

Introduction

The Human Rights of Non-citizens

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Biden will turn Minnesota into a refugee camp – and he said that – overwhelming public resources, overcrowding schools and inundating your hospitals. You know that. It's already there. It's a disgrace what they've done to your state. It's just – it's absolutely – it's a disgrace, OK?

These were the words of the President of the United States at a September 2020 campaign rally in Duluth, Minnesota.¹ These words are not only emblematic of now-standard fearmongering about the economic impact of accepting refugees. They also shine a spotlight on what we believe is a fundamental shift in discourse around non-citizens that has been building for some time, driven by populist, nativist, and racist tropes of the “other” – a shift from a language of compassion to one of indifference or apathy. According to the President, it is “disgraceful” to give refuge to those who are suffering, or to provide medical and other aid to those without.

This book is an attempt to respond to that shift by exploring what, if any, obligations we as humans have to other humans. Featuring contributions drawn from a range of disciplinary perspectives, the chapters in the first part of this book seek to shed light on the original promise of human rights law and how that promise has failed – spectacularly so in many places – to provide a basis for ensuring rights. Human rights law, a supposedly universal body of law that applies to every individual, has long tolerated limits on human rights protections for non-citizens.² States

¹ J. Rose, “What Are the Presidential Candidates’ Views on Immigration?,” *Delaware Public Media*, October 14, 2020, www.delawarepublic.org/post/what-are-presidential-candidates-views-immigration.

² D. Weissbrodt, “Human Rights of Noncitizens,” in R. E. Howard-Hassmann and M. Walton-Roberts (eds.), *The Human Right to Citizenship: A Slippery Concept* (Philadelphia: University of Pennsylvania Press, 2015), pp. 21–29; A. Abizadeh, “Closed Borders, Human Rights, and Democratic Legitimation,” in D. Hollenbech (ed.), *Driven from Home: Protecting the Rights of Forced Migrants* (Washington, DC: Georgetown University Press, 2010), pp. 147–166;

deny many basic rights to non-citizens within their borders, and international law imposes only limited duties on states with respect to those fleeing persecution.³ Furthermore, even those limited rights previously enjoyed by non-citizens are eroding in the face of rising nationalism, populism, xenophobia, and racism. Given such disparate treatment of non-citizens, the promise of *universal* human rights law appears relatively empty.⁴

Perhaps more importantly, however, this volume also seeks to go beyond a discussion of the promise and failure of human rights law, to help us imagine new forms of belonging across borders. If citizenship as a basis for rights is inadequate as a mechanism for universal protection,⁵ what other values or commitments might ground action to realize rights for the most vulnerable? The chapters in the second half of this book explore these themes, again from a variety of disciplinary perspectives, considering, among other things, the ideas of solidarity and non-citizen rights as concepts that might ground belonging across borders.

The book is drawn from presentations at an April 2017 conference on the human rights of non-citizens, held at the University of Connecticut in Stamford, Connecticut, sponsored by the Senator Joseph I. Lieberman Conference & Lecture Series on Human Rights. Both the conference and the collection are interdisciplinary in order to allow broad access to the topic of the rights of non-citizens, with the contributors intervening from their own disciplinary perspectives about the question of who gets to have rights and why. As such, the chapters are also necessarily limited in scope. The literature on human rights and citizenship in each of the disciplines included in this volume – political science, philosophy, sociology, law, anthropology, literature – is extensive. We have sought to be selective and provocative, including pieces designed to start conversations, rather than complete them.

Although each chapter approaches the topic from a different starting point, they cohere around two central themes – first, the deficiencies of the current approach to rights across borders and, second, the importance of bottom-up approaches to reimagining belonging that center on the lived experience of rights and responsibilities. The book is organized around these two central themes.

The first half of the volume addresses the problems of our current response to the rights of non-citizens both within and outside of state borders and the inadequacy of citizenship as the only foundation for making meaningful claims to rights

E. T. Achiume, “Re-Imagining International Law for Global Migration: Migration as Decolonization?” (2017) 111 *AJIL Unbound* 142–146, at 142.

³ D. S. Fitzgerald, *Refuge beyond Reach: How Rich Democracies Repel Asylum Seekers* (New York: Oxford University Press, 2019); S. Parekh, *No Refuge* (New York: Oxford University Press, 2020), pp. 131–141.

⁴ Weissbrodt, “Human Rights of Noncitizens.”

⁵ A. Brysk and G. Shafir, “Introduction: Globalization and the Citizenship Gap,” in A. Brysk and G. Shafir (eds.), *People Out of Place: Globalization, Human Rights, and the Citizenship Gap* (New York: Routledge, 2004), pp. 3–9.

protection. The chapters in this part illustrate the deficiencies of a state-centric view of who has rights and the terrible harms this approach inflicts on the most vulnerable – creating in effect a system of global apartheid.

The contributions in the second half of the book explore alternative foundations for rights, including empathy, solidarity, empowerment, and responsibility. Empathy and solidarity are emotional responses that can provide the necessary impetus for political action to protect and empower the vulnerable. Empowerment does not necessarily have to be tied to political membership but can be manifested through participation in an economic community. Those who act must take responsibility for the harms of their own actions. And the law can embody these principles not only in substance but in process; the very process of law creation can contribute to the development of conditions needed for rights to be realized across borders.

A few caveats are in order, however. First, although all of the pieces in this collection address the rights of non-citizens, they focus on different aspects of non-citizenship. In general, the chapters use the term “refugee” to refer to individuals who meet the international definition of this term, whether or not they have been officially recognized as refugees by the UN Office of the High Commissioner for Refugees.⁶ Individuals who meet the definition of a refugee are refugees even if their status has not yet been adjudicated.⁷ In addition, basic human rights should be afforded to all, including those who do not qualify for recognition as refugees.⁸ Some of the contributions also address the problem of statelessness and the political and logistical challenges of identifying who lacks effective protection of a state. The tenth chapter in this collection discusses the rights of “noncitizens” as a way of signaling all of the myriad ways in which individuals are affected by states of which they are not citizens.

Second, the contributions in this volume are not studies of citizenship in the traditional sense. A rich interdisciplinary literature theorizes the varied meanings and enactments of citizenship that have emerged in the modern nation-state system.⁹ The chapters in this volume engage questions of the legal status of citizens

⁶ United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Geneva, Switzerland: United Nations High Commissioner for Refugees, 2011), ¶ 28.

⁷ United Nations High Commissioner for Refugees, *Note on Determination of Refugee Status under International Instruments EC/SCP/5* (August 24, 1977), ¶ 5, www.unhcr.org/excom/scip/3ae68cco4/note-determination-refugee-status-under-international-instruments.html (noting that “determination of refugee status can only be of a declaratory nature” and that “any person is a refugee within the framework of a given instrument if he meets the criteria of the refugee definition in that instrument, whether he is formally recognized as a refugee or not”).

⁸ Weissbrodt, “The Rights of Noncitizens.”

⁹ See, e.g., E. F. Isin and G. M. Nielsen (eds.), *Acts of Citizenship* (London: Zed Books, 2008); Brysk and Shafir (eds.), *People Out of Place*; Howard-Hassmann and Walton-Roberts, *The Human Right to Citizenship*; B. N. Lawrence and J. Stevens (eds.), *Citizenship in Question: Evidentiary Birthright and Statelessness* (Durham, NC: Duke University Press, 2017).

(formal citizenship) and the social, political, cultural, and symbolic practices of becoming and being a citizen (substantive citizenship), focusing on the non-citizen through a human rights lens.¹⁰ Chapter 7 by Eleni Coundouriotis and Chapter 11 by Susan Bibler Coutin address how citizenship is enacted and new forms of belonging emerge through what some have called “lived citizenship,” a concept that stresses the phenomenological and performative aspects of citizenship. As Kirsi Kallio, Bronwyn Wood, and Jouni Häkli note, such work contrasts citizenship “based on status and the respective rights granted by the state” and attends to “less formal modes of political participation and ways of enacting citizenship beyond the largely institutionalized practices within states.”¹¹

Furthermore, there are many aspects of the topic the volume does not address, including the experience of non-citizens with quasi-membership rights, such as work authorization but without political rights, or the experience of resettled refugees or permanent residents. It also largely does not address the experience of those who may have political citizenship, but for whom the rights of citizenship have been denied due to racism or other forms of oppression.¹²

Securing the human rights of non-citizens is one of the most pressing global social problems of the twenty-first century. Like climate change and the global economy, addressing the human rights implications of global migration – and forced migration in particular – transcends the limits of any one state and requires both domestic and international commitments and action. This volume attempts to provoke conversations across disciplines about how we can ground such commitments and action for those with whom we do not share a political community.

PART I: THE FAILURE OF RIGHTS

The first section of the book discusses the imperfections of citizenship as a basis for rights. A historic number of refugees, asylum seekers, asylees, undocumented migrants, and immigrants with varied statuses reside and work within states where they do not have citizenship.¹³ And, in the post-Cold War era, they share new forms of insecurity and precarity due to a rise in xenophobia and racist backlash against

¹⁰ E. F. Isin, “Theorizing Acts of Citizenship,” in Isin and Nielsen (eds.), *Acts of Citizenship*, pp. 15–43.

¹¹ K. P. Kallio, B. E. Wood, and J. Häkli, “Lived Citizenship: Conceptualizing an Emerging Field” (2020) 24(6) *Citizenship Studies* 713–729 at 714.

¹² Brysk and Shafir, “Introduction,” pp. 6–7.

¹³ The International Organization of Migration estimates that there are 272 million international migrants (3.5% of the world’s population), of which approximately two thirds are labor migrants, in 2020. This figure surpasses earlier estimates that by 2050 there would be 230 million international migrants. IOM UN Migration, *World Immigration Report 2020* (Geneva, Switzerland: International Organization for Migration, 2020), https://publications.iom.int/system/files/pdf/wmr_2020.pdf at 2.

refugees and immigrants in many countries.¹⁴ Zero-sum politics around the world frame the issue of non-citizens' rights as "us against them," and politicians manipulate fears of economic and physical insecurity to justify hardened borders.¹⁵

The result is that many countries are now instituting procedures that effectively deprive migrants and refugees of even the limited rights they might once have had.¹⁶ These can be seen as part of a larger trend to "illegalize" migration in the past few decades, following an earlier century of creating legal mechanisms for global migration.¹⁷ As Catherine Dauvergne notes, "It has proven extraordinarily difficult to meaningfully extend human rights norms to those with 'illegal' status."¹⁸ States' efforts to limit "illegal migration" have occurred simultaneously with increasingly codified and restrictive asylum law norms at state levels, enabling states to "narrow the constraint on sovereignty to the smallest point possible."¹⁹ Nancy Hiemstra and Alison Mountz highlight that in the United States, immigration legislation passed in 1996 is casting a long shadow on immigration enforcement practices today, where the full force of crafting conditions of "illegality" is brought to bear on racialized groups.²⁰

In recent decades, as well, states have sought to deter asylum seekers through policies of mandatory detention and deportation. The United States and many European countries have aimed to prevent migrants from making claims of asylum at ports of entry and have enacted a queuing process that forces would-be claimants to wait for extended periods of time at sea or a land border in inhumane conditions.²¹ David Scott Fitzgerald has signaled that rich democracies actively repel asylum seekers, making refuge "beyond reach" for most.²² Yet policies to deter or repel are evident not only at EU, Australian, and U.S. borders, but also increasingly

¹⁴ See, e.g., M. Czaika and A. Di Lillo, "The Geography of Anti-Immigrant Attitudes across Europe, 2004–2014" (2018) 44(15) *Journal of Ethnic and Racial Studies* 2453–2479; J. O. Baker, D. Cañarte, and L. E. Day, "Race, Xenophobia, and Punitiveness among the American Public" (2018) 59(2) *The Sociological Quarterly* 363–383.

¹⁵ M. Hooghe and R. Dassonville, "Explaining the Trump Vote: The Effect of Racist Resentment and Anti-Immigrant Sentiments" (2018) 51(3) *PS: Political Science and Politics* 528–533; P. C. Gattinara, "Europeans, Shut the Borders! Anti-refugee Mobilisation in Italy and France," in D. della Porta (ed.), *Solidarity Mobilisations in the "Refugee Crisis": Contentious Moves* (Cham, Switzerland: Palgrave MacMillan, 2018), pp. 271–297.

¹⁶ R. Vandevoordt, "Resisting Bare Life: Civil Solidarity and the Hunt for Illegalized Migrants" (2020) *International Migration* 1–16.

¹⁷ C. Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge: Cambridge University Press, 2008), p. 4.

¹⁸ *Ibid.*, p. 5.

¹⁹ *Ibid.*

²⁰ N. Hiemstra and A. Mountz, "Slippery Slopes into Illegality and the Erosion of Citizenship in the United States," in Howard-Hassmann and Walton-Roberts (eds.), *The Human Right to Citizenship*, p. 165.

²¹ C. Dickerson, "Inside the Refugee Camp on America's Doorstep," *New York Times*, October 23, 2020, www.nytimes.com/2020/10/23/us/mexico-migrant-camp-asylum.html.

²² Fitzgerald, *Refuge beyond Reach*.

in many Global South states as well, as Yajaira Cecilia Navarro, Tanya Golash-Boza, and Luis Rubén González Márquez elaborate in Chapter 6.

The prevalent assumption that rights are tied to citizenship leaves countless people without protection as they flee violence, persecution, and famine. This assumption also coexists uncomfortably with the reality of the current moment, in which many people live and reside outside their country of nationality. Furthermore, the countries that fight hardest to close their borders are often also responsible for the very conditions and policies that have caused or contributed to displacement and migration, such as the United States with respect to historic role in destabilization of Central American governments and economies.²³ Systematically denying human rights to those in situations of vulnerability – both within a state’s borders and outside of them – is unjustified from both a moral and a practical perspective.

Finally, assuming that citizenship is the primary foundation for the enjoyment of rights also fails to recognize the countless ways in which citizenship itself is under assault today. From new state policies seeking to strip individuals of their citizenship status to immigration policies that deprive those in mixed-status families of the rights to which they are supposedly entitled – citizenship is no longer the foundation we believed it to be.²⁴ Likely it never was. The pressures of globalization and humanitarian crisis are simply making this more evident than ever before. By bringing contemporary scholarship on the rights of non-citizens to bear on current debates about rights and citizenship, the book is intended to help contribute to a dialogue about the very urgent problems states around the world are facing in grappling with migration, flight, and the failure of law and institutions.

One of the critical concerns of this collection is the inadequacy of domestic and international laws and institutions intended to protect those who have sought refuge beyond borders or who are stateless. As Weissbrodt points out, the rights of non-citizens are addressed in all the major human rights treaties and yet the chasm between legal principle and lived reality for non-citizens, and especially undocumented migrants, asylum seekers, and refugees, continues to grow.²⁵ Both international law and the international institutions that administer migration (the UN High Commissioner for Refugees, International Organization of Migration, and International Labor Organization) are ill equipped to address what is a profound global challenge.²⁶ This is a sober assessment shared by scholars and practitioners as we approach the United Nations’ 75th anniversary.

²³ M. G. Garcia, *Seeking Refuge: Central American Migration to Mexico, the United States, and Canada* (Berkeley: University of California Press, 2006), pp. 13–43.

²⁴ R. E. Howard-Hassmann, “Introduction: The Human Right to Citizenship,” in Howard-Hassmann and Walton-Roberts (eds.), *The Human Right to Citizenship*, pp. 1–18.

²⁵ Weissbrodt, “Human Rights of Noncitizens.”

²⁶ P. Nyers, “Humanitarian Hubris and the Global Compacts on Refugees and Migration” (2019) 5(2) *Global Affairs* at 171–178.

The United Nations has recognized this crisis of global governance regarding international migration and systematic violations of non-citizens' rights taking place around the world. In September 2016, the United Nations initiated a summit to convene world leaders and representatives of UN and nongovernmental organizations to make international migration, and particularly the situation of refugees, an international priority. The New York Declaration created a framework for future deliberations and, by late 2018, many UN member states had developed and agreed to a Global Compact for Safe, Orderly and Regular Migration (GCM) and a Global Compact on Refugees (GCR).²⁷ Although these compacts have been heralded as important steps in international law, it remains to be seen how they will guide international migration policy and practice at the national and supranational levels. The GCM highlights that human rights norms and processes are fundamental to the compact:

The Global Compact is based on international human rights law and upholds the principles of non-regression and non-discrimination. By implementing the Global Compact, we ensure effective respect for and protection and fulfilment of the human rights of all migrants, regardless of their migration status, across all stages of the migration cycle. We also reaffirm the commitment to eliminate all forms of discrimination, including racism, xenophobia, and intolerance, against migrants and their families.²⁸

The UN General Assembly passed a resolution affirming the Global Compact on Refugees on December 17, 2018.²⁹ The preamble highlights that the agreement demonstrates states' and other stakeholders' "political will and the ambition to operationalize the principle of burden- and responsibility-sharing" and to "mobilize the international community as a whole."³⁰ Peter Nyers charges that these compacts reflect a form of "humanitarian hubris" by assuming the need to "manage migration and asylum in the first place" and that "governments and international agencies are capable of managing global movements in a 'safe, orderly, and regular' manner."³¹ Nyers points to another source of hubris as "the precept that protecting the interests of host states – states of refuge – should be a leading objective of the global compacts."³² This latter critique is a central concern running through the chapters

²⁷ United Nations, "Global Compact for Safe, Orderly and Regular Migration, A/RES/73/195," December 19, 2018, www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/73/195; "ILO and IOM Sign Agreement to Strengthen Collaboration on Migration Governance," October 23, 2020, www.iom.int/news/iilo-and-iom-sign-agreement-strengthen-collaboration-migration-governance.

²⁸ United Nations, "Global Compact."

²⁹ *Ibid.*

³⁰ *Ibid.*, p. iii.

³¹ Nyers, "Humanitarian Hubris," p. 172.

³² *Ibid.*

included in Part I, which examines the failure of rights to be recognized or secured by governments and international organizations.

Chapter 2 by Kristy A. Belton and Jamie Chai Yun Liew examines the limitations of the global–national governance nexus for non-citizens, focusing on how states increasingly are “unmaking citizens.” The authors argue that a patchwork of national laws governing who can be a citizen – including variations of citizenship acquired at birth or through naturalization – renders citizenship “an inadequate foundation upon which to base human rights.” Legal barriers to citizenship have been created and fortified that exclude individuals because they are indigenous, female, or members of an ethnic minority, while other laws deprive individuals of citizenship based on criminal behavior or national security interests. Thus, citizenship – already an arbitrary concept that is often rendered ineffective by political or bureaucratic forces – is today even more precarious as a foundation for rights, as governments are increasingly depriving citizens of their claims to formal belonging on the grounds of national security or the war on terror.

The chapter highlights that “citizenship is not necessarily a neutral and stable status upon which to base rights, freedoms, and protections” because the law that grounds citizenship is not itself neutral. Modern citizenship law is based on international political practice that favors state sovereignty. Thus, although treaties and conventions would come to recognize the significance of citizenship through the human right of nationality, “no international organization exists, whether as creator, arbiter, or enforcer, of citizenship laws for any state.” Belton and Liew write persuasively that “[p]erhaps citizenship was never meant to be more than an international ordering principle of people(s) and we have tied notions of human rights, equality, and justice to a concept that was never built to hold them.”

Chapter 3 by Jacqueline Bhabha, “Zero Humanity: The Reality of Current US Immigration Policy toward Central American Refugee Children and Their Families,” illustrates the way in which even basic obligations owed to refugees within a state’s territory are currently being eroded. Bhabha examines the Trump administration’s policy of family separation to illustrate the impacts of anchoring rights on citizenship, and she calls for international action to remedy the deficiencies of national practice. Bhabha details the intensification of policies of deterrence since 2016 to block or prevent “humanitarian migrant children and families” entry into the United States, force them to leave the United States while awaiting asylum adjudication, or leave them to languish for long periods in harsh detention conditions. She argues that these policies are not only inhumane and in violation of binding domestic and international legal obligations, but also “futile.” She underscores that the so-called zero tolerance policies, which have an explicit intent to “deter” asylum seekers, including children, from entering the United States, are in fact “zero humanity” policies.

One way the United States is able to perpetuate its “zero humanity” policies, Bhabha explains, is by its failure to ratify international treaties that would impose

higher obligations in its treatment of children, such as the Convention on the Rights of the Child. Without ratification, the Trump administration's family separation policy "would doubtless have elicited more vigorous international protest had the UN Committee on the Rights of the Child been afforded oversight." And although a US court was able to halt family separation as unconstitutional, government officials were unable to comply with the order to reunify children with their families because it had no "clear or centralized tracking system." Bhabha also depicts the administration's efforts to overturn *Flores*,³³ the seminal Supreme Court case governing child migration detention. This chapter illustrates the nuances of "law" as a tool. Law has tremendous power to provide a platform for halting discriminatory government practices, but it can also be used to challenge long-standing precedent like *Flores* on which families have come to rely, camouflaging exclusionary politics under a veneer of neutrality.

Chapter 4 by Azadeh Dastyari and Asher Hirsch, "Australia's Extraterritorial Border Control Policies," further illustrates the inadequacy of law to ensure rights. Technically, states are obligated under international treaties to provide certain rights to individuals once they reach the state's territory. States are rendering this obligation increasingly meaningless by extending the reach of their immigration policies beyond their borders to ensure that no refugees reach their territory and exercise these rights. The authors highlight how "non-entrée policies" are more readily enforced in Australia because of its isolation and lack of land borders. They outline measures to stop irregular arrivals of refugees by air and sea, which have increased in intensity in the past decade despite human rights advocacy. Consistent with other chapters in this part, including those of Belton and Liew, Bhabha, and Ceciliano, Golash-Boza, and Rubén González (discussed later), Dastyari and Hirsch underscore that Australia's policy response toward refugees aligns with "the view that a refugee is a potential threat, rather than someone fleeing from harm." Here they amplify Nyers' point that states in the Global North have deployed a non-entrée regime "under the guise of an orderly and regular system" and are most concerned with protecting host states' interests.³⁴

Dastyari and Hirsch showcase the ways in which Australia has been avoiding its treaty obligations by exploiting loopholes through their non-entrée measures such as extraterritorial processing and detention, interdiction at sea, and carrier sanctions. Dastyari and Hirsch argue, however, that Australia's refugee response is still illegal under the Refugee Convention, because while "states may not have a duty to grant asylum, they do have an obligation to provide access to their asylum procedures." This access is key to refugees having their rights recognized and fulfilled and for Australia to avoid running afoul of its binding legal obligations.

³³ *Reno v. Flores*, 507 U.S. 292 (1993).

³⁴ Nyers, "Humanitarian Hubris," p. 172.

Chapter 5 by Brad K. Blitz, “Protection through Revisionism? UNHCR, Statistical Reporting, and the Representation of Stateless People,” begins by identifying yet another gap in international protections for non-citizens – the way that stateless individuals are counted by the UNHCR. Blitz argues that international efforts to respond to the problem of statelessness have replicated and reinforced disparities by focusing on *de jure* statelessness. Blitz charts the history of how the UNHCR defined and collected information about stateless individuals, demonstrating that its internal decisions and methodologies adopted a narrow definition of statelessness that exhibited deference to the (often limited) way in which states counted “statelessness.” Blitz also critiques the results-based turn to standards and indicators as creating systemic incentives to underestimate statelessness.

Blitz goes beyond identifying gaps, however, to generate recommendations for how the UNHCR might reform its approach, advocating a bottom-up approach that foregrounds the experiences of stateless individuals themselves. He argues forcefully that numbers matter, not only because of what they reflect about the world, but also because of their political authority. As he explains, “[w]ho is counted also tells us about governmental and institutional priorities and exposes biases about *what* counts, and how resources *should* be allocated.” According to Blitz, current approaches “reflect an increasingly top-down logic that ignores the lived experience of stateless people and undermines the provision of humanitarian protection to some who may need it.” Instead of a top-down managerialist approach to “success,” Blitz advocates focusing instead on how changes on the ground impact individuals and limit their ability to rely on citizenship to protect their rights. Definitions of statelessness and measures of success should foreground the lived experience of those who are stateless themselves.

Chapter 6 offers a critical vision of restrictive internal and external immigration policies as part of a much larger system of global apartheid. In “Reflections on Anti-immigration Narratives and the Establishment of Global Apartheid,” Yajaira Ceciliano-Navarro, Tanya Golash-Boza, and Luis Rubén González Márquez examine the construction, organization, and maintenance of global apartheid ideology “around narratives that criminalize immigrants and immigration.” The authors underscore that restrictionist immigration policies in the Global North reflect a segregationist ideology that “adopts subtle mechanisms of control, removal, and exploitation of migrants worldwide,” which in turn preserves wealth for a small minority. Deterrent and punitive moves such as these result in the transformation of “freedom of movement” into a costly and dangerous process, where moving becomes a “privilege and not a right.” Examining the ways in which mechanisms of control, removal, and exploitation of immigrants is steeped in racist, segregationist logics allows us to see how these policies operate to allow wealthier countries to control the movement of non-White populations.

The analogy offered by the authors to South African apartheid is helpful because it sheds light on how law (and the state) can codify and justify exclusionary

principles and practices, as well as how resistance to law can constitute resistance to injustice. Refusal to observe border controls and even the very act of transit over boundaries reject global forms of apartheid and constitute a demonstration of agency – or “acts of citizenship.”³⁵

Taken together, the chapters in this part underscore the limits of both global and domestic governance in securing the human rights of asylum seekers and refugees. They highlight the magnitude of injustice that is perpetuated by prioritizing national interests over the welfare of asylum seekers, refugees, and other migrants. Maintaining draconian border controls and waging policies of deterrence, the Global North enforces a kind of global apartheid that has ramifications not only in the present, but also for future generations.

PART II: BELONGING ACROSS BORDERS

Why do we – or should we – act to protect people who are suffering, when those people are not part of our political community and when their suffering is distant, both geographically and metaphorically? What underpins the human rights commitment to universality, the idea that every individual everywhere should have rights regardless of their political membership? Scholars across a range of disciplines have provided a variety of answers to these questions, some of which are highly pragmatic. Michael Perry, for example, points to ideas such as religion, altruism, and self-interest as motivating the “spirit of brotherhood” that is called for in Article 1 of the Universal Declaration of Human Rights.³⁶ The altruistic perspective, Perry explains, rests in an individual’s self-perception of themselves as an altruist – as one who believes all life matters and is simply “wired” to care about suffering.³⁷

Others point to empathy and other-identification as providing a basis for acting to protect those outside one’s own political community. Lynn Hunt, for example, argues that the emergence of the novel in the eighteenth century was instrumental in promoting the idea of equality and expanding the capacity of the reader to have empathy with those separated by lines of class and other status.³⁸ Novels, according to Hunt, provided the foundation for the idea of universal rights because they allowed the reader to see others “as like them, as having the same kinds of inner emotions.”³⁹ As Alison Brysk has written, human rights is centrally about the mobilization of care, which itself “rests on empathy, and empathy requires humanization.”⁴⁰ Serena

³⁵ Isin and Nielsen, *Acts of Citizenship*.

³⁶ M. J. Perry, “Why Act Towards One Another ‘In a Spirit of Brotherhood’: The Grounds of Human Rights,” in M. Goodale (ed.), *Human Rights at the Crossroads* (Oxford: Oxford University Press, 2013), p. 45.

³⁷ *Ibid.*, pp. 55–56.

³⁸ L. Hunt, *Inventing Human Rights: A History* (New York: W. W. Norton, 2007), p. 40.

³⁹ *Ibid.*

⁴⁰ A. Brysk, “‘Why We Care’: Constructing Solidarity,” in Goodale (ed.), *Human Rights at the Crossroads*, pp. 163, 167.

Parekh⁴¹ and Kathryn Sikkink⁴² – writing respectively as a philosopher and a political theorist – have invoked Iris Marion Young’s work on injustice to promote ideas of responsibility to others as a basis for engaging in collective and individual action to protect the human rights of all.

The second half of this collection engages with these ideas of empathy and responsibility to explore arguments for protecting the rights of others from a variety of different vantage points. Eleni Coundouriotis’ analysis of the work of Peter Balakian in Chapter 7 introduces this discussion by examining the role of narrative in creating conditions that enable a discussion about belonging and rights. Chapters 8, 9, and 10 by Daniel Kanstroom, Serena Parekh, and Tendayi Bloom, respectively, suggest possible grounds for new forms of belonging, including solidarity, economic rights, and non-citizen rights. The final two chapters in this part, Chapters 11 and 12 by Susan Bibler Coutin and Jaya Ramji-Nogales, respectively, discuss the way forward. They propose bottom-up methods for constructing international law and political action that may be better able to accommodate and channel responsibilities across borders.

Chapter 7, “Imagining New Forms of Belonging: The Futurity of the Stateless,” reflects on the importance of narrative in constructing community and defining bonds of belonging. According to Coundouriotis, literary analysis can help us navigate difficult questions of law and policy by prodding the reader’s imagination and ability to think outside the box. Coundouriotis examines Peter Balakian’s memoir *Black Dog of Fate* to explore the role of testimony in relating past to future. As she explains, “Testimony makes legible the futurity of statelessness and invites creative engagement to elaborate on new aspirations.” Accounting for the past is what allows us “to make a claim for future belonging.”

This chapter is also a contemporary illustration of literature’s ability to mobilize empathy as a foundation for such claims. According to Coundouriotis, narrative is essential in allowing the reader to identify with the experience of another. Empathy, as opposed to compassion and sympathy, is an active practice of becoming vulnerable. It requires one to identify with aspects of the experience of another person. Identifying with those in precarious and vulnerable circumstances can be terrifying: One worries it may negate one’s own pain, or that the experience of empathy will be painful itself, or will create new pain due to an awareness of one’s powerlessness. Balakian’s work engages the reader in the practice of empathy by allowing the reader to identify with Balakian, which not only makes legible the experience of violation but also “refuses to other the victim of genocide.”

Considering Balakian’s oeuvre as a whole, Coundouriotis traces a path in his work from engagement with history to responsibility for the future. His poetry, for example, links crises such as genocide and environmental catastrophe “by analogy

⁴¹ S. Parekh, *No Refuge* (Oxford: Oxford University Press, 2020).

⁴² K. Sikkink, *The Hidden Face of Rights: Towards a Politics of Responsibilities* (New Haven, CT: Yale University Press, 2020).

and poetic image to the plight of the stateless, making it hard to refuse the urgent predicament of the stateless in our contemporary moment.” Balakian’s works thus “afford a type of recognition cast as discovery that urges us to witness and hence interrupt the ways the past continues into the present. Through this witness, the stateless find new interlocutors with whom to claim belonging.” Coundouriotis argues that this “broadened sense of participation in history” in the reader “links explicitly to an ethos of human rights: everything is pegged on the idea that human rights give legibility to the type of responsible subjectivity that extends belonging to the stateless.”

The next three chapters explore other foundations for such claims of future belonging. These contributions pick up the theme of empathy but move beyond, exploring the role of rights, law, and the market in promoting or undermining relationships of belonging. Chapter 8, “Either I Close My Eyes or I Don’t: The Evolution of Rights in Encounters between Sovereign Power and ‘Rightless’ Migrants,” explores cases in which governments have prosecuted individuals who have provided migrants and refugees with basic humanitarian assistance – Cédric Herrou, a French olive farmer who provided assistance to unauthorized migrants in France; two German ship captains who rescued distressed migrants at sea; and Scott Warren, who provided food and water for people trying to cross the Sonoran Desert in the United States. In each of these cases, the individuals who were prosecuted invoked principles higher than the law in justification of their actions. And in some, the courts appeared to recognize such higher principles. In Herrou’s case, Kanstroom explains, the *Conseil constitutionnel* in France invalidated Herrou’s conviction, invoking the principle of fraternity as a value that must be balanced with state efforts to safeguard public order.

Kanstroom’s work illuminates the possibility that principles such as fraternity and solidarity might ground efforts to create relationships across borders, including to compel action on behalf of those who are not a part of our political community. The cases he explores also illustrate the way in which rights can emerge not only via the nation-state but also through the actions of individuals. Rights emerge, according to Kanstroom, “from encounters between raw state sovereign power and ostensibly extra-legal, humanitarian actions for those at the lowest ebb of their power and with the least legal status.” According to Kanstroom, the principle of fraternity “imbues charity with implications of universal obligation.”

The cases he examines also provide a basis for giving those bonds legal and not just moral weight. The decision of the *Conseil constitutionnel* in Herrou’s case recognizes the idea that acting to protect the safety of someone who otherwise would have no claim on us can override the sovereign’s otherwise nearly invincible prerogative in the context of national security. Kanstroom argues that “noncitizens, especially the unauthorized and ostensibly ‘rightless,’ are uniquely positioned to challenge, to critique, and to improve the meaning of law in constitutional democracies and of international human rights.”

These cases – and the judicial system’s response to individual defiance of unjust laws – illustrate not only the possibility of other ways of expressing rights outside of citizenship but also the risks that insistence on policing these boundaries could pose for the legitimacy of the constitutional order. In this way, Kanstroom’s chapter is in dialogue with the arguments of Tendayi Bloom, who later in the volume argues that the state’s legitimacy derives not just from its accountability to its citizens, but also the extent to which it attends to its relationships with and thus its obligations to non-citizens. Kanstroom similarly argues, “Since legitimate lawmaking both responds to and generates communicative power from, as it were, below, noncitizens play a central role in translating communicative power into administrative power and law.”

The third chapter in this part, Chapter 9 by Serena Parekh, “Do Non-citizens Have a Right to Have Economic Rights? Locke, Smith, Hayek, and Arendt on Economic Rights,” explores the idea of economic rights and the ability to meaningfully participate in the economy as a prerequisite for the enjoyment of human rights. Parekh begins by re-reading Locke, Smith, and Hayek, arguing that these scholars – known best for their defenses of the free market – in fact anticipated involvement of the state in the market in order to ensure individual equality and minimum economic guarantees.

Focusing on the experiences of individuals who are present within a country but unable to participate in the market because they lack work authorization (as opposed to those outside of a country seeking admission), Parekh then argues that Arendt’s ideas about the need for a “right to have rights”⁴³ can be extended to participation in the market. Parekh flips the usual neoliberal conception of economic citizenship in which individuals voice their opinions through participation in the market and the mechanism of consumer choice.⁴⁴ According to Parekh, economic rights are not a manifestation of citizenship, but its precursor. Parekh argues, echoing Arendt, that “being human is not enough to have one’s economic rights protected.” Instead, “non-citizens need a right to have economic rights, that is, a right to belong to an economic community.” Whether or not one can actually enjoy human rights has less to do with one’s citizenship than one’s place in the global economy.

Chapter 10 makes an explicit claim for rights based on non-citizenship. In “Human Rights Are Not Enough: Understanding Noncitizenship and Noncitizens in Their Own Right,” Tendayi Bloom argues in favor of the concept of “noncitizen” rights. Rather than seeing citizenship as the sole foundational relationship between an individual and a state and non-citizenship as its absence, she contends that there is another foundational relationship, that of non-citizenship. Moreover, this

⁴³ H. Arendt, *Origins of Totalitarianism* (2nd ed., New York: Harcourt, 1978); see also S. DeGoyer et al., *The Right to Have Rights* (London: Verso, 2018).

⁴⁴ K. A. Faulk, “Solidarity and Accountability: Rethinking Citizenship and Human Rights,” in Goodale (ed.), *Human Rights at the Crossroads*, pp. 98, 102.

“institutional, necessarily non-contractual, relationship of noncitizenship” gives rise to substantive rights and obligations of its own. As states seek to ensure that their citizens have access to goods, they “may also *actively impair* access to these goods for others.” As she explains, “a state has specific and institutional obligations towards those people who bear the burden of its existence and of its actions.” Writing from the vantage point of political theory, Bloom’s argument is that relationships of both citizenship and non-citizenship are essential to state construction and state legitimacy.

By emphasizing responsibility, Bloom’s contribution is in conversation the work of several human rights scholars seeking to reinvigorate the concept of responsibility. In her recently published book *No Refuge*, Parekh argues that we must move beyond a frame of “rescue” toward a frame of political responsibility for conditions of structural injustice that deny refugees the minimum conditions of human dignity.⁴⁵ The states that established the current refugee system “have created a situation in which the vast majority of refugees are effectively unable to get refuge in any meaningful sense; that is, they are not able to access the minimum conditions of human dignity.”⁴⁶ This is a structural injustice that *we* – the citizens of those states and Parekh’s audience for her book – “share political responsibility for.”⁴⁷ This is not the responsibility that one might have for a “direct injustice”⁴⁸ like the US family separation policy, but rather a responsibility for an injustice that has resulted from the aggregate acts of people living their lives, which is then “*assigned* depending on how we are related to the injustice.”⁴⁹ Kathryn Sikkink, in her recent work focusing on responsibility, has argued that some harms cannot be remedied without individual and collective action.⁵⁰ As a result, “for the enjoyment and implementation of rights, other agents, including individuals, must take some responsibilities for the fulfillment of rights.”⁵¹ Recent work by Tendayi Achiume ties this responsibility to the entrenched global inequality caused by colonization.⁵² She argues that “Third World peoples” are not in fact political strangers to “First World political communities” – they “were brutally initiated into First World political communities under European colonialism and remain within these communities today.”⁵³ Based on this, she argues that “First World states have no right to exclude Third World persons” and that “Third World persons are entitled to First World inclusion.”⁵⁴

⁴⁵ Parekh, *No Refuge*, p. 12

⁴⁶ *Ibid.*, p. 159.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, p. 167

⁴⁹ *Ibid.*, p. 172.

⁵⁰ Sikkink, *The Hidden Face of Rights*, p. 45.

⁵¹ *Ibid.*, p. 52.

⁵² Achiume, “Re-Imagining International Law,” p. 143; *see also* E. T. Achiume, “Migration as Decolonization” (2019) 71(6) *Stanford Law Review* 1509–1574.

⁵³ Achiume, “Migration as Decolonization” at 1533.

⁵⁴ *Ibid.* at 1551.

The work of Bloom and these other scholars also helps us understand how to direct this responsibility. To varying degrees, they argue that responsibility arises from our deep interdependence with others, regardless of (or even as a result of) borders. Empathy or fraternity may provide impetus for action, but it does not necessarily help decide where action is needed.⁵⁵ Bloom's argument, however, is that responsibility is tied to impact: "A stronger noncitizen relationship gives rise to stronger claims." This is resonant in the cases examined by Kanstroom as well. It is not undifferentiated suffering that Herrou rails against with his acts of civil disobedience – rather, it is suffering that is caused by the injustice of French law. When asked by a judge, "Why do you do all this," Herrou described French migration enforcement as "ignoble," explaining: "My inaction and my silence would make me an accomplice, I do not want to be an accomplice."⁵⁶

The final two contributions begin a discussion about how to move forward in constructing new bonds of belonging that can sustain political action on behalf of non-citizens. Chapter 11 by Susan Bibler Coutin, "Uncertainty and Educational Mismatch: Schooling and Life Pursuits in Contexts of Illegalization," illustrates the precarity associated with a life without citizenship or equivalent status, and it contrasts this precarity with immigrants' own understandings of what kinds of affiliations give rise to an entitlement to enjoy rights in a society. Coutin analyzes the complicated mismatches between the lives of immigrant youth and their families and the forms of subjectivity created through US immigration enforcement initiatives. These initiatives have subjected unauthorized immigrants from Mexico and Central America to illegalization, which gives rise to experiences of stigmatization and discrimination, as well as material precarity. Coutin focuses on the process by which individuals, families, and communities are "constituted" by the state and other actors as "illegal" and "undeserving" as an "ongoing part of daily life." Immigrant youths' lives in her qualitative study were rendered precarious by the state limiting access to key social institutions, including higher education, employment, health care, family, and safety. Public condemnation of undocumented immigrants for allegedly undermining the rule of law, however, differed sharply from interviewees' senses of their own merit, who saw themselves as deserving even though they remained vulnerable to detention and deportation.

Coutin's interviews profoundly illustrate the negative effects of this process of illegalization for youth in California during two different periods (2006–2010 and 2014–2017). But the interviews also reveal that youth have created new forms of

⁵⁵ P. Bloom, *Against Empathy: The Case for Rational Compassion* (New York: Harper Collins, 2016), p. 34.

⁵⁶ K. G. Brown, "France Prosecuting Citizens for 'Crimes of Solidarity,'" *Aljazeera*, January 25, 2017, www.aljazeera.com/indepth/features/2017/01/france-prosecuting-citizens-crimes-solidarity-170122064151841.html.

lasting, meaningful belonging, even among those who did not qualify for Deferred Action for Child Arrivals (DACA) status. Through the youths' stories, Coutin was able to point to the mechanisms through which "educational institutions were potentially empowering," but also that schools, colleges, and universities could be sites where "illegalization, precarization, and uncertainty occurred." Coutin suggests that similarities in experiences of those who came before or after DACA was enacted point to the inadequacy of temporary measures, which are "insufficient to counter both the intensity of illegalization, and the financial pressures of paying for college." Coutin calls for us to imagine a reality when college campuses can be "truly sanctuaries" that make achieving a higher education accessible for all youth regardless of immigration status or income.

Finally, Chapter 12 by Jaya Ramji-Nogales, "Constructing Human Rights: State Power and Migrant Silence," also begins by charting the gaps in current law. Ramji-Nogales traces the evolution of the concept of rights in international law, both the promise of its ideals and the disappointment of reality. Despite claims to be universal, the state-centric nature of international human rights law "prioritizes the power of the state while erasing the interests of migrants." The purported universality of human rights "mask[s] political choices that prioritize certain interests over others."

Ramji-Nogales calls for a "radical rethinking" of human rights law through the vehicle of "a new human rights treaty focused on migrants rather than states." Although states are unlikely to be supportive of a new treaty, efforts to create a new treaty would have an expressive function and could also "help to frame the debate, persuade the public, and focus activist energies in lobbying states for change." More fundamentally, the project of a new treaty would help advance a rethinking of human rights law by foregrounding the voices and experiences of migrants themselves. She explains: "An emancipatory approach to international human rights law might instead take the human seriously, beginning from the perspective of the law's subject: the migrant. A reimagined canon would identify and foreground the voices of those in precarious situations, asking what protections are needed to minimize their vulnerability."

The pieces by Blitz and Ramji-Nogales, together with those by Coutin and Kanstroom, decenter the state and emphasize the voices of those most affected by the law's gaps. In chapters by both Kanstroom and Ramji-Nogales', the state is the cause of the harm, not its solution. Coutin draws from interviews with Salvadoran immigrants and DACA recipients, illustrating the impact of illegalization on migrants' lived experiences and how they have resisted these pressures and harms. Blitz and Ramji-Nogales emphasize the importance of centering on these experiences to create bottom-up solutions that can better respond to the harms of the law.

To the extent that human rights is seen as a solution in each of these chapters, it is a different (and potentially more powerful) vision of human rights than one typically sees. In each of these, human rights is not operating as law, but as a vehicle for care. This vision of human rights emphasizes the responsibilities that individuals have to

one another⁵⁷ – what Alison Brysk calls “care” – “giving attention and worth to someone else’s experience, in a way that makes us available for solidarity with that person.”⁵⁸ Care, in this view, is ultimately a political act and (as Kanstroom would attest) in some instances an act of civil disobedience. Brysk writes: “Care is how we speak love to power.”⁵⁹ As Ramji-Nogales notes, “only by hearing and uplifting the voices of undocumented migrants can we push human rights law closer to its emancipatory potential, redeeming the humanity of migrants and citizens of destination states alike.”

This vision of human rights as acts of care/empathy/solidarity is a vision of human rights not as law, but as action. Human rights are not ensured, but claimed. And it is the process of claiming those rights that helps create the sense of social responsibility needed to ensure rights.⁶⁰ In Ramji-Nogales’ vision, for example, the value of a treaty is not in the law it might create, but in the networks and relationships that mobilization around a treaty might foster. Transnational advocacy to create international instruments promotes relationships between those in different political communities, thus providing a foundation for the development of greater shared understandings of the meaning of rights. This approach resonates with human rights scholars such as Alicia Ely Yamin, who emphasize the importance of rights-based practices, in addition to rights-based results. Thus, for Yamin, human rights are “social practices that create spaces for vital deliberation on how to arrange social institutions to meet population needs, especially of the most disadvantaged.”⁶¹

Of course, this does not mean that law is irrelevant. As Chapters 2–4 illustrate, legal reforms are clearly needed. It does mean, however, that human rights cannot be achieved by law alone. Blitz’s argument about the wrong turn that the UNHCR has taken in focusing solely on top-down technocratic arguments is law at its worst – what Yamin critiques as “top-down formalistic legal tools anchored by fixed understandings of norms.”⁶² Instead, Yamin argues for understanding human rights as “an incremental *process* by which they [human beings] can express their diverse views.”⁶³ Richard Wilson has called this “the potential for human rights law to be a form of ‘politics by other means,’ rather than as wholly ‘depoliticizing.’”⁶⁴ The chapters in this book make a compelling case that we must begin the work of prioritizing the voices of migrants and refugees caught in law’s gaps. Even if the

⁵⁷ Faulk, “Solidarity and Accountability,” p. 106.

⁵⁸ Brysk, “‘Why We Care,’” p. 163.

⁵⁹ *Ibid.*, p. 164.

⁶⁰ Faulk, “Solidarity and Accountability,” p. 105.

⁶¹ A. E. Yamin, *Power, Suffering, and the Struggle for Dignity: Human Rights Frameworks for Health and Why the Matter* (Philadelphia: University of Pennsylvania Press, 2016), p. 65.

⁶² *Ibid.*, p. 247.

⁶³ *Ibid.*

⁶⁴ R. A. Wilson, “Tyrannosaurus Lex: The Anthropology of Human Rights and Transnational Law,” in M. Goodale and S. E. Merry (eds.), *The Practice of Human Rights: Tracking Law between the Global and the Local* (Cambridge: Cambridge University Press, 2007), pp. 342, 355.

result of that work is uncertain, the process of re-centering holds significant promise on its own.

CONCLUSION

The chapters in this book together make a compelling case for the rights of non-citizens, examining the failures of our current moment, imagining new forms of belonging, and thinking critically about approaches that might bring us closer to the promise of universal enjoyment of rights. Thus, most directly, this book is about the laws and policies that affect those who are not members of a political community that can effectively protect their rights, and why – and how – those rights might be better protected.

More broadly, however, it is a book about why this matters. From the rise in populist governments around the world to the spread of disinformation and the COVID-19 pandemic, it is more evident than ever that the rights of all depend on the protection of the rights of the most vulnerable. As Brysk argues, “we are only as free as our weakest neighbor.”⁶⁵ Exploring new rhetorics of relationship may provide at least a starting point for that conversation. Whether empathy, care, or solidarity, finding new ways to relate across metaphysical and geographic borders may help us to challenge the zero-sum strategies of political leaders seeking to consolidate power using populist techniques.⁶⁶ These new ways of relating can contribute to a foundation on which we can build political arguments for more effective ways to address the injustice of borders.

⁶⁵ Brysk, “Why We Care,” p. 168.

⁶⁶ S. Scholz, *Political Solidarity* (Philadelphia: University of Pennsylvania Press, 2008).

