efforts at major policy reform in (inter)national settings.

In light of the preceding discussion, it is necessary and useful to unpack compassion as apart from the law, policy, and practice considerations that occur elsewhere in the volume. Doing so also means talking briefly of the conceptual relationship among "compassion," "sympathy," and "empathy"—three words sometimes used interchangeably but which have distinct etymological and discursive histories as well as shifting meanings as connected to specific phenomena. The point here again is to make transparent how these notions may bear on the development of "compassionate migration" and vice versa.

Compassion is a *moral* and *social* concept, although moral and social theorists do not necessarily agree over its description. For example, His Holiness the Dalai Lama (1999) posits a universal human potential or capacity to develop and enhance "genuine compassion." Karen Armstrong's "Charter for Compassion" (2009) and the organization that works under that name begin with the following statement: "the principle of compassion lies at the heart of all religious, ethical and spiritual traditions." Judaism treats compassion as a virtue of intimacy and tenderness identified both with God and maternity (e.g., the Hebraic word *rahamim* means "the quintessential feeling of a mother for her child"), and which is to be practiced toward humans and animals alike (Brodye 2011, p. 181). Martha Nussbaum calls compassion "the basic social emotion," but like these other theorists suggests that compassion may not even be a moral sentiment, strictly speaking. Nussbaum questions whether to act compassionately necessarily entails emotional response, let alone a particular one. She also points out that compassion involves a certain mode of reason or judgment as well as individual-community connections, and calls it "a bridge to justice" (1996, pp. 28–37). Importantly, these divergent accounts recognize that while compassion might be fundamental to the human condition, human beings are only ever imperfectly compassionate.

Contemporarily, "compassion" is associated with causes and issues (such as the welfare of children and animals, and the provision of community services to underserved populations) and with other norms (such as communitarianism, ethics of care, contractarianism, multiculturalism, and cosmopolitanism). While such meanings and applications may differ from those of "compassionate conservatism" for instance, it is not the case that one orientation *is* compassionate while the other *is not*. Rather, these notions of compassion, as well as their applications, mean different things.

Attitudinal and practical varieties of compassion may indicate or ultimately help produce overlaps across compassion orientations that are useful to the aims of "compassionate migration." After all, even a narrowly drawn social contract is in some measure compassionate and just toward those whom it includes (if also harsh and discriminatory against those it excludes). Types of compassion can be parsed according to factors like intent or motivation, target, action, agency of giver and receiver, appropriateness, and result (Saffire 2001).[8] Such recognitions, and room for critical thinking and productive disagreement in light of them, will assist the larger aims of building mutuality and social cohesion that must be at the heart of "compassionate migration" if this practical notion is to succeed in resolving conflicts toward improving lives and transforming community.

Few orientations to compassion contemplate universality; most focus on reinforcing intimacy, affiliation, or belonging. Furthermore, the extension of compassion is empirically finite and can produce "compassion fatigue," even as compassion is renewable and generative (i.e., able to spark reciprocal or asymmetrical gestures and practices). Insofar as compassion expresses moral though not necessarily physical proximity, it may pass between strangers and members of different social groups, not just familiars and social equals. Compassion thereby allows for at least temporary crossings into and out of particular lives, communities, and circumstances, sometimes also for the development of durable caring relationships, justice commitments, and other bonds across various distances. In these and other ways, we can talk of social compassion and compassion as specifically oriented toward morally-driven social change, among the other manifestations and meanings of this concept.

Etymology and Evolving Pragmatics

Etymological work further reveals the conceptual elasticity of compassion, as some meanings have emerged and evolved while others have declined and become obsolete. Attention to this work, along with pertinent lexical

definitions, holds heuristic and practical value for the aims of "compassionate migration." For beyond assisting efforts to explore moral, political, and legal salience, attending to etymological roots and discursive factors reminds of the possibility of conscientiously developing and operationalizing new meanings, and likewise of working effectively with competing orientations.

The *Oxford English Dictionary* defines "compassion" as "the feeling or emotion, when a person is moved by the suffering or distress of another, and by the desire to relieve it; pity that inclines one to spare or to succour." Besides seeing how this lexical definition diverges from the preceding theoretical accounts of compassion, it is worth noting this: while the English word "compassion" derives from Middle English, Old French, and Late Latin (*compassio* = "sympathy," from *compati* = "to suffer together with"), the *Oxford Dictionary* considers obsolete the specific meanings ("participation in suffering; fellow-feeling, sympathy") most closely connected with those linguistic roots.

Historically, it was "sympathy," as coming from Greek and Latin roots, not "compassion," that meant to have "fellow-feeling" and to "suffer together" (such as with a peer or beloved one). David Hume (1738), who developed a virtue-based, sentiment-driven account of ethics, identified "sympathy" as the human capacity for communication, especially with those to whom we are close or feel closeness. Hume's (1748) skeptical critique of social contract theory notwithstanding, it was something like this kind of sympathy but as connected to the ideological development of egalitarianism that made possible the conceptual metaphors and practical applications of contractarian ethics.

Like "sympathy," the practical notion of "compassion" developed within conceptual frameworks and social contexts of reified privilege and institutional power. Unlike the intimacy and equality implied in the prior notion of "sympathy," however, "compassion" described relations of distance and actions of condescension such as taking pity, displaying mercy, or giving charity. "Compassion" aimed toward amelioration (relief), not equalization (justice), and the "suffering with" that it involved has been identified with self-loving appreciation for good fortune ("there but for the grace of God go I") (Saffire 2001) rather than with standing in solidarity against suffering. Today, "compassion" and "sympathy" have largely flipped popular meanings; the latter is sometimes associated with distant condolence or actionless pitying.

"Empathy," as distinct from both "compassion" and "sympathy" (although arguably similar to Humean "sympathy"), is a relative notional newcomer. Titchener (1909), who is credited with coining the phrase, described "empathy" as a psychological phenomenon of being able to "feel one's way into" or "to enter into the feelings of" another. Today, the notion of "empathy" encompasses attitudinal and volitional dimensions, too, insofar as it connotes personal experience of emotional response and connects with exercises of moral imagination.

Recent interdisciplinary work seeks to enliven compassion as a conscientious force for social change. This account posits a triadic connection between a virtuous habit or committed practice of compassion and more basic emotional and cognitive capacities; each of which can be enlarged and refocused. Roughly stated, their conceptual relationship is this: an inability to bear the sight of the other's suffering and feeling impelled to address it (empathy); examining one's own relationship to the other and the suffering (moral imagination); and discerning and pursuing appropriate means of intervention for positive change (compassion).

In practice, this kind of compassion is usually extended contextually (such as via prior relationship or affinity, coming into another's immediate attention or thought, or seeking out common experience) when one is confronted with the other's predicament. In such cases, empathy and moral imagination trigger when one faces another who is suffering or one has an opportunity to advance the other's well-being.[9] Like a Samaritan, one does not avoid entanglement or shy away from the other. Yet compassion may also arise through merely contemplating how one, or a group or institution, can address other-regarding interests in some appropriate way.[10] One may act like a neighbor or friend, with generosity and fellowship, where one can provide aid according to what the other needs to thrive. One might act even more intimately and with greater affection, or less passionately but with no lesser commitment to addressing suffering and promoting well-being. In each case, empathy and moral imagination provide awareness of basic equality, interconnectedness, and mutuality of interest, while compassion strives for their actualization. The other may be human or non-human, individual or group, and the suffering may be natural or (much more often) human-caused. Basic equality arises from shared capacities to flourish and likewise to suffer. Concern for the other's well-being and (or) suffering as connected to one's own reflects interconnectedness and mutuality.

Put concretely: one may feel distressed over the other's plight, ashamed over realization of one's complicity in it or inaction against it, joyous in

new friendships and solidarity for social justice, celebratory about successful struggle, and gratified from helping the other and improving one's community. None of this involves imposing rather than helping, falsely identifying with the other, co-opting the other's experience, trumping the other's interests with one's own agenda, or turning an occasion for compassion into an opportunity for self-satisfaction (such as assuaging feelings of guilt).

Compassion thus understood connotes the power of moral agency: doing something to improve the other's condition and thereby one's own according to the other's interests, which also means doing something *with* the other to improve a shared condition and achieve a *shared* interest. Because of this humane intention, compassion tends toward leveling, inclusion, and transformation and it is appropriate to speak of mutual interests (such as in full participation, social cohesion, economic dynamism, social capital acquisition, and public health). The power of compassionate action so understood does not connote power differentials found in the etymological roots of "compassion" as previously discussed; it is arguably closer to older notions of "sympathy." This kind of compassionate action uses social power *morally* and moral power *socially* for equalization and community. Furthermore, the privileged can, and often do, find themselves recipients of compassion from those who are less powerful, even from abject others.

Connections, Caveats, and Consequences for "Compassionate Migration"

This contemporary notion of compassion, in a triadic relationship with empathy and moral imagination, would provide justification and practical support for "compassionate migration." It aligns, for example, with Armstrong's "Charter for Compassion" and its associated International Campaign for Compassionate Communities, His Holiness the Dalai Lama's teachings on compassion, and Pope Francis's worldwide advocacy from the Holy See of compassion toward migrants (which His Holiness often directs toward secular governments) (Arrocha 2013–14). It may also be compatible with legal norms, such as those reflected in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and other core human rights instruments, as considered in this volume.

However, to paraphrase a previous recommendation made for strategic and conceptual reasons, the aim of "compassionate migration" should not be

to reify this or any other account of compassion. Rather, we should engage, evaluate, and employ multiple accounts of compassion pragmatically, operationalizing convergence and productive disagreement toward key advances in the status and treatment of migrants and the transformation of political community. These advances include spreading compassion across noncitizen groups and throughout the body politic, expanding the scope of social compassion beyond the nation's borders, and building a society that dwells in and radiates compassion (Bender 2011). If the overriding concerns are thus ones of efficacy, inclusiveness, and consensus rather than the polemics of discourse, it may make little difference whether efforts to advance "compassionate migration" identify with this, that, or any notion of "compassion" phrased as such. It may be pragmatic in some contexts to present ideas and practices through reference to cosmopolitanism or contractarianism (such as international human rights law). In others, appeals to nationalism or multiculturalism ("we are a nation of immigrants"), localism ("we are neighbors," "we are a community"), or religious ideas ("we are all God's children") may best advance such social compassion. More to the point, and for most purposes, deeds will outweigh rhetoric.

In Chapter 17 of this volume, Maurice Hamington discusses the issue of moral (or social) readiness to practice "compassionate migration." It is a moot question whether the U.S. *is ready, willing, and able*, to employ a popular phrase here, because the sectors of civil society, the levels of government, and the people show varying degrees of preparedness. Far too many actors refuse to reject ready-made hatred and leave alone the tempting tools of enmification (Zur 1991). Where that is not the problem, other impediments like indifference, ignorance, benign neglect, and social inertia exist.

Several chapters in this volume also consider what role law may play in changing this situation, and Hamington correctly notes that law cannot change directly how individuals and groups happen to think and feel. Surely positive law conveys thought and feeling, as well as force, as it attempts to influence the conduct and treatment of public actors and private ones too. Over time, official behavioral changes can encourage, even produce, meaningful attitudinal and social changes. The panoply of policies and organizations connected to positive law can gradually influence hearts and minds, too. The American civil rights legacy, in its grandest scope, illustrates how empathy and moral imagination, as part of struggle and solidarity, propel development of laws, policies, and regulatory organizations that instantiate social compassion and produce meaningful change, however elliptical and subject to regressive force such change may be. Yet the influence of

positive law remains ambivalent, especially regarding immigrants and immigration. Over the past 15 years literally thousands of anti-immigration and immigration enforcement pieces of legislation were considered, and hundreds were enacted, at U.S. federal, state, and local levels. Some items never became law and others were reversed or struck down as unconstitutional, but the larger point is that while positive law (and its institutional arms and actors) might shape "compassionate migration," this work cannot be left to positive law or its province.

Subnational "Compassionate Migration"

The topic of subnational "compassionate migration" warrants especially careful consideration. Saying nothing of the (inter)national significance of mass migration, its human dimensions and impacts are profoundly interpersonal and "local." All people everywhere live daily in a *local* fashion—that is to say, in a place and in relation to its ambient circumstance. Even a solitary individual with few possessions, no long-term employment prospects, and no plans to settle is someone who nonetheless enters, exits, and otherwise navigates place-specific communities and their thick webs of intersubjective, inhabited relationships. Furthermore, migrants, like all people everywhere, are rarely such Hobbesian figures. Consider, for example, that the majority of unauthorized immigrants now living in the U.S. are women or children who traveled here from, or via, Mexico. Most of whom have families on one or both sides of the border. All have cultures and languages, and many have spiritual faiths, that accompany them wherever they go. Many have also experienced difficult-to-dire conditions back home, where they are now, and (or) somewhere in between. Just as importantly, all migrants have a variety of skills, what Nussbaum (1988, 1992) calls "capabilities," and dreams.

As Chapter 3 explains, the powers to set immigration policy and enforce immigration law are reserved to the federal government. However, the social treatment of noncitizens in daily life is a larger matter not exhausted by federal regulatory interest. Though the entire political community may remain unprepared for "compassionate migration," and though social compassion toward the noncitizen other is inconsistent and unevenly practiced across the nation today, subnational actors can play influential roles and carry out important activities in *immigrant policy* (which includes alienage law and thus connects to the federal regulatory interest in immigration policy). They can do this work on their own, together, and with the federal government.

As Chapters 4 and 19 explore, some communities already practice "compassionate migration" on various scales, while others may become prepared to emulate or innovate such practices. Indeed, communities previously unprepared for "compassionate migration" can sometimes change quickly. They might also ground their compassionate efforts in appeals to local history, national ideals, and civic concerns, without reference to "compassion" discourses and branding that might not fit the context.

The Hazleton Example: From Enmification to "Thanksmas"

To concretize the analyses advanced in this chapter, consider the case of Hazleton, Pennsylvania and the work of the Hazleton Integration Project (HIP). Hazleton is a small, rural mining and manufacturing town, in previous generations populated by European immigrants (such as Italian, Polish, German, and Irish) and now a thriving, near-majority Hispanic community. Just one decade ago, Hazleton symbolized the local-level anti-immigrant movement then (and still) sweeping the nation. Like so many other communities, Hazleton experienced rapid demographic change for which it was not prepared and which its established, working-class white population did not necessarily welcome. In only a few years, Hazleton transformed from a predominantly white community into an area with a large Latina/o population (93 percent white, 2 percent Hispanic or Latino of any race in 2000; 69 percent white, 37 percent Hispanic or Latino of any race in 2010). Hazleton had been mired in ongoing economic downturn, too, and the demographic shift and resultant social change provided opportunities for venting of frustrations and scapegoating. In 2006 and 2007, Hazleton's city council adopted the punitively oriented Illegal Immigration Relief Act Ordinance (IIRAO) and Rental Registration Ordinance (RRO).[11] Their provisions were emblematic of similar legislation produced from the 1990s through the early 2010s, and they inspired numerous copycats (O'Neil 2010; Khimm 2012; Gordon 2012a, 2012b). The Hazleton schemes were never enforced and were ultimately declared unconstitutional due to federal preemption (see Chapter 4). Besides losing several costly court battles extending over many years, the fractured community of Hazleton became a national symbol of anti-immigrant, anti-Latina/o enmification.

Seeking to undo such damage and address underlying interests in social cohesion and community development, several individuals and organizations

partnered to form HIP, which in turn led to the creation of the Hazleton One Community Center. HIP is the brainchild of its Honorary Chair, Joe Maddon, a Hazleton native and manager of Major League Baseball's Chicago Cubs. Before leading the Cubs, Maddon lived many years in South Florida when he managed the Tampa Bay Rays, and in Southern California when with the Los Angeles Angels of Anaheim. These contexts provided him direct, daily experience of living and working in highly diverse, significantly Latina/o communities and organizations. Maddon brought this mind-set back to Hazleton to help it repair its tarnished image and build a shared future. Of the rationale, promise, and vision for Hazleton Integration, he writes:

> We are a country of different cultures that have grown into one. That has always been the American way, and it's our greatest strength as a nation. The Hispanic population is just the newest group of immigrants to arrive, and they can help reinvigorate the community, increase business development and spur growth that is presently lacking . . . With all of us pulling in the same direction, I know we will transform our city into a vibrant, active community once again that will make us all proud. (Maddon n.d.)

Today, HIP and the Hazleton One Center combine immigrant integration and community service through low-cost or no-cost programs and classes focused on youth and families in the areas of health, education, sports/recreation, language acquisition, and cultural enrichment. HIP and the Center specifically aim to "foster trust and respect among all the region's ethnic cultures," such as through cultural discussions, cooking instruction, and classes taught in both Spanish and English.

One such activity is Hazleton's celebration of "Thanksmas," named for the holiday that Maddon invented; "Thanksmas" is annually observed sometime between Thanksgiving and mid-January. A decade ago, Maddon developed a program through which he and other Tampa Bay Rays employees shopped for, cooked, delivered, and served "Thanksmas" dinners at homeless shelters throughout South Florida. Maddon prepares dishes from family Italian and Polish recipes (such as spaghetti and meatballs and pierogis) alongside other culinary fare (like jerk chicken and roasted pork). While Maddon would love to see "Thanksmas" become a national effort, perhaps the most important "Thanksmas" celebration happens in Hazleton. Since 2011, a late-December "Thanksmas" meal at Hazleton One caps several days of fundraising and community events

organized or hosted by Maddon. The dinner, which is free to low-income individuals and families, is sometimes followed by a free community screening of *It's a Wonderful Life* (Capra 1946) shown with Spanish subtitles (Christman 2011). Watching this classic holiday film together provides a shared experience of an important American tradition. The film's story reminds us how much any individual affects the life of a community (and vice versa) and likewise of the importance of coming together in good times and bad. As for Maddon, he has emerged as a national spokesperson for immigrant integration and local strategies to build social compassion. It seems fair to say that Maddon was no longer able to bear the sight of how his hometown, other cities, and newcomer and established populations alike were suffering. He has utilized his particular social and moral power to address that suffering and promote well-being, thereby also addressing his interests in the same.

The messages and methods of the HIP/"Thanksmas" example emphasize solidarity, equity, conflict resolution, and social capital acquisition for the good of Hazleton and its people over time. Key to this model of social compassion is the embrace of both shared and diverse values, identities, and experiences—including of Hazleton as a community that has always had working-class *immigrant* roots and a shared passion for the American Dream. These efforts do not amount to a panacea and cannot resolve all of Hazleton's challenges, and they may not fit everywhere that "compassionate migration" matters. However, they do have impact in building empathy and moral imagination, as well as community empowerment through social compassion, both where these efforts have taken place and where their lessons may radiate out more widely.

Conclusion

Rather than recap this chapter, the concluding remarks seek to spark further conversation on developing "compassionate migration" as a practical notion. To that end, here are two provisional recommendations. The first is to work from the assumption that all people—as individuals and groups, and through organizations—can *choose* to become more compassionate, or differently so, by cultivating emotional-cognitive precedents of compassion. Thus, it is also always possible to widen the scope of social compassion (such as regarding specific causes, values, and constituencies). Though this may be challenging work, we can learn to identify and eventually overcome attitudes, activities, rationales, and institutions that delimit compassion or narrow its scope. Such

struggle is crucially important in previously less-compassionate contexts and toward continually growing compassionate communities and combatting enmification. The second recommendation is that "compassionate migration" may be best approached with a sense of stewardship, not stipulation. The meanings of "compassionate migration" will be deciphered through contextual answers to its core questions and concerns, and its success as a practical notion and social movement will depend upon how well it encourages others to discuss it, deliberate over it, and take on roles of policy innovation and social experimentation.

Notes

1. The total number of unauthorized migrants declined slightly between 2009 (11.3 million) and 2014 (11.1 million). The number of unauthorized migrants from Mexico declined from 6.3 million (2009) to 5.8 million (2014) while the numbers from Central America, Africa, and Asia increased. Thirteen states saw major demographic shifts, and Mexico remains the leading country of birth for unauthorized migrations nationwide (52 percent) and in at least 38 states.
2. By "enmification," I mean consistent psychological and semiotic processes of creating an enemy, against which to delineate, organize, and mobilize opposition—"them" against "us," "us" against "them." Important to these processes are the identification, construction, and demonization of an "other" who inspires righteous hatred; the "other" is an enemy, and hated, precisely because "their" conduct and character expresses enmity toward "ours." Immigration in general, and specific immigrant groups in particular, provide easy fodder for enmification, and opposition to the noncitizen "other" becomes ideological. "They" are cast as "outsiders" unwilling or unable to become like "us," and "they" stand for, or tolerate, what "we" rightly reject and oppose. "They" are depicted as fearsome and loathsome for taking what "we" have created and destroying what "we" hold dear. The obligation to oppose such an existential threat takes on moral, civic, and sometimes religious significance, as conveyed and carried out through words, images, actions, and policies. The path of Trump's rise to political prominence illustrates the sociopolitical utility and multifaceted cultural reliance on enmification. Trump parlayed his name recognition, media savvy (especially in gaining headlines and manipulating the conventions of "reality TV"), and willingness to espouse hateful and inflammatory rhetoric.
3. Trump stoked the animus behind anti-immigrant activism as useful to his political purposes, which included eliminating fellow Republican contenders Ted Cruz and Marco Rubio—two younger, more conservative, currently serving U.S. Senators who are the children of Cuban-American immigrants,

each of whom has had a complicated relationship to "compassionate conservatism" (Mencimer 2011; Zengerle 2015; Silver 2016).

4. Berlant (2004, p. 11) characterizes "compassionate conservatism" as a "social referent posited against the traditional (liberal) association of compassion with personal and state practices of recognition and redistribution," well-articulated by contemporary figures such as John Rawls (1971, 1993) and Martha Nussbaum (1996), that remains generally in want of a liberally oriented "book length study of compassionate conservatism as theory and practice." "Compassionate conservatism" and the "compassionate conservative" have been used as ideological visions, policy orientations, branding strategies, social justice critique, and honorific phrases. Although Marvin Olasky is known as "the godfather of compassionate conservatism" (Grann 1999, Weisberg 2008), historian Douglas Wead may have coined the term "compassionate conservative" in a speech by the same name at the 1979 Washington Charity Dinner; Wead later became an advisor to the Reagan Administration. In 1981, National Urban League President Vernon Jordan chided that Administration for "its failure to exhibit a compassionate conservatism that adapts itself to the realities of a society ridden by class and race distinction." By the early- to mid-1980s, some members of Congress extolled "compassionate conservatism" as a conscientious policy orientation of meeting social welfare obligations while maintaining fiscal conservatism.
5. These include a need to draw voters, rhetoric, and ideas away from Hillary Clinton and her campaign vow to enact "comprehensive immigration reform;" a wish to project the image of a wise political leader who can temper authority with compassion; and a fantasy of holding political subjects in thrall to the cult of personality of a "merciful" and "generous" autocrat.
6. When President Barack Obama introduced Sonia Sotomayor, then a member of the U.S. Court of Appeals for the 2nd Circuit, as his nominee for Supreme Court Justice, he mentioned several traits he thought were important qualities of a Justice, including "experience," "rigorous intellect," and "recognition of the limits of the judicial role." In speaking of experience, the President included life experience: "Experience being tested by obstacles and barriers, by hardship and misfortune; experience insisting, persisting, and ultimately overcoming those barriers. It is experience that can give a person a common touch and a sense of compassion." President Obama then praised Sotomayor for "compassion and empathy." Pundits seized on these remarks and the facts that the nominee was a relatively young woman of color with a short professional record; they voiced suspicion that Sotomayor would let emotion and identity politics taint her judgment and interfere with performance of her judicial role. During the Senate Confirmation hearings, Sotomayor distanced herself from President Obama's remarks, saying "Judges can't rely on what's in their heart" (Cushman 2009).

7. Garber (2004, p. 25) concludes that "Compassion seems to waver politically between two forms of inequality: The benevolence of those who have (the power of the rich) and the entitlement of those who need (the power of the poor). The insoluble problem for society—and for government and law—is to behave as if there were no competition between the two. And in some quarters, at least, 'compassionate government' is regarded as either a contradiction in terms or a category mistake. Compassion, it appears, is a good campaign slogan but not necessarily a winning political strategy."
8. In his dissent to *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001), U.S. Supreme Court Justice Antonin Scalia wrote "In my view today's opinion exercises a *benevolent compassion* that the law does not place it within our power to impose" (emphasis added). In subsequent correspondence, Scalia asserted that the phrase "benevolent compassion" is not necessarily redundant, and clarified that "benevolent" was chosen as his means of "stressing the social-outreach, maternalistic, goo-goo character of the court's compassion" in *Martin*. Scalia also suggested that "compassion" might be differentiated according to whether it was motivated by benevolence (suffering with the other) or by self-love (despairing of facing similar misfortune).
9. Empathy here does not necessarily mean the literal entry into the other's situation, as both older notions of "sympathy" and "compassion" had done, nor does it mean actually feeling the other's suffering or even necessarily *feeling* suffering (or any particular emotion) along with the other. Rather, empathy enlarged via moral imagination brings recognition that one's own lot may be affected by and implicated in the other's experience. This process need not, and perhaps should not, also involve trying to imagine experiencing what the other experiences or having similar qualitative feelings as the other has (Nussbaum 1996, p. 35).
10. Woodward (2004) argues that for compassion to be effective, it must recognize its non-universality, with each case addressed contextually.
11. The IIRAO and RRO imposed fines on employers for hiring unauthorized migrants and landlords for renting housing to them. They also imposed similar sanctions for those who contracted with unauthorized migrants, and required the use of English in conducting municipal government services.

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CHAPTER 17

Social Readiness: Care Ethics and Migration

Maurice Hamington

> *Care ethics then, challenges us to be attentive and responsive to our own location within circuits of power and privilege that connect our daily lives to those who are constructed as distant from us.*
>
> *Victoria Lawson (Lawson 2007)*

Ivonne's Story

I was only a few months old when I was brought in the U.S with my mother my father and my big brother. I was born in Mexico DF [Mexico City] on January 31. My mom thought it would be better to build a better life in the other side so we could have a better future. I am 20 years old now [and] I've been waiting to get my papers for too long. I finished high school and got my diploma to be able to go to college. But I won't be able without my papers. Every day I cry because I can't help my mom with rent anymore. I don't work anymore. I want my mom to be proud of me but how can I if I'm not from here and they won't accept us. My mom was once deported when I was ten years old. I found out the next day because she had not come home. I got a phone call from Mexico and she told me she wasn't going to come back until three to four month[s]. Never in my entire life have I felt so mad, so mad because I was left without a mother for three month[s]. After

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> that I've been scared of cops because I don't remember anything from Mexico because I've been living in Houston for my entire life. I want to be able to enjoy my life and learn new stuff and travel, something I can't do.
>
> Ivonne
> Houston, TX[1]

Ivonne's story is taken from the website, "My Immigrant Story" which collects immigrant stories delineated in 200 words or less. The concept is simple and minimalist but it provides a modicum of voice to a population that has few opportunities to be seen and heard. Ivonne's brief story can elicit a variety of reactions. One response might be concern about policies that created Ivonne's predicament—a political reaction. Another response might be compassion for Ivonne's circumstances—a personal reaction. In either case, reading Ivonne's story makes one immigrant experience a bit more concrete. It is a glimpse into what is for many an unfamiliar reality. A one-paragraph statement is certainly limited but it opens up the potential for more learning and the possibility of caring.

This chapter aims at investigating an overlooked aspect of social change in regard to migration: *the ethical readiness of a society to welcome and care for migrants.* In this context, ethical readiness refers to the extent to which members of a society are morally prepared and equipped to engage in responsive caring as described by the work of care ethicists. Social readiness is not centrally about rules or rights, although these are important markers of a cultural maturity regarding care. Rather, social readiness refers to the cognitive and emotional habits of care that a society has developed including those of empathetic imagination, as well as a willingness to learn and take action. Although the specific concern in this chapter is in regard to caring for migrants, on a larger theoretical scale, migration becomes a test case for the question of whether a society can care and what makes such caring possible.

The approach taken in this chapter includes a number of assumptions. First, care is presumed to be a moral ideal that addresses the human condition more holistically than traditional normative theories without negating significant insights from those approaches. Furthermore, given that care ethics assumes that everyone is interdependent and ultimately needs care, this chapter unabashedly advocates that care for migrants is good whether their travel is voluntary or forced. With those assumptions, the contention here is that along with discussions of progressive rights, the laws of nation states, and policy changes, there should be attention given to the social preparedness of people to care for migrants.

Such readiness can support legal changes as well as ensure that the promise of new policies is fulfilled.

The chapter begins with an introduction to care ethics that emphasizes its epistemic and skill-based dimensions. Accordingly, care is not framed as subjective. Care entails degrees of competency. Next, a discussion of a duty to care is offered to explore whether care can simply fit into existing theoretical structures. Finally, a notion of social readiness to care is developed and applied to issues of migration in service of a culture of hospitality.

Care Ethics

Care ethics began as a feminist reaction to the inadequacies of traditional Western moral philosophy. The early works of developmental psychologist Carol Gilligan, philosopher Nel Noddings, and others in the 1980s catalyzed a notion of "care ethics" as a relational approach to ethics that emphasized context, responsiveness, and emotional displacement over moral adjudication of individual action (Gilligan 1982; Noddings 1984). Not only were early feminist theorists concerned that the lives and experiences of women were absent from virtually all ethical theorizing but also the presumed objectivity of mainstream theory meant that the privileged position of the white male, able bodied thinkers who wrote moral philosophy was not problematized as influencing moral theory. As Jane Duran describes, "the putatively normative and universalized views of the standard theories are, in fact, Eurocentric and male dominant views . . . much of what was done in ethics, particularly in the eighteenth and nineteenth century, was not only deeply misogynistic—and frequently in stated terms—but was also profoundly discriminatory to non-European cultures" (Duran 2015, p. 73). This bias is particularly pertinent to considerations of migration. Specifically, Western theory promotes an individualist ontology of autonomous agents engaging in discrete ethical transactions. This individualist ontology underlies the standard normative question, "what is the right thing to do?" Care theorists are typically critical of the Kantian tradition of ethics but the concern for the blind spot of privilege can also be applied to modern social theorists. For example, Jacques Derrida (1992) and Emmanuel Levinas (1961) both offer otherwise useful considerations of caring, however their analysis is limited by their presumed atomistic ontology. As John Silk suggests, "A fundamental weakness of both Derrida's and Levinas' conceptions is that they define actors as free-standing rather than

relational individuals whose behavior is part of a specific socio-political context" (Silk 2004). The reality, according to care theorists, is that humans exist in a web of relationships and it is impossible to disentangle agency from relational context. Migration takes on a much different character when the experience is presumed to be voluntary and transactional. Care makes no such assumption.

The last quarter century has witnessed a blossoming of care ethics in terms of both theoretical refinement and application across disciplines—extending to theorists not explicitly identified with feminism. Although a constellation of common elements has emerged to describe care, it is still sufficiently early in its development that a canonical definition of care does not exist. The operant understanding of care used for this chapter entails authentic responsiveness to the needs of another being. That need emerges from relationship and takes into account the particular personal, social, political, and economic context as well as the well-being of the caregiver.

To flesh out an understanding of care, I offer three claims about care. First, care is personal *and* political. Ultimately, care is experienced at an interpersonal level often in concrete ways such as through listening, food preparation, hugs, etc. However, social institutions can have policies and practices that enhance or restrict caring. For example, jurisdictions that mandate significant paid leave for parents who have just given birth or adopted a child increase the potential for familial caring. Such rules do not ensure that caring will take place but they provide the temporal conditions for it to happen. It should be noted that even in the most oppressive conditions, acts of care and compassion can emerge but it is certainly easier to care in a supportive context. Governments, companies, families, and any other human institution can increase or decrease the potential for care through their policies and practices. A number of political theorists including Joan Tronto, Daniel Engster, and Fiona Robinson have made compelling arguments for the central role of care in political structures and policies. The ability of nation states to foment care through their policies and practices is particularly pertinent to the issue of migration. Those who are displaced and have traveled great distances need community and the experience of local, proximal care.

The second claim I want to make about care is that it is not a subjective activity and thus there are degrees of competency to care. Despite the ability of anyone to label their activity as caring, the standard that emerges from the literature is responsiveness. Care that is not attentive and attuned

to the needs of the one cared for runs the risk of being inappropriate paternalism. Although all paternalism is not morally inappropriate, care, particularly for unfamiliar others, requires a responsiveness to the expressed needs of the one cared for (Noddings 2010b, p. 148). Much colonial activity as well as interpersonal abusive behavior occurred in the name of care but that is not the kind of care we are describing here. Care is a particular activity of responsiveness to the other and their context. Learning and responding are skills of caring. Most humans are born with the capacity to care but the efficacy of delivery requires development and thus care can be described as entailing degrees of competence. Can we care about and for the unfamiliar migrant? Of course we can, but there are degrees to that care depending upon how responsive and skilled we are.

Third, I view care as a liminal, postmodern notion that cannot be fully captured by binary labels of "care" or "no care." Care exists on a continuum of depth. For example, retail transactions generally exhibit superficial human care in the service of monetary exchange. However, when someone takes the time and effort to learn more about someone and actively listen to their circumstances, opportunities for deeper care may emerge. That depth of care is correlated to the time and amount of effort devoted to learning about the other. Such efforts are choices that individuals can decide to make. When someone is described as "caring" they exhibit a willingness to listen and sympathize with others, moving from cursory pleasantries to more profound attention often resulting in caring action. As Virginia Held describes, "the focus will remain, for the caring person, on his or her *relations* rather than on his or her own dispositions, and on the *practice* of care" (Held 2006, p. 53).

Taken together, the claims I make about care—its personal and political nature, its responsiveness, and its levels of depth—paint a picture of a moral approach that integrates ontology, epistemology, emotion, and action. Acknowledging our interrelated identity, caring is about learning of a certain sort: learning that engages not merely propositional knowledge (this or that fact about the world) but also affective knowledge that captures nuance of feeling and visceral understanding. This knowledge affects and disrupts us. Opening one's heart in this manner makes the potential for taking action more likely. Can whole societies be said to care? To the extent that society is the aggregate of care-capable individuals, care theory would seem to point to the affirmative.

Finally, a note regarding migrant labor. The extant literature addressing migration from a care perspective has often focused on care labor (Kofman

and Parvati 2012; Williams 2010; Datta et al. 2010). In particular, there are concerns about how affluence and career freedom for women who have historically held much of the responsibility for care has shifted that care to paid labor, including migrant workers. The term "care chains" has been used to describe the flow of caregivers from the Global South to North whereby familial care shifts as a parent migrates to a more affluent country to perform care for a family whose traditional caregivers are pursuing careers. Although understanding this phenomenon is important for analyzing care worker exploitation, this chapter focuses on a related but broader concern regarding the social readiness to care.

An Alternative Approach to Migration

Given the context of Western political theory, the most common approach to issues of migration is to explicate and adjudicate competing rights. Notions of care and compassion are not central to these arguments. For example, in a recent book, the highly esteemed and award-winning political scientist Joseph H. Carens addresses the ethics of immigration. Carens' work is systematic, clearly argued, and compelling. Addressing immigration as an appropriate topic for ethical concern, Carens claims that despite the attention focused on disagreement between nation states, there is much agreement regarding principles applied to issues of migration (Carens 2013, p. 9). Appealing to this consensus as an appropriate basis for democratic deliberation, Carens makes an argument for policies of more open borders on the part of nation-states. He utilizes what he describes as the "theory of social membership." Although the relational connotation of this term might appear favorable to a care ethical approach, it is ultimately a claim about the basis for rights. As Carens describes, "simply living in a state over time is sufficient to make one a member of society and to ground claims to legal rights and ultimately citizenship" (Carens 2013, p. 168). Carens' conclusion is one that many care theorists would assent to: "a just world will be one in which people are largely free to live where they choose and in which there is relative economic equality among places and people" (Carens 2013, p. 296). As convincing as Carens is, the approach is rooted in the standard abstract language of Western political theory. Despite a focus on society, a reflection on care, compassion, empathy, and connection are absent from Carens' analysis. Why does this absence matter? Because the conclusion of changing national policies in favor of more open borders is morally and politically incomplete

without taking into consideration the affective and relational dimensions of migration.

What I am suggesting here is that although the current discussions of improving the rights and policies toward migrants represent a progressive step forward, indeed, a step that can lead to care, such formalistic advances are made much more robust if the attitude and skill of society are adapted to caring for unfamiliar others. Legal changes can have symbolic and material value but without commensurate dispositional and habitual changes, the legal changes may not realize their full potential. Take, for example, the comparative experience of two oppressed groups in the U.S.: African Americans and homosexuals. Ostensibly, the civil rights legislation passed in the 1960s was a great step forward for African American civil liberties, and it certainly made a difference. However, the legal changes did not match the social readiness for significant portions of the population. To this day, there are persistent indicators that the average African Americans' social experience is inconsistently better than it was in the 1950s given the violence perpetrated against black youth, poor education rates, high incarceration rates, and persistent economic challenges. The laws and rights changed but the human experience did not evolve as much as hoped. Homosexuals in the U.S. have also borne the brunt of horrendous discrimination and violence, but beginning in the late 2000s the tide of public opinion turned and has fueled formal changes in legal rights. One explanation for the divergence of the two experiences is the comparative readiness of society to empathize, show compassion, and care. Sentiment and disposition is leading the way for social change on behalf of homosexuals in a way that it has not for African Americans. This comparison is flawed and over generalized considering a number of contextual variables that influence the differences but the point is that the disposition of social groups has to be considered a political factor in liberal and democratic progress in addition to rules and rights. To put it bluntly, a law cannot change people's hearts. Caring suggests an alternative (but not a mutually exclusive) approach to the social and political challenges posed by migration.

What About A Social Duty to Care?

Given the argument thus far that a caring social disposition is an important element in thinking about the politics of migration, why not establish a social duty to care? A few theorists have suggested that one means of bringing care into social and political deliberation is through recognizing

a duty to care. Ostensibly, such a duty would change the relationships members of a society have toward those who migrate to their country. Given traditional approaches to political theorizing, this integration of care and a rights based framework makes sense. However, many care theorists hold skepticism toward duties and rights when they are viewed as the ultimate end of ethical thinking. As Noddings describes, "care theorists advise turning away from arguments that concentrate on the wording of principles and abstract interpretations" (Noddings 2010a, p. 238). Noddings is describing the central theme of this chapter in that changing laws, and policies, as well as claiming rights for migrants is important, but so too is having a society prepared to care. Noddings elaborates: "the contribution of care ethics is to examine the needs and wants that underlie the granting of rights and to question an assumed right claimed by some when its exercise might deprive others of the satisfaction of needs" (Noddings 2010a, p. 27).

Sarah Clark Miller provides a nuanced approach to care obligations. On the one hand, she claims, "The scope of the duty to care is universal, meaning that all people are required to care, not simply those who are inclined to do so, either 'naturally' or through social conditioning" (Miller 2010, p. 150). Miller explicitly universalizes this claim but follows it up with an equivocation, "Exactly when and how moral agents respond under the duty to care is a matter of flexibility. In this formulation, moral judgment, in connection with context, necessarily plays a large role in determining exactly when and how moral agents must meet others' needs" (Miller 2010, p. 151). Miller suggests that a duty to care can help a society establish values through its laws and practices and thus can be a beneficial method in advancing care in our social and political deliberations. Although I endorse much of what Miller claims, an *a priori* duty to care suffers the same challenge of all externally based abstract obligations in that they can be "gamed" and do not necessarily challenge individual agents to their highest ethical selves. By gaming, I mean that external rules lend themselves to game metaphors indicated by concerns over which rules trump other rules and under what conditions exemptions can be made (Hamington 2009). A personally identified norm of care, a self-generated duty, whereby the agent has internalized the commitments in a flexible open-ended way is much more likely to motivate a person to take significant ethical action.

What I have argued thus far is that social capacity to care is a missing element in moral considerations of migration. Traditional ethical concerns about migration fail to take into consideration the readiness of a society to

engage in caring. Although care labor can be compelled by law or compensation, care ethics and disposition cannot be legislated or required in a robust way. There is an internal authenticity to the experience of interpersonal care that can only emerge from individual moral agents. Next I turn to developing social readiness for care through means other than compulsion.

Developing Social Readiness for Care

Care ethics theorizing began in the 1980s with a strong emphasis on psychology and the relationships of individuals. Subsequently, theorists turned to social and political implications of care. These two trajectories should not be considered mutually exclusive and if held together can result in a compelling intersectional and cosmopolitan theory of care particularly fruitful for considerations of migration. What I am suggesting is that the widespread development of both cognitive and emotional care skills can result in improved capacity for caring for diverse unfamiliar others. Geography scholars have offered some significant work on care in terms of recognizing the relationship between local and distant caring. For example, Parvati Raghuram, Clare Madge, and Pat Noxolo claim, "The notion of care offers an affective register to this discussion [of ethics in an interconnected and postcolonial world] and also locates this responsibility in embodied enactments of care. It thus offers academics a mode of invocation for responsibility that draws on proximate relations, but makes these phenomenological experiences of care available for projecting out to distant relations and responsibilities" (Raghuram et al. 2009, p. 6). Raghuram, Madge, and Noxolo's claim suggests another formulation of cosmopolitan care whereby proximal experiences of diversity fuel one's capacity to care for distant, unfamiliar others. Such an approach does not begin with an abstract set of rules but rather starts with the practice of opening up the hearts and minds of individuals to the impact and benefits of caring. Ivonne's story at the beginning of this chapter is a small gesture toward what Raghuram, Madge, and Noxolo are addressing. If one reads the story and makes an empathetic connection to Ivonne, perhaps this humanizes a migrant experience in a small way.

What does it mean to develop a society's capacity to care in preparation to look at migration differently? First and foremost, care has to be valorized as a moral ideal and a social good. Care and compassion may have allowed human civilization to sustain itself through the ages but

they have been devalued in modern Western political discourse. This deprecation is particularly true in the U.S., given the ongoing cultural embracement of rugged individualism. Care and related notions such as hospitality, compassion, empathy, and sympathy need to participate in the narrative moral imagination of the country—what it means to be a good citizen. In other words, a caring-ready society might openly speak of the importance of care rather than finding it a source of weakness. One can find symbols and genealogies of care thinking in every society but the contention here is that they must be alive and vital so as to play a more central role in the nation's self-understanding. The Statue of Liberty, for example, is just such a symbol of U.S. hospitality to migrants although this particular symbol has not sustained a robust hospitality narrative into the present day. If care had equal footing with U.S. narratives around freedom, patriotism, choice, and economic potential, then perhaps care might play a more significant role in the country's moral immigration. I am not suggesting that language alone is enough to make a country ready to care for unfamiliar others, but words do matter. Take, for example, the disparaging popular discourse surrounding empathy when President Obama nominated Sonia Sotomayor for the Supreme Court. Although some engaged in a thoughtful nuanced conversation, others made the more sweeping claim that compassion would not only make Sotomayor a poor judge but also that compassion could be a threat to liberty. More pertinent to compassionate migration, in November of 2014 when President Obama announced an executive order to allow certain undocumented migrants to stay in the U.S., he framed the action in terms of compassion: "We need more than politics as usual when it comes to immigration. We need reasoned, thoughtful, compassionate debate that focuses on our hopes, not our fears" (Obama 2014). However, some of the reaction to the executive order did not share compassion as the significant value. Then Representative Michelle Bachmann only saw a negative impact of Obama's executive order: "The social cost will be profound on the U.S. taxpayer—millions of unskilled, illiterate, foreign nationals coming into the United States who can't speak the English language . . . Even though the president says they won't be able to vote, we all know that many, in all likelihood, will vote" (Costa 2014). The lack of compassion and knowledge of the immigrant's reality in this statement is striking. Care and empathy have epistemic implications that are extremely important for ethical considerations and should be central to the nation's moral self-understanding.

In addition to becoming valued in social narrative, another significant means for spurring the readiness of a society to care is through explicit care education. An education for caring would not simply be an intellectual engagement with content, but an embodied and interactive skill-building endeavor to strengthen cognitive and corporeal habits of care (Hamington 2015). Such an education would emphasize empathetic imagination and interpersonal responsiveness in the trajectory of what has been labeled emotional intelligence. As Nel Noddings describes, "Students should not forget the central aim of moral life—to encounter, attend, and respond to the need for care" (Noddings 2002, p. 23). Because an education that promotes care must spark emotional and cognitive imagination, there is a role for the arts and culture as well as meaningful community engagement opportunities. Martha Nussbaum refers to this approach as cultivating narrative imagination: "the ability to think what it might be like to be in the shoes of a person different from oneself, to be an intelligent reader of that person's story, and to understand the emotions and wishes and desires that someone so placed might have" (Nussbaum 1997, pp. 10–11). Ethics education designed to cultivate care might employ induction techniques to help students internalize the feelings of others that have been hurt; acting, improvisation, and role-play to imaginatively inhabit the positions of others; or study caring relationships for the verbal and nonverbal cues involved in the interaction. In addition, intercultural exchanges, perhaps enhanced by new technologies, can spur further sensitivity to the experience of unfamiliar others.

Caring discourse and education can improve a society's willingness and preparedness to care. Members of such a society are better equipped to inquire into the life of another person and find intellectual and visceral understanding of their plight. Authentic caring is accomplished with humility, recognizing the agency of the other and respecting the differences and gaps in understanding. A responsive act of care entails respect. Additionally, the caring individual is willing to be open to the possibility of acting on behalf of the other (Hamington 2010). If the individuals of a society are skilled at the emotional and cognitive habits of care then it is more difficult for the collective to be harsh and uncaring toward the plight of migrants. Skills of inquiry, humility, respect, and responsiveness mentioned above are necessary for engaging intersectional differences with care.

Thus far, I have described elements of social readiness to care for migrants as entailing the valorization of care and educating for the skills of care. These skills point to treating those who are "othered" as individuals

rather than categories or stereotypes. The central theme of care is responsiveness to the needs of the other. Any generalized care, despite its utility, falls short of robust responsiveness if it fails to take into consideration the particularity of context. The epistemic demand of care is to listen and understand. Two themes in specifying the experience of migration are intersectionality and localization.

Contemporary theorizing about intersectionality has revealed what a complex concept identity is. According to Patricia Hill Collins, intersectionality refers to "the critical insight that race, class, gender, sexuality, ethnicity, nation, ability, and age operate not as unitary, mutually exclusive entities, but rather as reciprocally constructing phenomena" (Collins 2015). The limitations of spoken language and modernist tendencies toward categorization tend to favor considering "migrant" as a homogenous identity category thus requiring similar care and similar policies. However, this kind of categorization is problematic. Intersectional analysis of migrants reveals the variety of identities even among those with similar countries of origin. Such studies, although addressing different challenges, share a complex notion of migrant identity as "constituted through a range of intersection and sometimes competing, forces and processes" (Levin 2014), addressing identity axes including "ethnicity, age, gender, generation, profession, social class and religion/secularity" (Kynsilehto 2011). The complexity of migrant identity is a barrier to easy and complete understanding, but it is an obstacle that can be at least partially overcome through the skills of caring. The hope for a future with diminished international conflict and violence where migrants from distant lands and unfamiliar cultures are welcomed and cared for rests on the possibility of engaging intersectional difference with the possibility of making common cause.

Another aspect of the complexity in caring for migrants is that systems and meaning of care are local and thus require cultural investigation. Parvati Raghuram is concerned that some of the narratives around globalizing care, although well meaning, are problematic if they fail to take into consideration local differences. She claims that rather than speaking of global care, attention needs to be focused on specific social and cultural manifestations. Migration intensifies this complexity. Raghuram explains, "When migrants mix in global cities they bring these varied understandings and expectations of care (both work and affect) into the mix. It is therefore imperative to understand how global care is constituted by asking what migrants understand by care. How do their pre-migration experiences of care influence it?" (Raghuram 2012, p. 169). Raghuram

does not believe that this is a simple matter of improving information sharing but that deep understanding of local caring systems can lead to altering how care is theorized.

Care is not an ideology or propaganda but a basic need for creatures born into as much vulnerability as humans are. We are also social beings and the claim here is to embrace the central importance of care—its widespread nurturing and flourishing—as a society. The moral disposition and skill of care will serve a society to empathetically understand the plight of immigrants and responsively act on their behalf.

Conclusion: Hospitality for Migrants

One manifestation of a society that is ready to care is a culture of authentic hospitality. When it comes to migration, a culture of hospitality connotes a proactive disposition that frames the migrant as a welcome guest, which is not only an honor to admit but in the spirit of cosmopolitanism, represents an opportunity for important collective learning and growth. Rather than perceived as a burden, the migrant who is framed as guest enriches our lives. This shift in metaphor is made possible in part though the development of a caring society skilled in compassion and open to learning about others.

Ivonne, whose story began this chapter, expresses concern about her ongoing education. Laws that support the public education of undocumented children of immigrants are a political issue of concern. However, this education continues to be framed as a limited commodity to be offered through social exchange. Education is a relational experience of community that is enriched by the varying experiences brought to the collective journey by its members. A cosmopolitan and caring hospitality reframes Ivonne's quest for education as a wonderful opportunity to welcome someone into the community for mutual benefit and growth.

The question of educating undocumented migrants is another example of how social readiness needs to accompany political progress. Matthew Collins and Giselle Reid offer a well-argued analysis of the ethical considerations in extending public education to undocumented migrants. They employ an "ethical triangle" to incorporate deontological, teleological, and virtue considerations in public policy decisions around education for migrants. The ethical triangle is "a means to assess a policy issue from different viewpoints" (Collins and Reid 2009, p. 62). Ultimately, Collins and Reid suggest it is "morally unacceptable to deny any human being access to an education

under any circumstances" (Collins and Reid 2009, p. 57). What Collins and Reid have proposed is elegant and does not oppose a caring hospitality, but it lacks the responsiveness that comes with a complete epistemological picture. Although they are explicitly concerned with actions, they do not take into consideration a campaign to improve community readiness, as if policies alone will accomplish moral objectives. For example, the model presented by Collins and Reid does not offer a place for the voice of the migrant. Ivonne's expressed needs should matter. Furthermore, as with other policies, changing the rules to benefit migrants is just one, albeit important, step. Policy change does not address the depth of care and hospitality. For instance, if undocumented immigrants are legally allowed to attend public school but the services are not in place to support their circumstances, they may be set up for failure. A human right, whether it is a right of movement or a right to education, not accompanied by community support to make the goal of that right a reality, is a hollow right. Society must be ready to authentically and responsively care for migrants.

Note

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CHAPTER 18

The Role of Arizona Desert Humanitarians in Compassionate Migration

Rebecca A. Fowler

On January 1, 1994, the North American Free Trade Agreement went into effect. Since then, over two million Mexicans lost their livelihoods, resulting in a diasporic migration north of the U.S.-Mexico border as hundreds of thousands of dispossessed workers sought employment in the U.S. As a consequence of this mass movement and the increase in "illegal" immigration, the 1990s witnessed a concomitant, unprecedented militarization of the U.S.-Mexico border. Under President Barack Obama's direction, border militarization continued to increase at an alarming rate. Like the Clinton and Bush administrations that came before, the Obama administration cloaked its attacks on immigrants under the guise of "public safety" measures and as part of a broader "national security" campaign. Under Obama's watch, the number of Immigration Customs and Enforcement (ICE) workplace raids and neighborhood sweeps increased nationwide, earning him the moniker "deporter-in-chief." Increasingly repressive measures undertaken by the Obama administration culminated, not only in the highest number of deportations, more than 2.5 million as of late 2015—but also in the number of migrant deaths along the U.S.-Mexico border.[1] The number of migrants

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traveling north for employment has fallen sharply in tandem with the decreasing number of Border Patrol apprehensions of undocumented immigrants. However, the number of migrant deaths as represented by the number of recovered human remains is still high.[2] The Tucson Sector, while only 260 miles long, is the deadliest segment of the 2,000-mile U.S.-Mexico border. It is no accident that half of all migrant deaths occur here. U.S. immigration strategies of "prevention by deterrence" create a deadly funnel effect that deliberately forces migrants away from populated areas and channels them into the most treacherous, desolate areas of desert and mountain terrain. The Arizona Sonoran Desert has become a killing field for the human detritus of U.S. neoliberal economic policies of "free trade."

Disappearing Acts

As M. Jacqui Alexander argues, "Not just any body can be a citizen" (Alexander 1994). Racialized bodies are already always not "ideal" citizens, for racism is not an effect but a tactic of state technology that is used to create biopolitical enemies against whom society must defend itself. In like manner, the brown body of the "illegal alien" has been marked by the state as an external threat, not only to U.S. society, but also to state sovereignty and governmentality.

U.S. immigration policies of deportation/detainment and "alien removal" necessarily entail the biopolitical production and configuration of political subjectivities of proper neoliberal citizens versus racialized anti-citizens. The rise of neoliberal rule and the dismantling of the social welfare state have resulted in an ideological mandate of privatized and individualized government of risk. Proper neoliberal citizens are expected to utilize market mechanisms in bearing the responsibility for their own social security and for insuring themselves and their families against ill fortune of poor health, accidental loss, and/or unemployment. The anti-citizen's individual lack of resources is equated with a pathological irresponsibility and inability to contribute to the well-being of the social body. Thus biopolitics rely upon "anti-citizen" regimes of truth that construct as pathological the undesirable body of the "illegal alien," associating it with crime and disease and as a cancer that must be excised from the social body. Biopower technology assures the production of docile bodies and the control of segregated, hierarchized populations intrinsic to the machinery of unrestrained neoliberal capitalism.

U.S. immigration policies deliberately render invisible undocumented persons. Steven W. Bender has noted how "we kill those from dehumanized

groups whom we can, keep others out of sight or control them in prisons, and tolerate the rest when they serve larger societal needs, especially for labor" (Bender 2015, p. 34).[3] Migrants are "disappeared" in myriad ways. Migrant deportability renders unauthorized immigrants invisible within communities where they serve capital as a tractable, imminently disposable labor force.[4] The undocumented person works for subservient wages and lives in constant fear of her imminent apprehension and deportation. Migrant vulnerability to arrest and deportation shapes social organization within immigrant communities in significant ways by impeding and curtailing spatial movement. Migrants live not only with the anticipatory anxiety of their own deportation, but also with the painful memories of the deportations and spectral absence of family and community members.

Immigration policies of "alien" detention and "removal" channel migrants into detention centers for profit. Operation Streamline fast tracks unauthorized immigrants through the federal court system, serving capital accumulation by warehousing them in privatized detention centers run by Corrections Corporation of America (CCA) or GeoGroup (GEO). In 2008, Tucson became the fourth federal court to adopt Operation Streamline. Since then, approximately 70 immigrants have been prosecuted every day, five days a week. On February 13, 2013, a typical day for Streamline, 66 migrants were sentenced to a total of 4,860 days in prison, at a cost to taxpayers of $552,152 when housed at CCA versus the $384,000 charged by the Bureau of Prisons system. Annual estimated costs for Streamline prison sentences in Tucson alone run taxpayers between $70 and $110 million. Since its inception in the late 1980s, CCA's profits have increased fivefold. In 2012, the company garnered $162 million in net income; of that total, 43 percent is owed to federal contracts with ICE. CCA recently sent letters to 48 states offering $250 million to buy existing state prisons in exchange for a 20-year management contract and a guarantee that the prisons would remain at minimum 90 percent full. GEO, which cites its largest client as ICE, has enjoyed a rise in net income from $16.9 million to $78.6 million since 2000.

Finally, U.S. immigration policies deliberately and literally secret away migrants into deadly, desolate environs where migrants run out of water, lose their way, and die ghastly deaths from exposure to intense heat or cold elements. Over the last decade, and in the Tucson Sector alone, more than 2,000 bodies have been recovered. It is estimated that for every set of human remains recovered, three to ten more are never found. According to John Fife, No More Deaths co-founder, the actual

number of persons who lost their lives crossing the Arizona Sonoran Desert can never be known. Fife writes:

> It is clear that many more deaths occur in the desert than are ever recovered or reported. There are two reasons. One, most people close to death wander off the trails and go downhill into the thickest cover; and two, the desert is designed to clean up quickly (buzzards, coyotes, small animals, etc.). I found a deer kill by a mountain lion and watched it over time. In two weeks there was no trace of the deer . . . No one knows what the ratio of deaths to recovered remains is . . . we searched for a woman's body in a specific area and before we found her body we found three others that were unreported. Migrants we talk with in the desert report seeing bodies on their crossing that are not reported or recovered. My experience indicates that 3x [the number of human remains recovered] is a conservative estimate.[5]

Many border crossers are swallowed up by the desert, never to be seen again.

Desert Humanitarian Aid and Counter-Conducts

In the following sections, I examine how desert humanitarian organizations Humane Borders, the Tucson Samaritans, and No More Deaths utilize *counter-conducts* to help bring undocumented migrants out of the shadows in promotion of compassionate migration policies. In discussing counter-conducts, it is useful to consider the significance of its oppositional correlate. In his work on the art of government, Michel Foucault references "conducting" to describe both the state's modus operandi in governing whole populations and the totalizing manner in which individuals are obliged to conduct themselves. "Counter-conducting" highlights the relation between counter-hegemonic social movements and the forms of government they protest. Ultimately, "counter-conducts" translates as "the will not to be governed thusly, like that, by these people, at this price." For desert humanitarians, counter-conducting translates as strategic, conscientious forms of resistance to harmful immigration policies and to the official narrative that portrays undocumented immigrants as less than human.

The combined missions of Humane Borders, the Tucson Samaritans, and No More Deaths seek to meet the urgent needs of the migratory victims of U.S. deterrence-by-death immigration policies. No More Deaths and Tucson Samaritan members maintain water drops and hike migrant trails seeking out travelers to provide food, water, and medical

aid; Humane Borders maintains permanent water stations throughout the Arizona/Sonoran Desert. However, all three organizations utilize counter-hegemonic language systems and other forms of symbolism to challenge the dominant narrative surrounding immigrants and immigration policies.

Language, after all, shapes reality. U.S. immigration policies and public discourses that construct literal and symbolic borders between the "American" and the "illegal alien" purposely erect barriers between "us" and "them" and are fundamental to maintaining a hegemonic U.S. citizenship and identity. Discursive systems that name undocumented persons as "illegal" and "alien" strip noncitizens of their humanity while oppositionally reflecting the "citizen" as all that defines "human." Naming that results in the exclusion of others from the human family and constructs barriers that preclude the possibility of compassion and desire for human connection and relationality with others. Words hold the key to moral imagination and have the power to deny or deliver social justice.

The next section explores the historical context of the three desert aid organizations as emergent from the philosophical and theological traditions of the Sanctuary Movement with its connections to liberation theology, highlighting how desert humanitarians utilize counter-conducts in various forms. The final section illustrates non-linguistic forms of counter-conducts as experienced by hiking migrant trails and as manifested through Samaritan artwork and photography.

Humane Borders, the Tucson Samaritans, and No More Deaths

Desert humanitarians engage in material, symbolic, and discursive forms of counter-conduct that challenge the state's criminalization and exclusion of undocumented immigrants. James P. Walsh terms such forms of intervention "debordering." According to Walsh, "debordering" involves counter-surveillance, discussed below, in addition to "broader transformative approaches that employ surveillance to humanize the border environment" (Walsh 2011, p. 286). Desert aid humanitarians engage in ethical and practical activities to aid migrants, but also act to redefine the terms of official discourses and policies that dehumanize migrants. Undertaking debordering as praxis, desert humanitarians commit to carrying out counter-hegemonic acts of resistance over the long run in the hopes of effecting compassionate immigration policies.

In his work on global citizenship, Luis Cabrera argues that desert humanitarians engage as global citizens in traversing the symbolic boundaries of differential citizenship to "secure those fundamental rights that would be better protected if there were a just system of global institutions [already] in place" (Cabrera 2008). In underlining an understanding of an ethos of care that points the way to a "defensible conception of global citizenship," Cabrera emphasizes a moral imagination and attitude that translates as "acting as though" one were adhering to a moral framework of obligations of justice firmly embedded within existent institutions (Cabrera 2008, p. 95).

To illustrate this attitude, Cabrera relates the story of an interchange between a reporter and a No More Deaths volunteer. When asked, "Why, as an American, are you [putting out water for 'illegal aliens']," the young woman responded, "It's not really an American thing. It's a people thing. You know, thirsty people should be given water. It seems to me just to make sense" (Cabrera 2008, p. 94). Thus desert humanitarians act as global citizens in positing "their sense of belonging to a common humanity as reason enough to reach across barriers of citizenship and nationality" (Cabrera 2008, p. 95).

Humane Borders was founded in 2000 in response to mounting numbers of migrant deaths resulting from U.S. deterrence policies. Humane Borders maintains water stations on the U.S. side of the Arizona/Sonoran Desert on federal, county, and private land. Water stations consist of one or two 55-gallon barrels of water fitted with spigots, resting on steel or wooden stands above the desert floor. All water stations are marked by blue flags rising 30 feet into the desert sky, signaling to migrants the locations of precious, life-saving water supplies. The number of water stations maintained depends on the time of year according to policies dictated by the Bureau of Land Management (BLM). During the sweltering summer months, or from May to September, over 80 water stations are maintained, but in cooler months over half are shut down, leaving 35 to 40 in operation.[6]

In 2001, in response to a spike in migrant deaths, the leaders of Humane Borders decided to push the boundaries of "passive assistance" in an effort to more proactively respond to the humanitarian crisis. As a result, the Tucson Samaritans (SAMS) were formed in 2002. The SAMS proactively seek out persons in distress by traveling remote roads southwest of Tucson, along and between Highway 286 and Interstate 19. In the beginning, SAMS trips were limited to driving isolated back roads, but members soon began hiking migrant trails as well.

No More Deaths[7] was initially formed to maintain a presence in the desert during summer months. However, since 2012 No More Deaths has maintained a 24/7 presence, 365 days of the year. The No More Deaths camp, located on private property10 miles north of the Mexico border, includes a makeshift emergency medical tent with cots and a generator for cooling. Volunteers staff the camp and conduct migrant patrols seven days a week from May through September.

No More Deaths and SAMS volunteers maintain water drops and hike migrant trails in the hopes of encountering travelers and offering food, water, and medical aid. Volunteers typically patrol migrant trails10 to 20 miles north of the Arizona/Mexico border. Because U.S. deterrence-by-death funnels migrants into the most desolate, treacherous areas of the Arizonan/Sonoran Desert, border crossers will run out of water just a few miles north of the border with as much as six to ten times the distance left to walk before resting at pick up points, so volunteers try to position themselves in strategic places to service migrants when and where they will need water and food supplies the most (Fig. 18.1).[8]

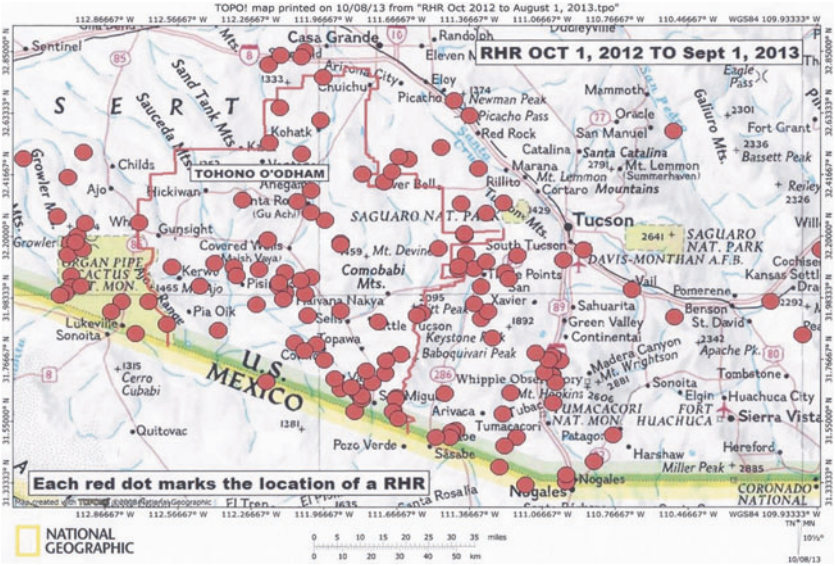

Fig. 18.1 Recovered human remains for fiscal year 2012 through 2013[9]

The different organizations' common vision of a universal humanity is made manifest in the framing of mission statements on their websites. How an issue gets framed is essential in counter-conducting anti-immigration policies to advance an alternative vision of migration across borders. Humane Borders identifies as a faith-based organization whose "sole mission is to take death out of the immigration equation."[10] The Humane Borders website reads:

> It is not our business to pretend we can control the flow of migrants that come north through our deserts where daytime summer temperatures can exceed 110 degrees. The facts are that due to circumstances way beyond our control they do come. Despite whatever opposing political views *people* may have on this issue we hope that the one thing we can all agree on is that this northward migration should not cost *people* their lives. (emphasis added)

In framing its lifesaving mission, Humane Borders deliberately embraces a common language of humanity that defines people originating from either side of the border simply as "people."

The Tucson Samaritans derive their name from Jesus's biblical parable as related in the Gospel of Luke 10: pp. 29–37. As the story goes, two highway thieves rob a traveling Jew of his money and leave him dying on the side of the road. Two Jewish clerics pass him by. However a third traveler, a foreigner from Samaria, a region known for its hatred of Jews, arrives on the scene. The Samaritan shows mercy and compassion to the injured man, caring for his wounds and lodging him at a nearby inn. The tale is powerful not for the Samaritan's good deed, but for his acting on a higher moral ethic in recognizing the stricken Jew as a reflection of himself. The Samaritan's acknowledgement of a shared humanity ultimately trumps the social conditioning that sought to teach him Jews were "other" and therefore undeserving of human aid.

On their website, the Tucson Samaritans declares itself a "voice of compassion" and "a people of faith and conscience" whose primary mission in responding to the immigration crisis along the U.S.-Mexico border is to "relieve suffering among our brothers and sisters and to honor human dignity." No More Deaths, founded in 2004, also identifies as "people of conscience" and states that its mission is to "end death and suffering on the U.S.-Mexico border." The organization adheres to a framework of "faith-based principles for immigration reform" and is

further committed to consciousness raising, global movement building, and the promotion of humane immigration policies.[11]

Both No More Deaths and the Samaritans base their philosophies and practices on *civil initiative*, a philosophical legacy of the 1980s Tucson Sanctuary Movement authored by Jim Corbett, a Harvard-educated Quaker. Civil initiative "neither evades nor seizes police powers" and is "nonviolent, truthful, wide-ranging, cooperative, pertinent, volunteer-based, and community centered."[12] Reverend John Fife, speaking at a No More Deaths training in August of 2012, defined civil initiative as "the legal right, as well as the ethical responsibility of all of us, of civil society, to protect the victims of human rights violations when the government is the violator."

Because it was understood from the beginning that volunteers would engage in impromptu encounters with unauthorized immigrants, lawyers from the Sanctuary Movement were utilized to educate Samaritan members as to exactly what kinds of action were and were not permitted by law. Samaritans further extend their connection with Sanctuary by identifying themselves as a mission of the Southside Presbyterian Church, a site used to sanctuary El Salvadorian and Guatemalan refugees during the dirty wars of the 1980s.[13]

According to Fred Kniss and Gene Burns, religion's autonomy from the state provides fertile ground for the growth of social movements in the provision of infrastructure, a safe space for face-to-face interactions of like-minded people, and a "presumptive legitimacy" of organizational actions (Kniss and Burns 2004, p. 706). Within religious organizations, social movements utilize counterhegemonic discourses and rhetorical framing to assign meaning to relevant events and conditions and interpret them in ways that are calculated not only to mobilize potential adherents and constituents and to garner bystander support, but also to neutralize the opposition. Counter-conduct framing provides an interpretive function in defining the issue and what is at stake, and creates a contentious agency in "calling for action that problematizes and challenges existing authoritative views and framings of reality" (Snow 2004, p. 385).

A particularly powerful form of counter-conduct utilized by desert humanitarians is that of counter-surveillance. Counter-surveillance serves as a powerful tool of resistance and democratization in its capacity to redirect the gaze, raise public awareness, foster empathy, and incite action. Over the last two decades, the U.S.-Mexico border has witnessed a dramatic intensification of border control surveillance that includes high-tech

fencing and surveillance towers, ground sensors, infrared cameras, and unmanned drones. In the Arizona/Sonoran Desert, Border Patrol agents are omnipresent in the sky and on the ground, in helicopters, trucks, all-terrain vehicles, and on horses and foot patrols. Anti-immigrant nativism has also resulted in the proliferation of civilian-led border watches and patrols as an abiding presence at the border. Thus desert humanitarians at the U.S.-Mexico border exist as a humane counter-presence to the U.S. Border Patrol and militia groups in that they aim to check otherwise unrestrained anti-immigrant powers. At a No More Deaths training session in August of 2013, in describing the existent tension between the Border Patrol and No More Deaths as "palpable" and "justified," John Fife told volunteers, "We're there, getting in the way of their basic border enforcement strategy, which is to use the deaths of migrants as a deterrent to other people trying to cross. So we're a problem, and as long as we're a problem, we're doing our job. Right?"[14]

Over the last few years, and in response to the increasingly frequent destruction of life-saving water supplies left for migrants, No More Deaths has utilized hidden cameras at water drop sites to surveil the actions of border patrol agents and others who destroy or remove water and food supplies intended for migrants in distress. A recent "Need to Know" PBS broadcast utilized a No More Deaths "Culture of Cruelty" video that revealed hostile Border Patrol agents removing and destroying humanitarian aid water supplies. The public exposure the video garnered arguably resulted in the Border Patrol being forced onto the defensive in an effort to ameliorate the damage to its public image. Speaking in 2014, Fife said: "After we gave [the videos] to the media, we have been able since then to negotiate [with Customs and Border Protection] that the camp is recognized, that they're going to train their agents not to slash water bottles, not to threaten our volunteers. Although some rogue agents still do, it's not as systemic as it was."[15] As a direct result, other social movements along the border have formed to utilize counter-surveillant techniques to "watch the watchers." In March of 2012, Arivaca, Arizona resident volunteers with the Samaritans and No More Deaths formed People Helping People (PHP) to oppose the expanding presence of border patrol in their community.[16] PHP has developed an ongoing project to document border patrol harassment of resident Arivacans as well as Border Patrol human rights violations of undocumented persons. In June of 2012, PHP conducted its first "checkpoint monitoring" vigil to protest the border patrol checkpoint on Arivaca Road, located some 23 miles north of the U.S.-Mexico border in Amado,

Arizona.[17] PHP's goals are threefold: (1) "'Collect video and statistical data' on apprehensions, seizures, searches, and detentions at the checkpoint in the absence of government oversight and record keeping; (2) 'Witness and Deter' unlawful and unwarranted searches, abusive language and behavior by the Border Patrol, and other rights violations at the checkpoint; and (3) 'Make visible Arivaca community resistance' to the continuing operation of the checkpoint and to the ongoing militarization of this region: militarization is not the answer."[18]

PHP's strategic use of the debordering practices of countersurveillance and counter-discourse techniques serves to "render perceived injustice visible" (Walsh et al. 2011, p. 286). In turning the gaze of power against itself, counter-surveillance techniques turn up the pressure on authorities and actively promote transparency and government accountability. These forms of resistance, enacted and intensified over the long run, have the potential to undermine and destabilize harmful immigration policies.

Here I have described some of the material and discursive aspects of counter-conducts utilized by desert humanitarians that challenge the state's criminalization and exclusion of undocumented migrants. However, humanitarian volunteers engage in other forms of creative comportment that raise public consciousness in solidarity with unauthorized immigrants and advance compassionate migration policies. Next, I explore art as well as non-linguistic forms of counter-conducts as manifested through Samaritan artwork and photography.

Art Form and Consciousness-Raising as Counter-Conduct

Desert humanitarian counter-conducts function as praxis in challenging and overturning dominant discourses that dehumanize undocumented migrants. Volunteers engage in creative acts of debordering that serve to reshape and transform the consciousness of a society. Within the Samaritans organization, the possibilities for raising a universal consciousness that transcends national borders manifests itself through two different channels: one, through service to migrants in hiking desert trails to provide life-saving water supplies; and two, through the creation of art that counter-conducts the dominant narrative that constructs undocumented persons as "Alien" "Others."

The desert experience of walking migrant trails teaches humility and inspires awe and admiration for what the migrant is willing to endure

crossing the desert. Even if one never sees a migrant, there are signs of her or him everywhere: empty tuna tins and food and electrolyte bottles, discarded clothes, backpacks, hygiene products including toothbrushes and toothpaste, deodorant, and foot powder. In layup or pickup sites where migrants rest and cast off their belongings, one will often find dozens of backpacks, blue jeans, shirts and underwear, shoes, and even books, journals, letters, and prized mementos like embroidery. In instances when such possessions are found, it is impossible not to identify with the migrant as a fellow human being. In the deodorant and aftershave bottles and foot powder, one recognizes how earnestly migrants strive toward maintaining cleanliness and good hygiene in a hostile environment under the most grueling and laborious of conditions. In an embroidered keepsake or written letter, one is made acutely aware of the abiding, binding ties of humanity, of the human emotions of love, pride, sadness, and grief, and of the principles of dignity and honor embodied in desert migrants.

Samaritans Kathryn Ferguson, Norma Price, and Ted Parks have written a collection of stories that highlight their personal encounters with migrants in the desert, in border towns, and in hospitals, and that detail the experiences of migrants as told to the author's firsthand (Ferguson et al. 2010). These 39 stories are difficult to read for the heart-wrenching experiences suffered by migrants. Readers, as witnesses, are offered a glimpse of the grinding poverty, deprivation, and desperation that compels migrants to risk their lives crossing the Arizona border where temperatures can swell to 115 degrees in the summertime and fall below freezing in winter months. In writing these accounts, the authors work to decolonize the master narrative that constructs migrants as criminals. The production of counternarratives that highlight the terrific abuses that unauthorized immigrants suffer have the capacity to prompt change in promotion of compassionate immigration policies that recognize all immigrants as global citizens. However, a huge potential for the raising of consciousness that spans across borders exists outside of the bounds of human language. Chela Sandoval argues that the process of the generation of consciousness is essentially nonnarrative in nature in that "narrative is viewed only as a means to an end—an end to domination" (Sandoval 2000, p. 63).

The artwork and photography of Samaritans Debbi McCullough, Jody Ipsen, Alvaro Enciso, and Bob Kee upset dominant narratives that dehumanize migrants as pathological criminals (Fig. 18.2). In their artwork, McCullough, Ipsen, and Enciso utilize materials collected walking migrant

trails to bring migrants out of the shadows of dehumanization as well as to honor and commemorate the untold number of migrants who have lost their lives crossing the Arizona/Sonoran Desert. Debbi McCullough defines her work as "an expression of hope, suffering, and the power of the human spirit" (McCullough 2007). She fashions art out of items most folks consider trash: broken, sun-baked shoes, discarded clothing, aluminum cans, toothpaste tubes and toothbrushes, and plastic water jugs are all considered precious materials. "We dismiss it as trash when really these are elements of someone's life," says McCullough (Licata 2009).

Angel of Mercy

Fig. 18.2 Artwork by Debbi McCullough

McCullough's favorite piece, entitled "Angel of Mercy," features the hand of a mannequin bearing a cross hand-fashioned from aluminum foil. McCullough relates the story of finding the cross:

> The Sonoran Desert of Southern Arizona holds traces of the lives of those who have walked through its vast terrain, along washes and trails etched by thousands of weary travelers who came before. One morning as I walked a migrant trail, looking for anyone who may have lost their way or grown too sick and tired to continue, I came to an abandoned resting area. Beneath the short, dense grove of mesquite trees I saw evidence of travelers: empty tuna cans, empty water bottles, abandoned backpacks with broken straps. Then, something shiny caught my eye. The lower branches of a sapling cradled a cross, constructed entirely of twisted aluminum foil. Holding it, admiring its sturdiness and simple method of construction, I imagined that in making it, the traveler had enacted a humble act of gratitude and prayer not only for himself, but also for the one who would find it: me. I have treasured that small cross, and it has found a home in the hands of the Angel of Mercy artwork I created.[19]

Jody Ipsen has arranged for the creation of quilts to honor migrants who died crossing the Arizona/Sonoran Desert. Quilts are made using recycled material from migrants' discarded clothing, especially blue denim, backpacks, and flannel shirts. In a quilt she made honoring those who died in FY 2011, Jody incorporated three hand-embroidered handkerchiefs. One with red and pink flowers reads "Duerme amor mio," ("Sleep [with angels] my love"). Another embroidered handkerchief reads "Contigo en la distancia" ("With you from a distance"). The quilt bears the names of all of the dead. However, many patches simply bear the word "desconocido," testifying to the fact that the human remains of many who die are never identified and the names of the deceased remain unknown (Fig. 18.3).

Alvaro Enciso fashions artwork from the hundreds of metal tops of tuna tins he finds at migrant resting sites throughout the Sonoran Desert. Enciso describes his experience hiking trails, including the sacred phenomena of finding objects that serve as channels for migrant stories:

> When I started hiking the migrant trails a couple of years ago, I was at first appalled by the plastic bottles, discarded back packs, shoes, clothing, tin cans and a plethora of other objects littering the beautiful Sonoran Desert. But as I learned more about the plight of the migrants, their abandoned belongings began to talk to me. Every item out there tells a sad and tragic story, but

Fig. 18.3 Photograph by Jennifer Eschedor

each object also bears witness to the unrelenting hope and courage of those who walk north in search of a better life.

I started collecting the rusted lids of tuna fish cans hoping that an artistic manipulation of these apparently insignificant materials would lead me to uncover the elusive meaning each item contains. The moment you bend down to pick up an object left there by another human being, you pick up the story of the person who left it behind, traces of beginnings and endings, of the indeterminable in-between of trudging through the Sonoran Desert.

The work of transforming these sacred items into art should tell of the immense suffering of the migrants to which the desert landscape alone bears witness. On the left side of *Lo Que Queda de Mi*, I appropriate the red dot of Recovered Human Remains maps that is used to pinpoint locations where bodies have been found. On the right, a photograph shows a segment of a trail where two bodies were found a few years back.[20]

Lo Que Queda de Mi (What is Left of Me)

Fig. 18.4 Diptych by Alvaro Enciso

As someone who has spent a lot of time hiking migrant trails as a Tucson Samaritan, *Lo Que Queda de Mi* speaks volumes to me. Looking at the concentric circles of rusted metal tins, I see the panoramic vastness of the desert and feel the sun radiating its scorching heat from above. And when I look at the dizzying array of circles, I think of the many who have lost their way. I ruminate on the person who, separated from her group and not knowing where she's going, might walk in circles for days never going anywhere. The red dot in the center of it all signifies what happens too frequently: a human being dies having expended every last ounce of her energy, ravaged by the extreme heat or cold of the desert.

Art, in its response to tragedy, arises out of a sense of heightened communal awareness and challenge. Samaritan counternarratives highlight the humanity of undocumented persons, upsetting the dominant paradigm of "illegal" immigrants as invasive threat. According to Richard Delgado, counternarratives generate a shared consensus among community members and a common culture of collective understandings, knowledge, and ethics. Counterstories also serve an important destructive function in that they "can show that what we believe is ridiculous, self-serving, or cruel. They can show us the way out of the trap of unjustified exclusion. They can help us understand when it is time to reallocate power" (Delgado 2013, p. 72). Through their art, Enciso,

McCullough, and Ipsen engage in powerful acts of migrant storytelling and engage in counter-conducts that raise awareness of the intense suffering of migrants who brave the Arizona Sonoran Desert in their search for a better life. Art, as a form of counter-conducting, engages a transformative continuity in that the migrant object, metamorphosed as artwork, "lives" on to tell the story.

Bob Kee, a volunteer with the Tucson Samaritans since 2005, has taken hundreds of photographs hiking migrant trails. His photography bears witness to the amazing fecundity and abundance of desert life, of cacti in full bloom, reptiles and raptors, and a host of other amazing wildlife. But other images in his collection testify to the frailty of human life and to the stealth and ruthlessness of the desert as an agent of death. Bob has discovered human remains on five different occasions. Bob describes these events:

> The most powerful experiences I have had were when I found remains. To have that happen, three times in such a short span of time, in an amount of a couple of weeks... Especially finding them for the first time, it was just so surreal to have that happen, like this shouldn't be. We're living in the 21st century and people should not be dying out there just because they're trying to survive. For me it's that basic.

Kee's photographs illustrate what words could never do, graphically conveying the inevitable outcome of harmful U.S. immigration policies that are literally killing thousands of people. Photographs of human remains translate as powerful examples of counter-conducts that upset the dominant narrative of immigrants that represent migrant bodies as essentially nonhuman (Fig. 18.5).

The 2014 and Ongoing Unaccompanied Children Crisis

In 2014, the media reported exceptionally large numbers of undocumented minors crossing the border into the U.S. Between October 2013 and July 2014, nearly 63,000 unaccompanied children, the majority from Honduras, El Salvador, and Guatemala, made the trip north of the U.S.-Mexico border. While White House officials have acknowledged the role of criminal and gang violence and ailing economies driving these children to migrate, it remains silent about its role

Fig. 18.5 Photograph by Bob Kee

in the structural violence that caused the crisis in the first place. From the 1980s until today, U.S. military and economic intervention in Latin America is the primary force behind both Central American and Mexican Diasporas.

The media treated the crisis as one that was unprecedented in nature. But Marjorie King, a long-term volunteer with Tucson's Restoration Project of Casa Mariposa, has worked with large numbers of migrants from more than 20 different countries and views the situation differently. According to King, "We're seeing twice as many unaccompanied minors [in 2014] as last year, twice as many last year as the year before,... doubling every year, for the last four or five years. This is not new, [the situation] has just reached a critical mass."[21]

In an opinion piece written for the *New York Times*, Veronica Escobar, of El Paso, Texas, reinforces King's view. "Contrary to the heated pronouncements," writes Escobar, "this is nothing we [in El Paso] haven't seen before." Escobar argued that, just in time for fall 2014 elections, politicians were exploiting the myth of a crisis to play up to voters and

justify tighter restrictions on immigration (Escobar 2014). Margo Cowan, a Tucson-based lawyer who was active in the 1980s Tucson Sanctuary Movement and is currently a pro-bono adviser to *Keep Tucson Together*, a free legal immigration clinic, believes the media spotlight surrounding the unaccompanied children was a ploy orchestrated by the right to obstruct immigration reform. States Cowan, "I don't believe in coincidence. This is a political moment when Congress was going to act... and the president was probably going to act in a much broader way."[22]

In 2014, President Obama fast-tracked migrant children's sentencing and deportation hearings while working to overturn the 2008 Trafficking Victims Protection Reauthorization Act that would protect migrant children by barring their immediate removal. If the media's showcasing of images of flag-waving, anti-immigrants in Murietta, California or League City, Texas were a reliable measure of public sentiment, it would appear that most Americans agree with Obama's solution.[23] But according to a Reuters/Ipsos poll, conducted from July 31 to August 5, 2014, 51 percent of Americans believed that the children should be allowed to stay for some length of time; 32 percent of the 51 said until such time it is deemed safe for their return, while 13 percent said that the children should be permitted to remain permanently. Another 32 percent polled said that the children should be deported immediately. Barring the possibility of reunification with a family member living in the U.S., the Office of Refugee Resettlement placed approximately 30,000 migrant children with sponsors, or adults who can suitably provide for the child's well-being. An undisclosed number of children were reunited with a family member residing in the U.S., but thousands more are still being detained in National Placement Centers.

In June and July of 2014, one such facility in Nogales, Arizona, warehoused upwards of 1,300 children. Many faith leaders of the community were initially barred access to the detention center, but Customs and Border Protection (CBP) officials extended an early invitation to Juanita Molina, executive director of Border Action Network and Humane Borders, to tour the facility and to participate in a discussion and evaluation process. In a June 2014 press release, Molina offers a firsthand account of conditions she witnessed at the facility. Molina notes that although CBP were "doing their best to meet the children's physical needs," their emotional needs were far from being met. Molina also noted that many of the teenagers "appeared depressed, shutting out their surroundings under metallic blankets issued by the facility" (Harrington 2014).[24] Molina

observes, “It was evident that a policing force should not be put in the position of providing primary care to children in custody.” Molina also describes encounters with small children, and of finding “Martita,” a seven-year old girl from Guatemala, crying in a corner. Molina, acting out of compassion, took the girl by the hand and consoled her, telling her that she “would never forget her and that we were all here to help her” (Harrington 2014).

Paula McPheeters, a retired schoolteacher and desert aid humanitarian, relates other stories about her time at the Nogales facility as a volunteer translator for the Red Cross working the phones to reunite children with family members. She tells of how children within a yard enclosure were given a soccer ball to play with to celebrate the World Cup Games then in session. McPheeters describes how the children played with the ball for only a short time before it flew up, snagged atop the razor wire that enclosed the fence. The children and McPheeters watched as the ball slowly deflated. The sunken ball appears an apt metaphor not only for the broken promise of Congressional immigration reform, but in 2016 with the Supreme Court’s divided decision that blocked Obama’s executive plan for immigration reform. The sunken ball is an apt metaphor for the broken dreams of undocumented immigrants who desire so very much a better way of life or to reunite with their families that they pay with their lives trying to cross the Arizona/Sonoran Desert. And because walls, barbed wire, and inhumane immigration policies are not powerful enough to snuff human dreams, people will keep on coming.

In 2016, the U.S. public may believe that the crisis of children fleeing their countries and migrating north has abated. This, however, is not the case. The children are still coming. What has changed is that the Obama administration has made it incumbent upon Mexican authorities to prevent their ever reaching the U.S.-Mexico border to stake rightful claims of asylum. The Obama administration has essentially “outsourced its refugee problem to Mexico” in giving Mexico tens of millions of dollars to carry out a vicious campaign against migrant women and children “who are being hunted down on a scale never seen before and sent back to countries where gangs and drug traffickers have taken control of whole sections of territory” (Narzario 2015). In 2016, the Obama administration continued to carry out deportation raids against mothers and small children without concern for due process. As Bryan Johnson notes, “The truth is that Obama’s sole concern is and always has been to send the message to would be-crossers that they won’t be allowed to remain in the U.S. even

if they would qualify for asylum or other relief to remain in the United States" (Johnson 2015). In spite of Obama's crackdown, desert humanitarians working in Nogales and Agua Prieta Mexico continue to encounter Central American women and unaccompanied children who make it to the U.S-Mexico border. Many of these women and children will attempt to clandestinely cross the Arizona/Sonoran Desert. And while many of them will reach their destinations, others will die trying.

Conclusion

The lessons the desert and its travelers have to teach enable the growth of a universal consciousness and connection with the undocumented "other" in consciously realizing one's place in a racialized hierarchy that privileges the white neoliberal citizen. The humanitarian work and creativity of the Tucson Samaritans provides space for realization and transformation, for the formulation of an imagined community that reaches across national borders and for the grounding of a moral and ethical epistemology committed to social justice.

Ultimately the humanization of unauthorized immigrants can be achieved only through the implementation of open border policies that reject the supremacy of the neoliberal subject and finally serve to "humanize the face of U.S. immigration" (Bender 2015, pp. 57–58). In making a case for open borders, Kevin R. Johnson has argued for "nothing less than a fundamental reevaluation and rejection of the foundational tenets of current U.S. immigration law" (Johnson 2007, p. 9). Compassionate immigration policies would be grounded in the recognition that human rights are not predicated on a distinction between citizen and alien and cannot be nullified through claims about nationality and sovereignty. A human rights regime would allow for compassionate immigration reform that acknowledges the immense contributions that undocumented persons bring to our economy. Reforms would provide not only for the 12 million undocumented immigrants residing in the U.S., but also for "those future migrants with an American Dream" (Bender 2015, p. 55). Additional reforms would increase the number of visas available to accommodate the demand for family reunification. Tanya Golash-Boza argues, "Legalization for all is not enough ... Even if undocumented migrants in the United States were able to legalize today, 10 years from now we would find ourselves in the same situation with a new population of undocumented immigrants. This is the unspoken truth that rarely makes its way into the debates over immigration" (Gonzales 2014, p. 168).

To effect compassionate immigration policies, an expanded consciousness of human connection with "others" worldwide must displace dominant discourses of nation and citizenship that create divisions between "us" and "them." In the meantime, desert humanitarians, scholars, and activists must tirelessly and unwaveringly commit to the long run in bringing into focus that which the state has effectively erased: the humanity of the person without papers.

Notes

1. Reverend John Fife notes that an increasing number of the dying are persons who lived in the U.S. for an average of five to ten years and were deported as a result of the Obama administration's mass deportation sweeps. Once deported, men and women are desperate to reunite with their families in the U.S. and attempt to make the crossing. Fife notes that many of these migrants did sedentary work in the U.S. and thus do not possess the stamina or sheer physical strength of migrants coming from agrarian cultures who "are amazing in terms of their strength in the desert" (No More Deaths Desert Camp Training, July 2012).
2. The number of recovered human remains for the last five years, from FY 2008/09 to 2012/13, are as follows: in 2008/09, 189; in 2009/10, 224; in 2010/11, 177; in 2011/12, 171; and in 2012 to 2013, 182. McCullough, Ed "2008/2009 to 1013/2014 Recovered Human Remains: Data from Pima County Forensic Science Center." e-mail communication with author (October 16, 2013).
3. I share Bender's conviction that "we" are all to some degree implicated in the institution of harmful immigration policies in that we benefit directly from the exploitation of migrant labor. See Bender's "A note on 'we'," (Bender 2015, p. 11).
4. According to Nicholas De Genova, "it is deportability, and not deportation per se, that has historically rendered undocumented migrant labor a distinctly disposable commodity" (Peutz and Genova 2010, p. 14).
5. John Fife, email communication with author. (January 29, 2014).
6. Michael Hyatt, telephone interview (September 21, 2013). According to Hyatt, the Buena Aires National Wildlife Refuge (BANWR) allows water stations year round. BLM, on the other hand, is resistant to and even begrudging in renewing contracts that allow for water stations to be maintained: "They're opposed to us being out there, but they really can't turn us down."
7. I intentionally utilize the organization's full name and refrain from referencing the nominal abbreviation NMD in light of our respective organizations' missions to end migrant deaths.

8. However, Recovered Human Remains (RHR) maps that pinpoint the geographic locations of migrant deaths illustrate that some travelers run out of water and expire before ever crossing the border. Migrants are sometimes forced to walk for some days' distance before reaching the international boundary that separates the U.S. from Mexico.
9. "RHR for FY 2012–13." Ed McCullough, e-mail communication. (October 15, 2013).
10. "Humane Borders/Fronteras Compasivas," www.humaneborders.org.
11. "History of No More Deaths," http://www.nomoredeaths.org/information/history-and-mission-of-no-more-deaths.html.
12. Corbett, Jim, "Tucson Samaritans/Los Samaritanos," http://www.tucsonsamaritans.org/civil-initiative.html.
13. The theological basis for the Sanctuary Movement drew on Latin American liberation theology and the biblical concept of sanctuary or "sacred place."
14. Fife, John NMD Training Session, Most Holy Trinity Church, Tucson, Arizona, August 4, 2012.
15. Fife, interview.
16. The organization, whose mantra is "Arivacans providing hospitality and community support in the borderlands," also provides support for community residents who render aid to undocumented persons.
17. Arivacans routinely encounter border patrol agents on their private property or in helicopters overhead. Residents traveling to and from work, or simply to the bank or the hardware store, must stop at the checkpoint to declare their citizenship. Built in 2007 as a "temporary" security measure, the checkpoint has become functionally permanent over the past seven years.
18. Hannah Hafter, email communication to No More Deaths and Samaritans listserve. (January 19, 2014).
19. Debbi McCullough, email communication to author. (January 30, 2014).
20. Alvaro Enciso, email communication to the author. (January 20, 2014).
21. Marjorie King, Casa Mariposa Restoration Project, interview, Tucson, Arizona. (July 9, 2014).
22. Margo Cowan, Tucson Samaritans Training, Tucson, Arizona, July 6, 2014.
23. News stations highlighted anti-immigrant rallies in Murietta, California, League City, Texas, and Oracle, Arizona. In Oracle, it was estimated that more pro-immigrant activists showed up to support the immigrant children than did anti-immigrants who were there to obstruct a bus from entering an encampment reserved for the children.
24. There also exists the possibility that, in addition to being depressed, the children were cold. Stories abound in the media about how children who were not used to air conditioning in their home countries experienced freezing temperatures in different facilities.

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CHAPTER 19

Sourcing Compassionate Migration Policies: Searching for Venues of Humanity

Steven W. Bender

The ultimate goal of this volume, and the vision of "compassionate migration" it articulates, is to transform the coercive and punitive climate of current immigration law and policy, particularly of the U.S., to a kinder and more tolerant migration regime. It imagines a migration regime in the Americas informed by the principles and values of compassion—found in the core international human rights instruments and other sources—brought forth and embodied in complementary law, policy, practice, and humanitarian action.

As the largest receiver of immigrants in the hemisphere and more generally the host to the world's largest immigrant population, the U.S. dominates the South/North migration debate in the Americas. (Canada also ranks in the top ten of international migration population (United Nations 2015) and as Sasha Baglay details in Chapter 15 is similarly known as a nation of immigrants). Other hemispheric nations observe with great interest any U.S. attempt at immigration reform, and the country remains the epicenter of migration-related conditions and problems that span legal, geographic, environmental, economic, and demographic regions within and beyond its borders. This final chapter and the question of

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sourcing compassionate migration policy, accordingly, are steeped in the histories, challenges, and opportunities of U.S. migration law and practice.

As this volume demonstrates, compassion is noticeably absent as the driving force of U.S.-based migration policy. Instead, exclusion of migrants perceived as undesirable, balanced against the need for laborers in workplaces historically from railroads to agricultural fields to today's high-tech industry, has dominated U.S. migration policy in its ongoing invitation and exile of migrants. Glimmers of compassion in recent executive action by the Obama administration are outweighed by the aggregate of exclusionary, discriminatory, and mostly unilateral immigration policies in U.S. history that fail to include the voices and interests of migrant-sending countries whose labor we have relied upon.

Exemplified by Victor Romero's account in Chapter 3 of that U.S. exclusionary history, U.S. immigration policy has especially targeted for exclusion those seen as non-white, such as Chinese barred under the Chinese Exclusion Act as a precursor to all Asians, and the most recent exclusion of child migrants fleeing violence in Central America. Although of late U.S. exclusionary policies have focused on Mexican and Central America's Northern Triangle migrants, U.S. restrictive policies once cast wider nets—targeting white immigrants from southern and eastern Europe who were seen in the early twentieth century as non-white (and thus excluded, although not to the degree of Asians, by means of the 1924 National Origins Act), as well as migrants who were homosexual, poor, or thought to be Communists. Not just the federal government acted to exclude "undesirable" migrants. U.S. states have an equally long history of excluding groups perceived as undesirable, ranging from exclusions and oustings of Mexicans and even U.S. citizen Mexican Americans during the Great Depression to the modern day exclusionary aim of the Arizona "show me your papers" law that Karla McKanders discusses in Chapter 4.

This book arrives at a particularly bleak moment in a history of exclusionary migration policy. At a time when the Republican presidential candidate and now president-elect Donald Trump unflinchingly called for deporting millions of undocumented Mexican immigrants as "rapists" who are "bringing crime," and issued a similar call to ban Muslim immigration out of fear of widespread terrorist proclivities, a deeply divided Congress is stymied in a political stalemate over "comprehensive" immigration reform proposals that seem to address how best to comprehensively seal and securitize the U.S.-Mexico border. As discussed by Bill Ong Hing in Chapter 5, the rare compassion of President Obama's executive orders addressing

undocumented child migrants and the undocumented parents of U.S. citizens or lawful permanent residents was mostly stifled by the courts (and now at risk for broadscale reversal in the new presidential regime), leaving a legacy in the last decade of mass deportations and the Secure Fence Act of 2006 as embodying the current restrictive federal approach to immigration policy. Despite hosting the world's largest immigrant population, the U.S. cannot be judged as compassionate when its policies and practices target and exclude the most vulnerable of migrants—such as survival migrants from Central America that William Arrocha details in Chapter 8, and the women and child migrants Ana Stern Leuchter addresses in Chapter 10. Moreover, we have pressured other states to adopt U.S. exclusionary policies, notably Mexico, which acts now as a surrogate for U.S. officials by removing Central American transmigrants from Mexico before they can reach the equally unwelcoming U.S.

Coinciding in 2017 with the new U.S. presidential regime, the scholars and activists in this volume suggest frameworks of opportunity to rethink the suitable venues and blueprints of compassionate migration policy. These range from traditional policymaking venues like the U.S. Congress to new interventions in compassion such as desert Samaritans described by Rebecca Fowler in Chapter 18 with humanitarian and Samaritan aspirations that serve Maurice Hamington's imperative in Chapter 17 of reaching societal readiness for authentically and responsively caring for migrants as a necessary prelude to meaningful and compassionate immigration reform. The remainder of this chapter briefly surveys the landscape of potential immigration venues in the hopeful search for compassion and sites of humanity in migration policy for the Americas.

In surveying these possible venues, the reader should envision the human faces of migrants as portrayed in this volume, particularly its focus on undocumented migration northward from Mexico and Central America. The faces are those of women and children fleeing violence as survival migrants, and of migrants seeking economic opportunity as they have for decades, such as the migrant workers presently in the grueling U.S. agriculture industry doing the same work that Bracero laborers from Mexico did in prior decades with legal status. Despite these compelling testaments of the will to survive against all odds, and the frequent death of those lost along the migrant trail, these images have failed to garner compassion in most U.S. venues, whether policymaking or within the hearts and minds of U.S. residents and the media. Rather, even migrant children are portrayed as fiscal and moral burdens on society, as reflected in the sentiments of a

drafter of California's infamous 1990s anti-immigrant Proposition 187, who described immigrant children in hostile terms: "they shoot, they beat, they stab and they spread drugs around our school system. And we're paying them [with tax dollars] to do it."[1] As Bill Ong Hing details in Chapter 5, the once bipartisan initiated DREAM Act directed at regularizing the status of undocumented youth languished in Congress in recent years as support eroded for presumably some of the most sympathetic of migrants.

Locating Venues of Humanity

Plenary power and the recent *U.S. v. Texas*[2] court decision seem to isolate the U.S. Congress as the supreme immigration policymaker, but as detailed in this volume, Congress has tended to be exclusionary and unwilling to see humanity in the faces of migrants. Mexican and other Central American migrants once had a facially more compassionate Congressional immigration policy exempting the Western Hemisphere from migration constraints imposed on other countries (Johnson 2015). Nevertheless, this supposed Good Neighbor policy, as implemented by immigration officials, worked as a faucet to be shut when a poor economy dictated by relying on discretionary grounds to exclude migrants, such as those likely to become public charges and thus excludable. Moreover, even when no ceiling existed on Western Hemisphere migration to the U.S. before the 1965 Immigration and Nationality Act imposed the first limits, the 1950s military-like operation by the U.S. attorney general, named Operation Wetback, resulted in massive scale deportations of undocumented Mexican workers.

Congress can do much to redress the failures of U.S. migration policy to honor the contributions of migrants from the Americas to the U.S. economy. Chapter 6, for example, considers the role, if any, of guest workers in compassionate migration policy. Still, more comprehensively and compassionately, only a return to the pre-1965 standard for Mexico particularly, and restoring the spirit of the Good Neighbor policy more broadly within the Western Hemisphere, would acknowledge the debt owed for one of the most undervalued contributions in U.S. history—Mexican labor. Rather than focusing on developing compassionate policy for undocumented migrants risking their lives in entry and then living in the shadows, realistic and compassionate U.S. entry policies would obviate the need for most undocumented entry in the first instance.

Some volume contributors have discussed the potential of a human rights regime as the compassionate center of migration policy, particularly Raquel Aldana (Chapter 9) and William Arrocha (Chapter 8). Congressional approval would be needed for the U.S. to finally join the migrant-sending countries adopting the International Convention on the Protection of Migrant Workers and Members of Their Families (ICMW) that recognizes migrants as human beings (with families) rather than just as low-wage workers to be exploited. The challenge of embracing a human rights focus, however, is that the ICMW preserves state sovereignty of borders and of who is entitled to enter and who can be excluded or deported, and thus fails to confront the stingy lawful migration limits under U.S. law that particularly impact migration from its neighboring Mexico that has long supplied U.S. labor needs, as well as from Central America's Northern Triangle. The ICMW can serve as a framework for U.S. laws to ensure the procedural and human rights of undocumented migrants in deportation proceedings. But no matter what procedural rights are supplied to undocumented migrants under the ICMW, without realistic immigration allowances that address the U.S. reliance on and addiction to cheap immigrant labor and the upheavals of past and current U.S. policies and interventions in and on migrant-sending countries, migrants will still be deported to countries where they face threats to their economic livelihood, and even to their lives. Moreover, despite being a party to ICMW, Mexico is mistreating transmigrants to serve the U.S. interests of intercepting these migrants before they become a problem for U.S. immigration officials and policymakers. Human rights accords, then, despite being symbolically important testaments to the humanity and value of migrants, are an incomplete template and venue for truly compassionate migration policy for the Americas.

Despite its pivotal role in adopting migration policy for the world's most significant migrant destination country, the U.S. Congress has been stymied on immigration policy. At the same time, the executive has made no compassionate headway, with courts striking down compassionate executive action while deportations rise to record levels.[3] Against this backdrop, consider what U.S. states and local government might do to extend compassion to migrant residents. Rather than following an exclusionary path as have U.S. states such as Arizona and Alabama, states and local governments can serve as innovators in protecting, welcoming, and integrating immigrants into the community fabric—embodying what Hamington in Chapter 17 called the social readiness to care for migrants.

Indeed, some U.S. states, cities, and regions recognized the measurable benefits of migrants to transform and revitalize their communities and have concentrated on enacting laws, policies, and programs to promote immigrant integration, social capital acquisition, civic participation, and social cohesion (Baron 2013; Campbell 2014).[4] In contrast, the U.S. federal government has no "systemic policy for helping immigrants become self-sufficient, fully contributing members in their new society," instead focusing solely on "contentious matters of who will be let in, who gets to stay, and who needs to go" (Eaton 2016, p. 204). Applicable to states and local governments such as cities and counties, as well as to the vital work of CSOs acting within local communities, the following suggestions chart this visionary policy route for those jurisdictions that aim to embrace and practice compassion. They can do so by:

1. Working to create and expand "sanctuary" cities
2. Realizing the need for reassessment of what has worked and what has not to protect undocumented migrants who live in sanctuary cities to effectively counter programs focused on harsh detention and deportation practices
3. Making every effort to ensure that families remain together and unharmed
4. Assisting irregular migrants in places where their lives might be in danger as when crossing deserts, waterways, or the ocean
5. Encouraging "community dialogues" among migrant communities, local residents, and government agencies to ensure public and health safety
6. Recognizing that municipal and city governments as well as schools need to work with CSOs to create programs that address the social and psychological needs of irregular migrants and to create safe spaces for culture and recreation aimed at migrant workers and their families
7. Understanding the need for public/CSO oversight agencies that ensure that constitutional rights protecting migrant workers and their families are honored by local police and detention centers under the jurisdiction of state or municipal governments
8. Ensuring that public schools create spaces where migrant families and their children are embraced as part of the larger community, and providing for equality by extending in-state residency college tuition to undocumented immigrant residents

9. Ensuring that public health departments, working with community organizations, outreach migrant communities that are isolated from the rest of the community with programs designed for their socioeconomic needs
10. Ensuring that municipal governments, and in some cases regional consulates, have ongoing workshops and information campaigns to inform migrant workers and their families of their rights to protect their person and property
11. Ensuring that migrant workers and their families can rent safe housing in the same manner enjoyed by U.S. citizens, and ensuring that housing and zoning laws restricting occupancy and affordability are not enacted out of animus toward, nor do they have a deleterious effect on, migrants and their families
12. Ensuring that all workers, regardless of their legal status, can express their grievances and join local unions if they desire to do so
13. Understanding that local governments need to find ways, with CSOs and the community, to ensure that the children of migrant workers have access to health care, as well as programs that enable them to attend school without being left behind because many work with their families in the fields or in construction
14. Ensuring programs particularly to help meet the basic health care needs of migrant girls, women, and mothers, including a safe and clean environment for those who suffer from domestic violence
15. Ensuring migrants in transit have programs that protect their safety, with special programs for children and women
16. Creating programs that bring together migrant children with other members of the community through sports and culture
17. Coming together as local governments, CSOs, and other members of the community to better the living spaces where migrant workers and their families reside, including making their neighborhoods safer and more family friendly through the creation of parks, youth centers, and mobile libraries
18. Ensuring local police create programs that connect them to migrant communities to support their community needs
19. Working with the local media to create spaces, with the support of churches, CSOs, and businesses, for migrant workers and their families to express their needs and their success

20. Appreciating that schools and cities need to find funding for special days to honor migrant workers and their families to give them back their dignity
21. Creating school programs and spaces where students and parents learn about their respective cultures as they are sensitized about the challenges and benefits of embracing new members into their communities
22. Ensuring refugee centers, camps, and residences fully embrace human security as they create safe and welcoming spaces where migrant individuals and families can regain their dignity
23. Ensuring foster care programs focused on migrant children adapt to the special needs of migrants as they ensure their safety and proper integration into their respective communities
24. Using their organizational and institutional capabilities to push their governments to decriminalize migration
25. Using their organizational and institutional capabilities to push their governments to demilitarize their borders, including the dismantling of walls and fences that separate nations and put migrant lives in danger
26. Engaging as CSOs in dialogue and building bridges with government agencies that are migration policymakers, as the COMPA organization described by Ana Stern in Chapter 10 has done

Relatedly, the Charter for Compassion's International Campaign for Compassionate Communities supplies a blueprint toward compassion for local residents that encompasses migrant rights in its attention to recognizing and meeting the needs of all people in the community.[5] Perhaps the most compelling case that compassionate migration at the local level exists as a practice is the Sanctuary Cities movement. Embraced by U.S. city councils and mayors since it began in 1979 in Los Angeles, the movement goal is to preclude police from inquiring about the immigration status of those arrested. Boosted by backlash against Donald Trump, as of early 2017 hundreds of U.S. cities and towns have ordinances that ban city employees and police officers from asking about immigration status. In Canada, two Ontario cities, Toronto and Hamilton, embraced this movement.

Although the Sanctuary movement failed to echo in other cities across the Americas, this volume supplied examples of the large and complex networks of CSOs that have embraced compassionate migration as they assist migrants through all phases of their migration. The local CSOs like the Tucson Samaritans and No More Deaths in Arizona, *Las Patronas* in

the state of Veracruz, Mexico, the Mexican NGO *Sin Fronteras*, added to hundreds more CSOs working together in large national and regional networks like the Regional Network of Civil Organizations on Migration and the *Colectivo Migraciones para las Américas*, as well as the "albergues" (shelters) across Mexico and Central America, are the embodiment of compassionate migration. Today's compassionate actions seem to find their primary source in the relations of empathy that CSOs establish with individuals and communities. CSOs cannot gain the trust of individuals and communities if their work is not directly linked to their plight. These CSOs are not just supporting the most vulnerable migrants, they are the vehicles that transmit their human needs to the state and other social actors with whom relationships of empathy might not exist or can be hindered by social, cultural, or class differences. A fundamental characteristic that differentiates CSOs from other social actors is that they are not motivated by economic or material gains. This does not exclude their ideological inclinations, as some are religious-based and others, though secular, might embrace discourses and practices of social justice linked to counter-hegemonic discourses and practices. Yet, what they all have in common is a practice of kindness and benevolence with the ultimate goal to ease migrant hardships and advocate for their protection.

Emerging in many chapters in this volume are important differences on the depth and reach of the care that CSOs provide to the most vulnerable migrants. As mentioned above, some undertake to work in localized and immediate survival contexts (such as Rebecca Fowler describes in Chapter 18 for desert interventions), while others advocate and intervene more broadly for the legal rights going forward that can protect migrants and their well-being. Once CSOs engage in transforming the existing structures that jeopardize the well-being of those who must flee their countries leaving behind family and friends, compassion takes another dimension as it becomes a force of empowerment and emancipation.

Searching for Policy Cooperation Across Borders

Although subnational governments can be incubators for compassionate policy, a hostile federal or state government can stymie pro-migrant initiatives at the local level, such as by enacting anti-sanctuary city laws discussed by Karla McKanders in Chapter 4. These limitations suggest that compassionate laws ultimately may need to originate at the U.S. Congressional level, and await the compassion absent now in that venue.

One writer who contributed to this collection has argued for a venue compromise situated between the immigration supremacy of the U.S. federal government and the potential for compassionate innovation at the subnational level, an approach termed "immigration regionalism":

> In the briefest terms, under the move toward an "immigration regionalism," the federal government would create federal immigration regions and a governance structure of regional immigration councils. The councils would incorporate representatives of federal, state, and local governments, as well as private sector interests from affected industries and civil society groups (e.g., regional economic councils, labor organizations, etc.), legal permanent residents, and perhaps even elected representatives of the other NAFTA nations. The councils would provide: a political forum for participatory input; a clearinghouse for gathering, assessing, and disseminating information (with appropriate safeguards to protect individual rights and protect privacy) about regional migration trends, labor patterns, immigrant crime statistics, etc.; and, a blue-ribbon think-tank for policy recommendations on labor and jobs as well as other subnational and national immigration-related matters. (Aoki and Shuford 2010, p. 64).

Channeling these ideas, proposed Congressional comprehensive immigration reform in late 2009 would have created a U.S.-Mexico Border Enforcement Commission consisting of appointed officials from U.S. border states, but that proposal languished. The broader-sighted inclusion of Mexican and Canadian representatives in the migration think-tank detailed above is a refreshing break from the unilateralism of U.S. immigration policy. As demonstrated by President Nixon's 1969 surprise southern border shutdown, Operation Intercept, which thoroughly searched every incoming car, truck, and person and brought traffic to a standstill, the United States tends to approach cross-border issues unilaterally. Unilateralism came with a cost, as the Intercept strategy damaged U.S.-Mexico relations and was soon replaced by so-called Operation Cooperation involving the collaboration of both countries to wage a War on Drugs. Today, the Mérida Initiative defines the joint U.S.-Mexico partnership against the drug cartels, with the U.S. funding south of the border drug enforcement efforts with equipment and infrastructure.

Illustrating the potential for bilateral cooperation on issues of cross-border movement of goods, NAFTA, CAFTA-DR, and the 1965 Border Industrialization Program of maquiladoras assembling U.S.-bound goods, each regulate cross-border commerce, but fail to address migration even as

both NAFTA and the maquiladoras destabilized Mexico and prompted additional migration to the U.S. (Bender 2012). Although the Bracero Program was a bilateral migrant labor accord, the U.S. helped ensure that wages were low for its farmers by opening its border to undocumented entries as needed to undercut the Program. Truly bilateral negotiations and policymaking are needed toward the aim of recognizing the human rights of migrants and laborers in systems and structures that traditionally have favored the interests of commerce and employers rather than the humans that fuel those engines. Instead of the U.S. simply dictating to Mexico what it must do as appropriations "strings" (as done under the Mérida Initiative) or intervening on the border unilaterally (as under Operation Intercept or Trump's proposed all-encompassing border wall), or acting in a shadow capacity to draw Mexico into the securitization against and interdiction of transmigrants (by means of *Programa Frontera Sur*), we need truly multilateral negotiations with migrant-sending countries addressing the push-pull factors of migration and recognizing the interconnectedness of the U.S. and Mexico, as well as the Northern Triangle and the rest of the Americas.

At least as between the U.S. and Mexico, bilateral negotiations on migration policies seem compelled under the Treaty of Guadalupe Hidalgo, which contemplates that disagreements between the two countries with respect to "political or commercial relations" will be resolved by "mutual representations and pacific negotiations."[6] Models for such negotiations and cross-border policymaking include those at the subnational level—the Arizona-Sonora Commission and also legislative representatives from California and the Mexican states of Baja California and Baja California Sur who regularly meet to address border issues (Ganster and Lorey 2008, p. 200). Similarly the Regional Conference on Migration, discussed by William Arrocha in Chapter 8, is a multilateral regional forum for migration discussions among the U.S., Canada, and migrant-sending countries in the Americas such as Mexico and the Northern Triangle countries, but its migration dialogues and initiatives are non-binding.

Broader models exist for binding multilateral border relationships at the federal level, particularly those addressing cross-border labor migrations. These include the South American models of MERCOSUR and CAN detailed by Juan Artola in Chapter 13, and the federal regionalism model of the European Union in which citizens of member states enjoy freedom of movement for work and other opportunities. Even a U.S. unilateral policy return to an ostensibly open southern border under the Western Hemisphere exemption, which I advocated above, nonetheless might

invite Mexico to do the U.S. dirty work of keeping transmigrants at bay. Only a multilateral border strategy within the Americas can overcome such temptations. Even so, honoring the interests of both migrant sending and receiving countries within the Americas does not address entry pressures from outside the Americas, as with the present migration and refugee crisis in Europe coming from outside the European Union. This suggests that compassionate immigration reform also requires inclusion and reconsideration of refugee policies, starting with how the U.S. historically and today (mis)treats Central American migrants fleeing violence, whether from their governments, gangs, or drug cartels. Too often these refugees have been excluded from U.S. asylum or refugee status—considered as unprotected migrants rather than as persecuted individuals entitled to protection. Although Mexico reformed its laws in 1990 to liberalize its recognition of survival migrants fleeing generalized violence, the U.S. has not done so, leaving a politicized system in place favoring those fleeing countries whose governments the U.S. opposed.

Conclusion

From the perspective of those who would embrace compassionate policy-making, it is clear that the increasingly hostile, punitive, unilaterally-derived, and enforcement-minded proposals that now circulate under the mantle of "comprehensive reform" lead us in the wrong direction. As the contributors to this volume demonstrate, there is evident need for coordinated, forward-looking regional and bi/multilateral policies and initiatives, sensitive to the structural push-pull factors of South/North migration as well as intra-regional migration, and committed to promoting compassion for all migrants, particularly women and children. Government implementation and oversight should be meaningfully supplemented and guided by CSOs, with reference to international public law standards such as the ICMW; the task is that enormous and important.

For the U.S. Congress to enact compassionate, or even comprehensive immigration reform, the impetus and venues for reform must expand to the hearts and minds of U.S. residents[7]—from those leading humanitarian and Samaritan efforts on the migrant trails to those communities embracing migrants and integrating them into the social and political fabric. Our hope is that this volume will offer a blueprint to locate and translate that burgeoning compassion into immigration policy that is transformative and respectful of the humanity and dignity of migrants and their families.

Notes

1. Podger, Pamela J. and Michael, Doyle "War of Worlds," *Fresno Bee*, January 9, 1994, A1 (remarks of Barbara Coe). For a recent example of hostility toward child migrants, see "California City Rejects Shelter for Unaccompanied Migrants," October 16, 2014, https://www.theguardian.com/us-news/2014/oct/16/california-city-rejects-shelter-unaccompanied-child-migrants (Escondido, California denies proposal to turn vacant nursing home into a shelter for arrested unaccompanied minors, most of them from Central America).
2. *Texas v. United States*, 809 F.3d 134, 170 (5th Cir. 2015), aff'd, *U.S. v. Texas*, 579 U.S. __ (June 23, 2016) (a 4-4 split affirming the lower court) (see discussion in Chapters 3, 4, and 5).
3. See Cade (2015, 661) (discussing Congressional amendments in the 1990s that both broadened grounds for removing immigrants from the U.S. and near eradicated the immigrant's chances for discretionary relief to avoid deportation).
4. This includes the Hazleton Integration Project in a Pennsylvania city once at the forefront of exclusionary laws targeting Latina/o immigrants, as described by John Shuford in Chapter 16 of this volume. See also Gordon (2015) for a description of educational, housing, health, and policing initiatives to integrate Latina/o migrants in the community of Greenport, New York.
5. Charter for Compassion, http://www.charterforcompassion.org/index.php/communities.
6. Treaty of Guadalupe Hidalgo, art. 21. Some commentators have questioned the efficacy of bilateral negotiations to address migration, with one arguing for unilateral U.S. policy embedded within a multinational ICMW (FitzGerald and Alarcón 2013, 111, 133, "Historical experience suggests it is unlikely that a bilateral treaty with Mexico would lead to effective supervision of migrant workers' rights by the Mexican authorities, and such a policy would indirectly discriminate against potential migrants from other countries.").
7. For the most part in this volume we have not addressed the role and venues of industry in prompting compassionate migration reform, as those industry-led efforts, such as FWD.us founded by technology leaders, tend to work toward reforms that open migration to the so-called "best and brightest," which may leave vulnerable economic migrants and survival migrants from the Americas behind.

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Index

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