DEPORTING DEMOCRACY: THE POLITICS OF IMMIGRATION AND SOVEREIGNTY

María Inés Valdez Tappatá

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Approved by:
Susan Bickford
Michael Lienesch
John McGowan
Andrew Perrin
Jeff Spinner-Halev
ABSTRACT

INES VALDEZ: Deporting Democracy: The Politics of Immigration and Sovereignty
(Under the direction of Susan Bickford and Jeff Spinner-Halev)

This project critically investigates the politics of immigration. It proposes a political cosmopolitan perspective that illuminates the role of immigrants’ political action and rights claims in challenging coercive institutions of sovereignty and altering the shape of the political community. Conversely, democratic politics suffers when anti-immigrant discourses and racialized immigration enforcement prevail. Democracy needs public spaces that welcome difference and plurality for the excluded to put forward revised and expanded understandings of community. In this sense, the way democracies deal with immigration acts as a canary in the coal mine. This is because actions taken to prevent immigration and to enforce immigration regulations result in racial hierarchies within the polity and silence legitimate voices of democratic contestation. To make this case, the dissertation addresses four dimensions of immigration politics: (i) it theorizes how international hierarchies shape the domestic politics of immigration; (ii) it criticizes assumptions of individual or collective benevolence toward immigrants and instead explores political sources of hostility; (iii) it theorizes immigrants as political subjects and highlights the role of their activism in democratic politics; (iv) it theorizes the effects of institutions of immigration enforcement in fostering (or preventing) immigrant political action and, ultimately, a thriving democracy. I examine the work of liberal-egalitarians and deliberative democratic approaches, arguably among the most
welcoming of immigrants. Given my focus on immigrants as political subjects and the
dangers of depoliticizing immigration, these schools are important interlocutors. They, if
any, should offer normative scripts with the most emancipatory potential for immigrants.
Regardless of this, they fall short of recognizing immigrants as political actors. The
theoretical exploration concludes that in the context of unbalanced power in the
international realm and domestic polities characterized by racial inequality, the case for
defending sovereign prerogatives to control borders and domestic enforcement grows
very weak. This project illuminates instances of injury and closure of spaces of
democratic politics that characterize the contemporary immigration regime. A
cosmopolitan approach highlights that these spaces of oppression within democracies are
facilitated by the assertion of a sovereign right to exclude. It also identifies immigrants as
legitimate political subjects that challenge sovereignty from within.
To my parents, Patrícia Tappatá and Gilberto Valdez, from whom I get my love of knowledge, and politics.

To the millions of migrants that build new spaces of belonging away from home, and to those who lost their lives in the journey.
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I was extremely lucky to have Michael Lienesch as a professor and mentor as well. I benefitted from the inclusive and stimulating atmosphere that prevails in his graduate seminars, and continued throughout his mentorship. I also acknowledge that my own writing style is indebted to his attentive and practical advice, or at least when it comes across as crisp and concise.

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I received comments on chapter 3 from Eric MacGilvray, David Miller, and Alexander Wendt. Chapter 4 came to being after I read Seyla Benhabib’s The Rights of Others in 2007. I owe to this influential work my decision to write about immigration and democratic theory. Benhabib’s book opened a lively discussion on the political theory of immigration, and her initial conceptualization of the problem in a Kantian framework influenced my own readings and critiques. I presented an early version of this chapter in the 2008 American Political Science Association (APSA) meeting, under the title “An Alien Consciousness? A Critical Reading of the Construction of Citizenship and Borders.” I received excellent comments and criticism at several stages from Ishan Ashutosh, Amy Cohen, Romand Coles, Debanuj Dasgupta, Eric MacGilvray, Hollie Mann, and Joan Tronto. I also presented this work at the Political Theory Workshop of the Department of Political Science at the Ohio State University (OSU).

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Last, but not least, this dissertation would not have been possible without my family’s solid support. My parents, to whom I dedicate this dissertation, and my three sisters Patricia, Paula, and Jimena, were constant in their love and encouragement year after year (after year). Philipp’s partnership and his support throughout the writing was more than I could have ever asked for. His willingness to listen, read, comment, and re-
read my work was only a part of this. Most important was the generosity and genuine curiosity that he had to offer in these exchanges, which managed to keep both determination and creativity alive throughout three years and two transatlantic moves.
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## ABBREVIATIONS

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
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<tbody>
<tr>
<td>ACLU</td>
<td>American Civil Liberties Union</td>
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<tr>
<td>CEDAW</td>
<td>Convention to End All Forms of Discrimination Against Women</td>
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<tr>
<td>DHS</td>
<td>Department of Homeland Security</td>
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<td>DREAM Act</td>
<td>Development, Relief, and Education for Alien Minors Act</td>
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<tr>
<td>EU</td>
<td>European Union</td>
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<tr>
<td>FOT</td>
<td>Fugitive Operations Teams</td>
</tr>
<tr>
<td>FRONTEX</td>
<td>Frontières Extérieures, European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union</td>
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<tr>
<td>IACHR</td>
<td>Inter-American Commission on Human Rights</td>
</tr>
<tr>
<td>ICE</td>
<td>Immigration and Customs Enforcement</td>
</tr>
<tr>
<td>ICIRR</td>
<td>Illinois Coalition for Immigrant and Refugee Rights</td>
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<tr>
<td>IOM</td>
<td>International Organization for Migration</td>
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<tr>
<td>IRCA</td>
<td>Immigration Reform and Control Act</td>
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<tr>
<td>IRIRA</td>
<td>Immigration Reform and Immigrant Responsibility Act</td>
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<tr>
<td>IYJL</td>
<td>Immigrant Youth Justice League</td>
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<tr>
<td>MPI</td>
<td>Migration Policy Institute</td>
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<tr>
<td>OAS</td>
<td>Organization of American States</td>
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<td>UN</td>
<td>United Nations</td>
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CHAPTER 1
INTRODUCTION

On August 19 of 2007, Elvira Arellano was detained by 15 agents of Immigration and Customs Enforcement (ICE). She would be deported to Mexico only hours later. The detention took place just two blocks away from Our Lady Queen of Angels, a Roman Catholic church in downtown Los Angeles. She was visiting the church in her role of activist and member of the New Sanctuary Movement, a multi-denominational group that opposes immigration raids and gives refuge to migrants.\(^1\) The immigrants that take refuge in one of the churches or temples must have pending deportation orders and be willing to speak publicly on the cause.

Arellano had spent one year taking refuge in Adalberto United Methodist Church in Chicago. There, she presided over 35 families seeking relief from the deportation of one of its members through La Familia Latina Unida a branch of Chicago’s Centro Sin Fronteras (No Frontiers Center).\(^2\) She had recently, in consultation with her pastor and the Center, decided to initiate a tour around the country to raise awareness on the issue of family separation.\(^3\) Her plan was to end her trip in Washington D.C. to bring the issue of

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immigration to public attention and hand over to Congress a proposal for a temporary solution of the “immigration crisis.” Her tour coincided with a time of heightened enforcement against undocumented immigrants that followed the collapse of congressional efforts to pass immigration reform.\textsuperscript{5}

The tour that Arellano had planned was cut short by her apprehension in Los Angeles. However, her detention and expedited deportation succeeded in bringing the injustice of the immigration regime back to the surface of public debate. In a press conference held after her deportation in Tijuana, Arellano asserted that if it helped the people to stand up and community leaders and religious groups to unite in the struggle for legalization, her deportation was worth it.\textsuperscript{6}

Later, she asserted that she got an “express deportation” that did not give the Mexican consulate an opportunity to intervene.\textsuperscript{7} She added that this was because her work organizing and mobilizing the immigrant movement to achieve legalization was threatening to the United States.\textsuperscript{8}

The political intent of her actions was downplayed by ICE field officer Jim Hayes, who said that her arrest was not a “message to the sanctuary movement as much

\textsuperscript{4} T52 Telemundo Los Angeles, “Elvira Arellano Es Deportada a México. La Activista Indocumentada Fué Detenida En Los Angeles,” \textit{Telemundo Los Angeles} August 20 2007.


\textsuperscript{6} T52 Telemundo Los Angeles, “Elvira Arellano: Eeeu Me Consideraba Una Amenaza.”

\textsuperscript{7} Ibid.

\textsuperscript{8} Ibid.
as it [was] a message to criminal illegal aliens who are fugitives, that we are going to continue to target them.”

Following her detention, an official communiqué from ICE stated that Arellano “was a criminal fugitive alien that spent a year seeking to elude federal capture.”

Arellano had been deported once before, in 1997, making her re-entry that same year a felony. In 2002, when detected in a raid conducted after 9/11 in Chicago’s O’Hare airport she was accused of identity theft (a criminal offense) for her use of a fake social security card to obtain the job.

Arellano’s deportation bypassed international regulations that obligate the United States to notify a consular officer in the event of a deportation of a foreigner. Elvira Arellano’s activism continued south of the border, succeeding in having the Mexican Congress pass a public condemnation of her expedited deportation. She publicly called Mexican authorities “to defend those of us that decided to migrate to another country.”

The events that led to the deportation of Elvira Arellano are representative of how the immigration regime works today. Arellano herself symbolizes the approximate 11 million undocumented immigrants that reside in the United States. Her public advocacy and publicized peaceful resistance to her deportation order made her a symbol of the

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10 Watanabe, "Immigration Activist Deported to Mexico."

11 In 2009, a unanimous Supreme Court decision (Flores-Figueroa vs. United States) established that the charge of identity theft could not be used to charge undocumented immigrants that had used fake social security numbers to obtain work. *Flores-Figueroa Vs. United States*, 556 (2009), Adam Liptak and Julia Preston, "Justices Limit Use of Identity Theft Law in Immigration Cases," *The New York Times*, May 4 2009.

plight of these immigrants. Her case was well known to national and international audiences, and among immigrants. The founding of the Sanctuary Movement followed from her decision to disobey the order to surrender to authorities for deportation in 2006 and instead take refuge at Chicago’s Adalberto United Methodist Church. Even before her detention, her story was featured in Time Magazine, as part of the 2006 *People Who Mattered*. Her detention, just two blocks away from a Sanctuary church, went very close to breaking ICE’s policy of not entering spaces of refuge. Amalia Pallares discusses her significance for immigrant activists:

> Arellano’s case moved people in powerful ways, leading activists throughout the country to organize marches, protests, and other events in her name, inspiring songs, poems, and the motto, “We are all Elvira Arellano,” which has been used in protests and rallies since her deportation.

The example of Elvira Arellano also highlights the limitations of existing scholarship for addressing contemporary features of immigration politics. In particular, there are four central dimensions that are omitted by the existing literature on immigration.

First, the expedited deportation of Elvira Arellano illustrates the asymmetric power that exists between the United States and Mexico. This asymmetry is reflected, on the one hand, on the unbalanced institutional structure and the capacity of powerful

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countries to sidestep international norms or simply refuse to participate in certain covenants. On the other hand, the international discursive sphere relies on racialized identities that establish a hierarchy that ranks countries and their members. Institutionally, what immigrant-sending countries can do to protect their citizens abroad is limited by the international balance of power. Powerful Western countries routinely bypass international immigration regulations and not a single one of them has signed the United Nations Convention for Migrant Rights. Regarding identity, immigrants that arrive in Western countries are often preceded by dehumanizing stereotypes that mark them as un-assimilable. The identification of Elvira, a single mother with an American citizen son, as a criminal reflects the routine way in which racialized immigrants from certain countries are constructed as threats to the polity. This dissertation is concerned with examining the effect of these international hierarchies on domestic immigration politics.

Second, the events narrated above contradict the assumption—common in liberal and democratic deliberative approaches—that citizens of receiving countries will benevolently extend membership to immigrants or, at the very least, guarantee certain minimum human rights standards. As mentioned above, Elvira Arellano had started touring the country after immigration legislation failed to pass in Congress. This means that for two decades, since 1986, no successful legislative initiative has provided a path to citizenship for the millions of undocumented. Indeed, some of the bills that have been considered contain no path to citizenship and concentrate in heightening border security, reducing due process rights, and increasing the grounds for deportation of existing documented and undocumented immigrants.
Third, the case of Elvira Arellano illustrates the political involvement of immigrants and their role in challenging the fairness of the immigration regime. Existing approaches concentrate on theorizing citizens as the main political subjects who will or will not extend inclusion to outsiders. However, immigrants’ political action is evident in their acts of civil disobedience, the mass demonstrations demanding inclusion, and their leadership in coalition-making with other groups. These actions result in the political articulation of principles of equality and justice and a principled demand for inclusion.

Finally, Arellano’s experience is related to a fourth concern of this dissertation, the struggle regarding the naming of events as issues that belong to politics as opposed to police, law and order, or security. When Arellano claims her deportation is intended to prevent a political challenge she identifies herself as a political actor and ICE as a force that denies the political nature of these challenges. ICE’s response, on the other hand, marks her as a threat and a criminal. Arellano’s crimes of “illegal re-entry” and “identity theft” were strictly connected to her undocumented status. As a consequence, ICE field officer Hayes’ assertion that she was a “criminal illegal alien” who was “fugitive” is akin to identifying all undocumented immigrants as criminals and fugitives.

The case of Elvira Arellano demonstrates that theorizing immigration requires jointly addressing external sovereignty and democratic theory to redefine the role of politics and rights in challenging coercive institutions. My dissertation does this by addressing four dimensions of immigration politics: (i) it theorizes how international hierarchies shape the domestic politics of immigration; (ii) it criticizes assumptions of individual or collective benevolence toward immigrants and instead explores political sources of hostility; (iii) it theorizes immigrants as political subjects and highlights the
role of their activism in democratic politics; (iv) it theorizes the effects of institutions of immigration enforcement in fostering (or preventing) immigrant political action and, ultimately, a thriving democracy.

**Repoliticizing the Immigration Debate**

The political theory literature on immigration has grown steadily in the last two decades. Its two camps are organized around the defense of self-determining communities’ right to limit immigration and, alternatively, the assertion that principles of freedom of movement trumps external sovereignty and the right to limit immigration. Discourse theoretic approaches are located somewhere in the middle: they recognize a tension between existing regulations of immigration and universal norms of hospitality and expect a gradual process of mediation and eventual convergence toward cosmopolitan moral principles. This gradual process is nonetheless led by a self-determining formal community of citizens.

In this dissertation I examine the work of liberal-egalitarians and deliberative democratic approaches, arguably among the most welcoming of immigrants. Given my focus on immigrants as political subjects and the dangers of depoliticizing immigration, these two schools are important interlocutors. This is because these literatures, if any, should be able to offer normative scripts that provide the most emancipatory potential for immigrants. In contrast to approaches that offer prescriptions as if immigrants were

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waiting at the border, scholars of freedom of movement and deliberative democracy are concerned with immigrants that already reside in the community in question. Regardless of this, they still fall short of fully recognizing them as political actors.

_Hierarchy, Mass Migration, and Political Cosmopolitanism_

The particular configuration of power that exists in the international sphere, and the hierarchical identities that mediate relations between countries, structure how immigrants are received. The combination of inequality in the international sphere and domestic authority based solely on popular sovereignty produces spaces of vulnerability in which immigrants dwell.

In chapter 2, I offer a conceptualization of the politics of immigration that attends to the unequal balance of power in the international sphere. Through a close reading of Kantian cosmopolitanism, I distinguish the contrasting dynamics of interaction between sovereignty and cosmopolitanism depending on whether the context is colonialism or mass migration. I argue that Kant’s strict conception of sovereignty is justified by his concern to maintain a realm of sovereignty that is complementary with cosmopolitanism. In the context of colonialism, achieving this complementarity requires privileging strong sovereignty. In Kant’s time, the strength and hostility of the visitors/conquerors made limited hospitality and strong sovereignty act in tandem to keep away conquerors, expanding cosmopolitanism. In the contemporary context of immigration, individuals from poor countries migrate to wealthier ones where they are subject to a sovereign authority that excludes them. Sovereignty and cosmopolitanism no longer work complementarily, but rather strengthen powerful state actors vis-à-vis non-citizens subject to unilateral rule. Only through the moderation of sovereignty and the creation of
“cosmopolitan spaces” of politics can we reproduce today the complementarity that Kant envisioned.

A political interpretation of cosmopolitanism highlights the normative need to ease the authority of sovereignty to prevent a hostile reception of immigrants and the potential of an excessive use of force by the immigration enforcement regime. Chapter 2 is centrally concerned with the normative consequences of inequality in the international sphere over domestic politics, but it also touches upon the other three critical arguments. First, it considers and criticizes the reliance on benevolence as a normative guide to the reception of immigrants. Second, as a cosmopolitan approach, it conceives of non-citizens as political actors. Finally, it highlights the point that unless we consider cosmopolitanism a realm of politics, external sovereignty as an authority will be seen in isolation to the political challenges that immigrants raise against it.

*From Humanitarianism to Political Contestation*

Chapters 3 and 4 analyze approaches to the politics of immigration that rely on liberal or discourse theoretic principles but coincide in granting full decision-making power to formal citizens. These models posit immigrant inclusion as a benevolent extension of membership toward foreigners. They do not theorize the possibility of hostility against immigrants, or the processes of dehumanization that underlie migrants’ rights violations within democratic polities.

I contend that examining hostility is theoretically important. Even if scholars find that immigrants are normatively entitled to membership, their institutional prescriptions will lack critical purchase unless they account for the reality of hostility and dehumanization and how to overcome it.
Chapter 3 analyzes critically the liberal egalitarian literature on immigration, with a focus on Joseph Carens’ ideal and non-ideal writings. This scholarship is the exception to the broader literature in that it focuses on the international sphere of sovereign states. It argues for the normative priority of principles of global egalitarianism and freedom of movement and conclude there is no justification to maintain sovereign borders.\(^\text{19}\)

However, these theories do not explore the hierarchy and racialized structures that characterize the international realm. Furthermore, they do not connect their theorizing of the external realm with their non-ideal exploration of domestic immigration politics. Importantly, Carens’ analysis of domestic immigration politics deploys a principle of “democratic morality” through which liberally minded individuals willingly extend certain human rights guarantees to immigrants. I take issue with this framework because it downplays the complex way in which hostility mires liberal convictions as well as the contingent and politically conflictual ways in which human rights are extended.

The analysis of deliberative democracy approaches to immigration reveals a commonality with liberalism in its reliance on benevolence for the extension of human rights and citizenship to foreigners. In contrast to liberals, the benevolent extension is a collective endeavor, resulting from rich processes of deliberation.

In chapter 4 I address Seyla Benhabib’s influential framework of cosmopolitan-oriented deliberative iterations.\(^\text{20}\) I explore the “dark side” of iterations, namely, the risk of closure and/or securitization of domestic spaces of politics. I conceptualize the process

\(^{19}\) Carens, "Aliens and Citizens: The Case for Open Borders."

through which political communities come to understand themselves in ways that are hostile and exclusionary. My critique builds upon the reading of Kant in chapter 2 as well as an alternative interpretation of Derrida’s concept of iterations. In short, I argue that repeated deliberation may reinforce prejudices rather than overcome them. I address recent agonistic critiques of Benhabib’s work, arguing that they too should be complemented by a more thorough exploration of anti-immigrant hostility.

Who is the Subject of Immigration Politics?

The prescriptions that emerge from liberal and deliberative democratic approaches offer principles of equality, freedom, and human rights that are not attuned to contemporary political conjunctures. As explained above, these theories consider that these values are held by citizens and subsequently extended to foreigners in a humanitarian move. This means that immigrants such as Elvira Arellano are not considered political subjects by states and citizens of recipient countries, even if they reside in the same communities. This is an historically inaccurate and normatively problematic assumption. It is inaccurate because extensions of political rights and equality are usually the result of political struggles led by the excluded actors. It is normatively problematic because it pictures immigrants as passive subjects and citizens of Western countries as uniquely capable of fairly adjudicating rights.21

This limitation is partly a consequence of theorists working within popular sovereignty frameworks of democracy, such as deliberative democracy proponents.

21 Throughout the dissertation I refer to “immigrant” or “racialized immigrant” to refer to what Étienne Balibar identifies as a catch-all category that combines ethnic and class criteria and into which foreigners—but not all foreigners and not only foreigners—are lumped together. This does not mean that I consider such a category as an adequate description of the group, but rather that it is the way in which immigrants” are constructed in contemporary debates about immigration. Étienne Balibar, “Racism as Crisis,” in Race, Nation, Class, ed. Étienne Balibar and Immanuel Wallerstein (London: Verso, 1991), 221.
When faced with the issue of immigration, the legitimacy of this framework is compromised. As currently theorized, the community enacts immigration regulations that—by definition—they will not have to obey. Concomitantly, immigrants obey rules that they did not participate in choosing. This weakens a prime source of legitimacy of democratic decisions.\textsuperscript{22}

The realm of cosmopolitanism addresses this shortcoming. In developing my critiques in chapters 3 and 4 I expand my conceptualization of “cosmopolitan spaces of politics” and examine how immigrant political action can contest narratives of hostility and dehumanization prevalent in the public sphere. I suggest that immigrants’ political claims disrupt existing understandings of community and particularly those that do not grant them political subjectivity. In the process, they alter the meaning and shape of the political community.

I illustrate my conception of politics with a discussion of experiences of immigrants’ activism and their emancipatory potential, focusing on the conflict between political and apolitical narratives within DREAM Act activism. Finally, I rely on the film \textit{The Three Burials of Melquíades Estrada} to reflect on the process of transformation of subjectivity that is required for members of the community to overcome dehumanizing perceptions and accept immigrants as subjects of rights.

The emancipatory cosmopolitan spaces of politics where immigrant political action can thrive have to be created and nurtured. They involve challenging the dehumanizing narratives that construct racialized subjects as threatening and enforcement

regimes that militarize and depoliticize these spaces. I turn to the latter in the next section.

Spaces of Politics and Democracy

When significant numbers of foreign residents with a diversity of legal statuses reside in recipient communities, the sovereign prerogative to exclude turns inward and becomes productive. By turning inward I mean that when immigrants reside in political communities without full membership, sovereignty—a right that is originally meant to limit or keep away—continues regulating their lives. In other words, an institution that is not democratic rules the lives of immigrants within the community. By productive I mean that it shapes domestic spaces of politics and marks certain racialized groups—that exceed immigrants—as outsiders. Moreover, by obscuring political challenges and creating a sense of vulnerability among racialized groups, it offers a sanitized view of community to the privileged. Non-racialized citizens’ safety and comfort is guaranteed through the truncation of the debate regarding the consequences and political responsibility that follow their actions. Both of these features have significant consequences for the vitality of democratic politics. Ultimately, a defense of a sovereign right to exclude must address the consequences for domestic democratic politics that follow from such a defense.

In chapter 5 I explore contemporary practices of immigration enforcement in the United States and illustrate how the way communities deal with immigration acts as “the canary in the coal mine” of democratic politics. I critically examine the way in which immigration regulations are deployed through institutions of “policing” and detention pursuant to deportation. These practices significantly shape the lived experience of
racialized immigrants populating urban and suburban spaces. I argue that the joint
deployment of federal, state, and local law enforcement to police immigration
domestically creates spaces of fear for racially targeted groups. Meanwhile safety and
ease of movement characterize the lives of the privileged that live in and traverse those
same spaces. I evaluate the effects of the immigration regime in the capacity of
immigrants to articulate and express publicly their demands for alternative modes of
inclusion. The potential for the creation of spaces of politics is localized and dependent
on the history of activism—or lack thereof. However, even in the presence of coercive
immigration enforcement, these interventions can take place at the limits of the policing
power of the state.

In contrast to enforcement, immigrant political action is a force hospitable to
democratic politics. This is because, first, it opposes racialized policy interventions that
affect citizens and non-citizens. Second, political action by immigrants forces the
reconsideration of ideas of membership and community toward stances more welcoming
of change and diversity. Finally, immigrants’ political participation broadens the range of
the democratic debate by incorporating actors whose perspective has been shaped by
transnational forces that often originate in the wealthy countries to which they migrate.
Throughout these chapters, I develop a conception of politics that incorporates
immigrants as political subjects. Though constrained by racialized and hierarchical
perceptions and institutions of enforcement, immigrants articulate discourses of rights
and equality that challenge the existing terms of inclusion. In the remainder of this
introduction, I introduce the conception of immigrant rights and political action that this
dissertation advances.
**Immigrants’ Political Action and the Politicization of Rights**

My approach to rights and political action is indebted interpretations of Michel Foucault that take rights to be vocabularies for claim-making located at the limits of power. These vocabularies seek to open “spaces of politics, critical insight and possible transformation.” As Kirstie McClure argues, a Foucaultian rethinking of rights involves refusing an understanding of individuals as autonomous and sovereign subjects. For McClure, rights can be articulated differently in time and place through diverse usages and disparate practices that are polyvocal and polyvalent. The attraction of such a conceptualization is that rights can then become a “problem for sovereignty,” rather than the necessary product thereof. Immigrants’ rights can be fittingly described in this way: as a problem for popular sovereignty and the sovereign right to exclude. By saying “problem” I do not wish to mark immigration as “a problem” to be dealt with. Instead, I wish to convey that immigrants’ rights claims originate neither in popular sovereignty nor in the exclusionary external sovereignty. As a consequence, their activism and demands for rights trouble these institutions in productive and political ways.

Jacques Rancière’s conception of democratic politics and rights is useful here. His conception emerges as a response to pessimistic accounts of rights that do not see space

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26 Ibid., 164.
left for politics within the overwhelming work of power. Rancière recognizes the limits imposed by power, or “the police,” which he identifies with the procedures that aggregate collective consensus and legitimize the distribution of power.27

This structure is, however, not closed to politics, which Rancière sees as an “extremely determined activity antagonistic to policing.”28 His political conception is connected to his understanding of rights. Rights are tentative. This means that they are never equal to the rights of citizen (those that have been accepted and enshrined in law) but continuously remade and resignified by those who use them in the public sphere.29 This resignification of rights occurs when subjects that are formally denied rights build a case for their inclusion. This may involve, for example, arguing that basing access to legal status and—eventually—citizenship through economic skills is unjust because it reinforces international disadvantages and creates a population of invisible undocumented laborers. An egalitarian argument for inclusion of those that were thought not to “count” expands the sphere of application of existing rights and redraws the border between the included and the excluded. The putting into question of this border constitutes democratic politics for Rancière.30

Applying this conceptualization to immigration politics illuminates the democratic potential of immigrant political action. Immigrants organizing mass demonstrations and those resisting deportation are not considered part of the community


28 Ibid., 27-29.


by its current (formal) members. However, their activism conveys that while such exclusion may be commonsensical in a world of popular sovereignty and border controls, it should no longer be considered just. In acting politically, they proclaim their equality and their belonging to the community regardless of what the laws say. Their claim to be equals contrasts with the institutions of immigration enforcement that seek to silence them. The community that is inaugurated by immigrants’ claim to belonging reflects the conflict between the logic of the police and the egalitarian logic put forward through political action.  

When a community’s self-understanding relies on certain commonsensical exclusions, politics unsettles such understanding. Democratic politics, in Rancière’s framework, is the disruption of the order guaranteed by the police, rather than a kind of regime. Politics is also a mode of subjectification. By this I mean that actors become political subjects when they are capable of putting forward an egalitarian argument that conflicts with existing arrangements. The lived experience of immigrants as vulnerable subjects that are constantly threatened by deportation is altered when they announce themselves as members of the community to denounce an injustice. The perception that formal members of the community have of racialized immigrants is also altered when these immigrants take to the streets as political subjects.

The 2006 immigrants marches in Washington, D.C., according to Mae Ngai, “shake up the question” of who we are and imply that “we’ can no longer decide on

31 Ibid.
32 Ibid., 99.
33 As chapter 4 explores, not all pro-immigrant arguments are political in this sense, particularly when they rely on an economic rationale or notions of national security.
immigration policy—their fate—without their participation.” Cristina Beltrán notes that the marches were “democratically distinctive.” Noncitizens laid claim to the public realm and created relational spaces of freedom and common appearance where there were none before.

The rest of this dissertation develops and backs up a conception of politics that gives immigration activism a central role in maintaining a thriving democracy. As the title, *Deporting Democracy*, suggests, the chapters convey that contemporary developments in the realm of immigration have substantive negative effects on the quality and dynamism of democratic politics. I also develop a framework of immigrant politics and rights that makes visible the central role of immigrants in challenging coercive institutions that seek to close spaces of politics.

**Conclusion**

The forthcoming chapters engage with liberal and deliberative democratic theorists on their own terms, seeking to expand and complicate rather than discard their conceptions of rights and freedom. I seek to broaden the capacity of theories to illuminate potential spaces of political action that could lead to egalitarian reconfigurations of political communities. At the same time, I am interested in improving the ability of political theorists to identify depoliticizing maneuvers that are implicit in certain theoretical frameworks about immigration.

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As a consequence, this dissertation is less committed to finding a normative script to organize sovereignty in the era of mass migration than to identifying the ways in which power and coercion are challenged politically. The goal is to understand which groups are targeted and why, as well as the instances of democratic political action that contest these structures. In other words, the chapters ahead are attuned to finding those spaces of critique that, in the Foucaultian sense, advance the “undefined work of freedom.”\textsuperscript{36} This work involves identifying those points in which “change is possible and desirable” in order to explore the forms change may take.\textsuperscript{37}

In the realm of immigration politics, I take these “points” to be the contentious spaces in which politics and security stand in tension as alternative ways of dealing with foreign populations. This struggle maps into the political fight of millions of immigrants like Elvira Arellano that create and inhabit cosmopolitan spaces and oppose the racializing and militarizing trends of immigration enforcement.


\textsuperscript{37} Ibid., 46.
In this chapter, I reconstruct Immanuel Kant’s conceptualization of cosmopolitanism and its complementarity with the other two Kantian realms of Right, the domestic (or sovereign) and the international. Attending to Kantian normative priorities and the transformation of the world from a situation of colonialism to one of mass migration I argue that we should reconceptualize the cosmopolitan realm. A political interpretation of such realm is necessary to avoid spaces of injury and vulnerability for immigrants within democracies. It is only through the creation of cosmopolitan spaces of politics that immigrants and pro-immigrant activists can contest the existing shape of sovereignty.

My interpretation of Kant differs from other scholars of immigration. These scholars find his conceptualization too restricted for our time, given the reassertion of state sovereignty that characterizes his political writings. This chapter demonstrates that existing interpretations of Kant’s cosmopolitanism fail to address how the intellectual and historical context influenced the derivation of cosmopolitan right. In the context in which it was written, Kant’s assertion of sovereignty enhances respect of cosmopolitan right and is coherent with the spirit of complementary realms. This effect is lost when Kant’s prescriptions are applied without attending to how the present context prevents the intended complementarity between realms and thwarts the role of cosmopolitanism in
protecting individuals from foreign governments. As a consequence, in order to preserve the principles of Kant’s theory, it may be necessary to rethink the institutional foundations of his inter-connected system of right.

*Perpetual Peace* intervenes in debates about colonialism, Eurocentrism, and economic cosmopolitanism. In the process, Kant expands the cosmopolitan community beyond Europe and recognizes the effects of an unequal distribution of international power. The right to hospitality that he grants is only unconditional if the visitor risks death and is otherwise regulated by a charitable contract. This prescription follows from extending cosmopolitan right to the population of exploited countries and contesting the legitimating use of cosmopolitan principles by European powers. We often think of hosts as hospitable (or hostile) and visitors as subjects of hospitality (or hostility) yet Kant repeatedly refers to the visitors’ hostility. While we consider cosmopolitan right as a right that would protect visitors presenting themselves in foreign shores, its derivation in *Perpetual Peace* protects hosts from the exploitation of conquerors. As such, sovereign right and the charitable contract strengthen cosmopolitan right by imposing sovereignty-backed coercion against European conquerors, which are only guaranteed benevolence.

Once we have traced the context and structure of Kant’s argument, and in particular his emphasis on the complementarity between realms of right, we can amend Kant’s cosmopolitanism to theorize the rights of contemporary migrants.

Immigrants currently living in foreign lands are the most vulnerable to abuses of cosmopolitan right, and the governments of host countries the most likely to incur violations of this right. Kant’s dictum that in a cosmopolitan community “a violation of rights in one part of the world is felt everywhere” alerts us to the irony that today abuses
take place in the midst of host countries, rather than in the distant colonial lands.\(^1\) The disavowal of the rights of immigrants is justified on the preeminence of sovereignty over other prescriptions, including cosmopolitanism, yet such preeminence was favored by Kant due to the complementarity that existed between the two realms of Right in his time. The realm of *ius cosmopoliticum* is predicated on the fact that individuals and states coexist “in an external relationship of mutual influences” and institutional arrangements should be altered as this configuration evolves historically.\(^2\) If the theoretical relevance of historical transformations is ignored, maintaining the preeminence of domestic sovereignty and a restricted right of hospitality results today in the negation of both the interdependence among individuals that share a dwelling space and contemporary immigrants’ right to freedom. This in turn negates the innate and inalienable rights of a portion of the community by refusing to recognize their equal claim to freedom, detaching the fates of the included from that of migrants and abandoning the principle of a “single common legislation” of republican constitutions.\(^3\)

Today, just as during colonialism, members of weaker countries are more likely to have their cosmopolitan rights violated, although this happens while they take the role of visitors. Conversely, countries that used cosmopolitan principles in order to legitimize their expeditions in the past are keen on emphasizing the exclusive rule of sovereignty

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\(^2\) Kant, *Perpetual Peace: A Philosophical Sketch*, 98n, 99n.

\(^3\) Ibid., 98-99.
today when discussing immigration. Just as the nature of economic organization transitioned from a colonial model based on conquest and resource extraction towards a model based on off-shorization, trade, and low-wage immigration, principles of sovereignty and cosmopolitan right should adapt accordingly. Without this adaptation, historical transformations result in the inversion of the effect that sovereignty and restricted hospitality right jointly have in the Kantian system of Right. While in Kant’s account both work to protect individuals whose government was overtaken by European powers, today they leave migrants without access to political and legal tools to assert a right to freedom.

In the next sections I develop and support this argument. First, I focus on the intellectual context within which Kant wrote. In this section I examine how Kant’s concern with inequality in the international sphere explains his departures vis-à-vis traditions of natural law, economic cosmopolitanism, and a Eurocentric or hierarchical cosmopolitanism. Second, I explore Kant's derivation of the universal right to hospitality and the regulation of visits he proposes. I explain that the twin tensions between right and philanthropy and between sovereignty and cosmopolitanism disappear when applied to hostile visitors/conquerors. Finally, I suggest a reading that considers how globalization and migration alter the interaction between sovereignty and cosmopolitanism. As a consequence, a Kantian inspired response should devise new institutional forms which open cosmopolitan spaces within sovereign countries that guarantee – in an unequal world – the respect of migrants’ cosmopolitan rights.
Kant, Anti-Cosmopolitan?

Kant’s writings on cosmopolitanism address the natural law tradition, the context of colonialism, and particular strands of the cosmopolitan literature prevalent during his time. To trace how and why he redefines this tradition, it is necessary to understand Kant’s discussion of the legitimating role that discourses of universal community, the cosmopolitan dimensions of trade, and a superior Europe had vis-à-vis colonialism.

Cosmopolitan ideas favoring a world community achieved through travels and commerce were used implicitly and explicitly to support European colonialism. Francisco de Vitoria, a University of Salamanca friar and scholar engaged in the controversies of slavery and the rule of the American Indians, provides one of the earliest examples. In 1539, Vitoria gave the lecture On the American Indians (De Indis) on the rightful conditions for Spanish rule in the Americas and the range of civil and spiritual powers that Crown and Church could have.

Vitoria opposes the enslavement of American Indians but offers a just rationale for the traveling and dwelling of Spaniards in the Americas. He claims that the “natural partnership and communication” among nations means that “barbarians” cannot prevent the Spaniards from dwelling in their lands, for it is “inhuman to treat strangers and travelers badly without … cause,” while to “behave hospitably to strangers” is what humanity and duty indicate.

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Vitoria accompanies each of these principles with no-harm conditionalities, but the argument transforms travelling, trading, and dwelling in other lands into rights of nations independent of the will of locals.

The no-harm conditionality seems to absolve Vitoria from the accusation of misuse of cosmopolitan principles. However, a broader reading of Vitoria reveals that the conditional clauses and anti-slavery stance come with a reformulation of the status of Indians from nature’s slaves to nature’s children. The new status positions America’s natives as individuals that “will one day grow into a free and independent citizen of a true polis” but must remain under just tutelage of Spain until then.\(^7\) This allowed Vitoria to justify Spanish rule through a retrospective natural law contract, a contract that is retrospectively just if a man that had the capacity to choose would have consented to it.

The confessional and civil upheaval that convulsed Europe during the 16\(^{th}\) and 17\(^{th}\) centuries elicited a switch away from Aristotelian/Christian arguments of natural sociability.\(^8\) Hugo Grotius and Thomas Hobbes resisted arguments of natural community and hospitality, considering them threats to national security, state power, and internal peace.

Once peace was achieved, cosmopolitan thought reemerged, with Samuel von Pufendorf, Christian Wolff, and Emmerich von Vattel engaging critically with Hobbesian conceptions.\(^9\) These writings consider commerce a positive force and emphasize the beneficial effects of admitting foreigners. These theorists do not follow Vitoria in the

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\(^9\) Ibid., 12.
indiscriminate use of these principles. In fact, Pufendorf criticizes Vitoria’s use of cosmopolitanism for its disregard for the number of foreigners or their reason to come. However, much of this debate was either concerned exclusively with Europe or posited a hierarchical world modeled on Europe. Wolff and Vattel devised a cosmopolitan *civitas maximas* built in the image of Europe that represented the top stage in a stadial theory of progress.\(^\text{11}\)

Kant’s contemporaries Thomas Paine and Nicolas de Condorcet also read the world in hierarchical terms when they linked trade to the extension of civilization.\(^\text{12}\) In his writings on progress, Condorcet laments the cruelty in the European colonies, hoping that they restrict themselves to free commerce and the settlement of the industrious that could spread “to Africa and Asia the principles and practices of European liberty, knowledge, and reason.”\(^\text{13}\)

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When not considering a hierarchical arrangement, many authors take Europe to be the universe to which cosmopolitanism applies, encouraging the transcendence of national prejudice in the name of “common European civilization.” This was the case of Jean-Jacques Rousseau and the Abbé de Saint-Pierre who devised a federation that would guarantee perpetual peace through a European alliance.

In sum, the idea of Europe played two roles in the cosmopolitan literature; it either served as the universe to which the principles applied or the model to which states should aspire. The latter view sometimes included conceptions of trade as the means of connection and transmission of European values.

Trade was viewed as a positive flow from many different perspectives. Some saw free trade as conducive to world peace, increased individual freedom and a reduced state role, converging in a school of thought known as market cosmopolitanism. This school, that included Adam Smith and Dietrich Hermann Hegewisch, also favored freedom of migration in order to facilitate readjustment after trade induced shifts in production.

Paine saw the British trade monopoly as an “injury and a disadvantage” and an obstacle to the achievement of peace and friendship between the United States and the rest of Europe. In Paine’s argument, the idea of Europe is expanded to include the

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17 Ibid., 519.

United States, and trade becomes the instrument to achieve a cosmopolitan community. Paine does not see peace resulting from commerce, but he is clear that the latter cannot take place without the former, arguing that breaking the alliance with Britain is necessary because the wars in Europe set America “at variance with nations that would otherwise seek [her] friendship.”

These notions remained prevalent well after *Perpetual Peace* was written. As late as 1816, Benjamin Constant claimed that it was partly because of commerce that “there are no longer slaves among the European nations.” Constant was confident in the power of commerce to bring “nations closer” and give them almost identical “habits and customs” regardless of whether their heads of states were friends or enemies.

A superficial reading of Kant seems to show some similarity between him and the arguments reviewed above. The *Doctrine of Right* contains positive passages toward immigration and settlement, which Kant thought could be encouraged by governments as long as it did not curtail native subjects’ private ownership. The same could be said about commerce, as discussions abound in his writings about its incompatibility with war and its virtuous role in establishing a cosmopolitan community

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19 Ibid., 86.


21 Ibid., 325.


However, on closer analysis, Kant’s stance on cosmopolitanism is more critical. His criticisms refer to the role that commerce plays in supporting the formation of a cosmopolitan community, the reach of cosmopolitan principles, and the legitimating uses that arguments about trade, settlement and European superiority serve regarding colonial expeditions.

**Commerce as Interaction**

In contrast to the economic-inflected arguments, Kant’s use of the Latin *commercium* only sometimes refers to economic trade, otherwise alluding to “interactions among individuals of different peoples.”\(^\text{24}\) Both activities justify a right to visit, but it is wrong to see cosmopolitan right narrowly as a ‘bourgeois right’ to trade, because when these forces are in tension in Kant, anti-imperialism prevails in privileging the ethical idea.\(^\text{25}\)

Additionally, Kant specifies that economic exchange is a benevolent force only during peaceful times. He refers to the violence and cruelty in the Spice Islands and other colonial sites, adding that they do not benefit the commercial states, whose trading companies are “on the point of collapse.”\(^\text{26}\)

Kant discusses how nature has driven men in all directions, and provided for a gradual transformation of communities into “established states in which landed property was secure … abandoning the lawless freedom they had enjoyed in their previous


\(^{25}\) Ibid., 37.

\(^{26}\) Kant, *Perpetual Peace: A Philosophical Sketch*, 107.
existence as hunters, fishers, and shepherds.”27 Only after this transformation can nations abandon their isolation and start trading:

In this way, nations first entered into peaceful relations with one another ... achieved mutual understanding, community of interests and peaceful relations, even with the most distant of their fellows.28

Two paragraphs later, talking about estranged nations united by a common language, he clarifies the necessity of peace before one can engage in commerce:

I should reply that those who live on the Ob, the Yenisei, the Lena, etc. will supply them with it commercially ... but only after nature has compelled them to live in peace with one another.29

These excerpts suggest that international trade will not, singlehandedly, result in an increased cosmopolitan community, rather requiring peace to work positively.

Cosmopolitanism Beyond Europe

A major departure of Kant with respect to other cosmopolitan theorists was to expand the realm of cosmopolitanism beyond European peoples and grant nomad and hunter peoples a sovereign prerogative over their territory.

In spite of his identification of agriculture with civilization and of a republican government with compliance with Right, Kant refuses to grant that the lack of such conditions justify war or conquest.30 His contemporaries justified conquest by making one of three arguments: that whenever land was not labored it was formally unoccupied; that lawlessness constituted an injury; or that such lawlessness was an opportunity for the natives to be civilized.

27 Ibid., 110.
28 Ibid., 111.
29 Ibid., 111n.
30 Ibid., 100, 10.
Kant contradicts these three arguments. First, in *The Doctrine of Right* he directly addresses John Locke’s argument that property can only be claimed once it has been labored.\(^{31}\) For Locke “proper” laboring of the land involves “pasturage, tillage, or planting,” while the lack of such work constitutes land with “no improvement” or “waste.”\(^{32}\)

Regarding the laboring of land, Kant asks:

[I]n order to acquire land is it necessary to develop it (build on it, cultivate it, drain it, and so on)? No. For since these forms … are only accidents, they make no object of direct possession and can belong to what the subject possesses only insofar as the substance is already recognized as his. When first acquisition is in question, developing land is nothing more than an external sign of taking possession, for which many other signs that cost less effort can be substituted.\(^{33}\)

Kant also refers to European claims about unoccupied lands, and connects the arguments about property to an anti-cosmopolitan orientation towards the inhabitants. He writes that “America, the negro countries, the Spice Island, the Cape, etc. were looked upon at the time of their discovery as ownerless territories; for the native inhabitants were counted as nothing.”\(^{34}\)

To spell out Kant’s opposition to the second argument that posits lawlessness as injury, it is necessary to clarify certain passages that seem to support it. In a lengthy footnote Kant asserts:

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\(^{34}\) Kant, *Perpetual Peace: A Philosophical Sketch*, 106.
It is usually assumed that one cannot take hostile action against anyone unless one has already been actively injured by them. This is perfectly correct if both parties are living in a legal civil state. For the fact that the one has entered such a state gives the required guarantee to the other, since both are subject to the same authority. But man (or an individual people) in a mere state of nature robs me of any such security and injures me by virtue of this very state in which he coexists with me. He may not have injured me actively (facto), but he does injure me by the very lawlessness of his state (statu iniusto), for he is a permanent threat to me, and I can require him either to enter into a common lawful state along with me or to move away from my vicinity.\textsuperscript{35}

He clarifies that the injunction to adhere to a constitution applies to “all men who can at all influence one another” and that such constitution should follow one of three types:

(i) a constitution based on the civil right of individuals within a nation (\textit{ius civitatis}). (ii) a constitution based on the international right of states … (\textit{ius gentium}). (iii) a constitution based on cosmopolitan right, in so far as individuals and states, coexisting in an external relationship of mutual influences, may be regarded as citizens of a universal state of mankind (\textit{ius cosmopoliticum}).\textsuperscript{36}

Proximity is crucial to make the injury operative. Kant notes that in face of injury the steps to take are either to enter a civil state or have the injurer move away from the vicinity. Moreover, this proximity cannot be willfully produced and, even when it exists, it certainly does not result in a justification for war. It is not casual that, when referring to European expeditions, he emphasizes that it is not ‘chance’ or ‘nature’ but “our own will” that “brings us into the neighborhood of a people that holds out no prospect of a civil union.”\textsuperscript{37} He also claims that the extension of colonial rule is done “irrespective of whether the other is on its way or not,” again noting the absence of natural vicinity.\textsuperscript{38}

\textsuperscript{35} Ibid., 98n.

\textsuperscript{36} Ibid., 98n-99n.

\textsuperscript{37} Kant, \textit{The Metaphysics of Morals}, 6:266.

\textsuperscript{38} Kant, \textit{Perpetual Peace: A Philosophical Sketch}, 117.
The principle of proximity also gives peoples priority over the decision of who will settle in adjacent land and makes the territory that separates two peoples a commonly-owned land, which is different from land that does not belong to anyone (res nullius).³⁹ In the absence of natural proximity, lawlessness for Kant is simply “a bad example which one free person gives to another (as a scandalum acceptum)” and “not the same as an injury.”⁴⁰ Thus, Kant does not necessarily discard the claims of superiority of certain customs but he divests these claims from their role justifying conquest.

Third, regarding the paternalist argument, Kant explicitly repudiates the founding of colonies to fulfill ‘the end of creation’ or in the name of “civilization” as pretenses to hide injustice.⁴¹ In addition, he takes pains to describe the acts of savagery of Europeans, thus ranking them down in the civilization scale.

In refuting these arguments, Kant not only acknowledges non-agricultural peoples as members of the cosmopolitan community. He also recognizes their freedom “to order their collective ways of life.”⁴² This recognition is tied to affirming that anyone, “Brit or ‘Hottentot,’” is “the potential subject of covenants.”⁴³

In sum, Kant grounds cosmopolitanism on the systematic interdependence of humans due to the finitude of the earth and the potential of injury associated with proximity. He further supports—in his writings on property—the extension of the

³⁹ Kant, The Metaphysics of Morals, 6:255.

⁴⁰ Kant, Perpetual Peace: A Philosophical Sketch, 96.

⁴¹ Kant, The Metaphysics of Morals, 6:266.


cosmopolitan community to all peoples of the earth and the granting of sovereignty to non-European countries, which were formerly counted as “nothing.” Ultimately, it is the need of humans for a place to live and the concomitant right to a place that cosmopolitanism relies on. In the next section, I expand on Kant’s response to paternalistic arguments of empire and the conditions under which publicness acts as a fix.

Hierarchy and the Cosmopolitan Public Sphere

Kant criticizes the way in which cosmopolitan ideas are paired with the idea of European superiority. He claims that when “a whole continent,” feels that it is “in a superior position to another one, [it] will not hesitate to plunder it or actually extend its rule over it, irrespective of whether the other is on its way or not.” A literal reading of this passage tells us that Kant deplores European colonial exploitation.

A broader reading incorporates Vitoria’s claims about the immaturity of “Indians,” Vattel’s stadial theory, and Condorcet’s claims about Europe’s liberty and knowledge and alerts us to the fact that Kant seems to assign these “feelings” or theories of superiority an enabling and legitimizing role in the extension of European rule.

The context in which Kant writes is dominated by the colonial enterprises of Europe and the waging of war in the continent over control of colonial and overseas markets. In parallel, debates about the legitimacy of colonization and/or the slaving of distant peoples are taking place, coupled with arguments regarding rights to travel, settle, trade with, pass through other countries, and dwell in foreign lands.

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44 Kant, *Perpetual Peace: A Philosophical Sketch*, 117.

In addition to amending these arguments as specified in the previous sections, Kant reflects on the role that they play vis-à-vis European wars of conquest. He refers to Grotius, Pufendorf, and Vattel as “sorry comforters” for being quoted to justify military aggression even if neither philosophical nor diplomatic codes have “the slightest legal force” over states.\(^{46}\) He requires that “false representatives” confess that “they are advocating might instead of right.”\(^{47}\) Kant calls these discourses sophistries [Sophisterey] and notes their role in covering up injustices.\(^{48}\)

This focus re-appears in examples of the inhospitable behavior of imperial countries that engage in cruel acts without regard to their religious piety:

The Sugar Islands, that stronghold of the cruelest and most calculated slavery, do not yield any real profit … And all this is the work of powers who make endless ado about their piety, and who wish to be considered as chosen believers while they live on the fruits of iniquity.\(^{49}\)

In *The Doctrine of Right* Kant refers to discourses that justify colonization as fulfillment of “the end of creation” as veils of injustice or “Jesuitism” that we can easily see through.\(^{50}\) This derisive tone also accompanies his comments on diplomats, who are always ready “to justify war for the sake of propriety.”\(^{51}\)

Two themes emerge: first, there is no legal need for these countries to resort to philosophic or diplomatic justifications, yet they do. Second, these justifications obscure

\(^{46}\) Kant, *Perpetual Peace: A Philosophical Sketch*, 103.

\(^{47}\) Ibid., 121.

\(^{48}\) Ibid., 121.

\(^{49}\) Ibid., 107.

\(^{50}\) Kant, *The Metaphysics of Morals*, 6:266.

\(^{51}\) Kant, *Perpetual Peace: A Philosophical Sketch*, 100.
the unjust nature of the deeds of Europe. Why this focus on discourses, its uses, and its legitimating role? What role does discourse play vis-à-vis the narrative of antagonism and injustice?

I suggest that the answer lies on the role of publicness in Kant’s system of right. The formal attribute of publicness is defined in the second appendix as what is left of public right when we “abstract from all its material aspects (… the various empirically given relationships of men within a state, or of states with one another).”\(^\text{52}\) Publicness belongs to the system of public right yet it does not operate materially, through political institutions or physical coercion.\(^\text{53}\) When Kant refers to the lack of “legal force,” he alludes to the lack of a coercive system in the international and cosmopolitan spheres. With coercion lacking, publicness is one tool available to promote rightful behavior.

Kant defines the transcendental formula of publicness as follows: “[a]ll actions affecting the rights of other human beings are wrong if their maxim is not compatible with their being made public.”\(^\text{54}\) While it seems that publicness works to make up for coercion, Kant makes clear that this principle is not just ethical (the sphere where duty is

\(^{52}\) Ibid., 125.


\(^{54}\) Kant, Perpetual Peace: A Philosophical Sketch, 126.
the incentive) but juridical (the realm in which factual coercion is the incentive). This statement is puzzling, given that the definition of publicness does not reference coercion but defines it as what is left once we abstract from “all empirical elements … including that evil aspect of human nature which makes coercion necessary.” One way of resolving this puzzle is to think of publicness as an action hindering an unjust action, and thus equivalent to the constraints imposed by coercion. To the extent that the publicity of unjust plans imperils their completion, publicness mimics the work of coercion by providing an incentive against unjust actions.

If in the absence of an established international regime states seek legitimation for their expeditions it is because publicity of their intentions would be detrimental. The effectiveness of publicity depends on the level of community that the world has reached, which beyond certain point obliges countries to legitimate their actions. James Bohman trusts this cosmopolitan public sphere with a process of public reflection that “may promote peace by reshaping political institutions in accordance with cosmopolitan right.” Bohman is confident that social and historical processes of globalization will mimic the mechanisms of Kantian natural teleology, eventually resulting in the emergence of an international institutional framework.

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58 Ibid., 197.
However, I suggest that the emphasis in *Perpetual Peace* is on the obstacles to the unrestricted operation of a cosmopolitan public sphere, an underexplored issue in Bohman’s essay. Kant is concerned with two obstacles to publicness, the international spread of discourses that obscure, rather than contest, injustices, and the way in which power inequalities make the cosmopolitan public sphere less effective or redundant.

Kant argues that certain discourses cover up rather than criticize injustices. The actors involved are as diverse as diplomats, philosophers, lawyers, and religious representatives. He urges philosophers to be the handmaid that “bears the torch” in front of the powerful rather than carry “the train behind.” In fact, Kant’s own engagement with injustices and their disconnect from discourses used to justify them can be understood as part of the activity of publicness that he expects to operate in the cosmopolitan public sphere.

This mechanism is not always effective. Kant acknowledges that publicity is insufficient when a country has “decisive supremacy” and no need for concealing unjust maxims. This highlights that the realms of international and cosmopolitan right will be under particular stress in a context of inequality. Just when violations of right are more likely, the incentives toward rightfulness cannot be expected to work, and the apparent lack of authorization of coercion in Kant’s system of Right becomes troubling.

59 Kant, *Perpetual Peace: A Philosophical Sketch*, 115. In contrast to Kant’s, Bohman’s “cosmopolitan public sphere” eludes the treatment of inequalities of power and the role of unjust discourses that legitimize the actions of powerful actors. An exception is his consideration of the media as a means to control meaning in the public sphere. However, his trust on the role of “cosmopolitan social critics” and “international collective actors” in creating new and vital publics is too optimistic in light of the continuing inequalities of power in the international realm. This is a problem both in terms of the groups that manage to access this sphere and in terms of the capability of certain actors to act despite being publicly criticized. Bohman, "The Public Spheres of the World Citizen," 196.

60 Kant, *Perpetual Peace: A Philosophical Sketch*, 129.
Cosmopolitanism for an Unequal World

Kant responded to the cosmopolitan debate by extending the reach of the cosmopolitan community and qualifying arguments of trade as a cosmopolitan force. After extending the reach of cosmopolitanism, Kant is faced with an unequal world. Military might in combination with ideas of economic cosmopolitanism and European superiority support colonialism and abusive trade. In this context, Kant sees the public contestation of these claims of rightfulness as a tool for arousing resistance. However, he is quick to admit that publicness will not be sufficient if one country has achieved decisive supremacy.

Only by considering the historical context and the complexity of the intellectual debates can we understand why he reoriented the cosmopolitan tradition by reasserting sovereignty. The strong sovereignty right has normally been interpreted as restricting cosmopolitanism. However, a contextualized reading shows that strengthening sovereignty claims in parallel to recognizing the sovereignty of non-European countries is a move that increases the capacity of colonized countries to respond to the behavior of European powers, thereby enhancing the role of the cosmopolitan realm.

Philanthropy or Right?

In Perpetual Peace, Kant begins his discussion of hospitality by claiming to be concerned “not with philanthropy, but with right” and defining hospitality as “the right of a stranger not to be treated with hostility when he arrives on someone else’s territory,” as long as “he behaves peacefully.” The existence of a right to hospitality does not

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62 Kant, Perpetual Peace: A Philosophical Sketch, 105.
translate into an assured acceptance of the foreigner when she arrives, as she can be “turned away” as long as this will not cause her death.\(^{63}\)

This heavily limited right (to the extent that it is only unqualified if the visitor risks death) raises questions when one thinks of today’s most common form of visiting: immigration. The restrictiveness of this right becomes puzzling as one examines the unavoidable interdependence that grounds the right to hospitality. I am referring to hospitality’s origin in the “communal possession of the earth’s surface” that arises from the finitude of the earth and creates the necessity to “tolerate one another’s company.”\(^{64}\) Moreover, Kant makes clear that “no-one originally has any greater right than anyone else to occupy any particular portion of the earth,” a principle that impels individuals into social relations that ensure equal respect for equally valid claims to external freedom.\(^{65}\)

The injunction to enter into social relations follows from the possibility of injury that comes with the mutual interdependence that results from physical proximity. This mere possibility is conceptualized by Kant as an injury (although a passive one) that results from coexisting in a state that is not regulated by a common law.\(^{66}\) Viewed in this light, the detailed account of the active injuries of European conquerors underlines the urgency of the regulations proposed. Kant suggests that these injuries are not felt by Europeans because the inhabitants of faraway lands are “counted as nothing,” in contrast with the situation of cosmopolitan community in which a violation of right “in one part of

\(^{63}\) Ibid., 105-06.

\(^{64}\) Ibid., 106.


\(^{66}\) Kant, *Perpetual Peace: A Philosophical Sketch*, 98.
the world is felt everywhere." These excerpts emphasize the inter-connection of the three realms of right and notes that certain injuries are muted by excluding the victims from the cosmopolitan community or by covering them up through religious, diplomatic, and supposedly-cosmopolitan discourses.

In spite of this hospitable set up, Kant claims that the “natural right of hospitality does not go beyond conditions which would allow visitors to ‘attempt to enter into relations with the native inhabitants.”

What is offered by these passages to those attempting to become members of a community? Foreigners could request more than the attempted right to visit [Besuchsrecht]—which contains few certainties beyond not being treated with hostility. One could solicit “the right of a guest” [Gastrecht] which would require a “special charitable [contract]” on the part of the recipient society." This agreement, however, allows the visitor to “be a fellow inhabitant” only “for a certain period.”

There is a tension between the duty of toleration of each other’s proximity that derives from the commonly shared earth and the limited charitable and temporary reception ultimately granted. While the former implies an expansive conception of

67 Ibid., 106, 08.
68 Ibid., 106.
69 Ibid., 106. Amended translation.
70 Immanuel Kant, *Perpetual Peace*, trans. Ted Humphrey, *Perpetual Peace and Other Essays on Politics, History and Morals* (Indianapolis: Hackett Publishing Company: 1983), 15. In this paragraph I alternate between H. B. Nisbet’s translation and that of Ted Humphrey. Nisbet’s translation (used so far) refers to a “special friendly agreement,” sidestepping the politically relevant adjective charitable [wohltätig]. Alternatively, I return to Nisbet’s version with the right of a guest [Gastrecht], because in Humphrey’s version it is called “the right to be a permanent visitor” (emphasis in the original) which implies a permanence (even if always marked by the quality of visitor) that Kant is not willing to grant in the original text, as both translations make clear eventually.
interdependence and cosmopolitan obligation, the latter is subject to the willingness of the receiving nation and is optional whenever the foreigner’s life is not at risk.

What are the implications of having a special charitable contract \([\text{besonderer wohltätiger Vertrag}]\) rule the acceptance and regulations of visits? I answer this question by relying on Kant’s theory of contract in *The Doctrine of Right*, which offers a structure that is compatible with a defense of the sovereignty of non-European countries.

The contractual agreement that Kant suggests for regulating visitor-host relationships belongs to the *Dogmatic Division of All Rights That Can Be Acquired by Contract* within the *Doctrine of Right*.\(^{71}\) In this section, Kant divides contracts according to their purpose \([\text{Absicht}]\) and categorizes contracts of depositing, lending, and gift-making under the category of benevolent contract \([\text{der wohltätige Vertrag (pactum gratuitum)}].\(^{72}\)

These contracts have in common that they are not remunerated, thus their gratuitous quality. Sharon Byrd suggests making sense of this ordering through the “progression in the amount of rights transferred to the other person.”\(^{73}\) While by depositing something I merely transfer possession, lending and making a gift transfers rights to use and ownership rights, respectively. It is only the latter contract that involves a complete transfer of rights, and a transfer that—once promised—becomes coercible in the context of the civil condition.\(^{74}\)

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\(^{71}\) Kant, *The Metaphysics of Morals*, 6:284-86. I thank an anonymous reviewer for pointing this out.

\(^{72}\) Ibid., 6:285.


For each of these contracts the beneficiary depends on the benevolence of the other signatory. In the case of the deposit, the beneficiary depends on the recipient’s willingness to keep the goods gratuitously, while in the cases of the loan and the gift, the recipients rely on the benevolence of the original owner. It is only once the transfer has taken place that a relationship of right is established, and only if the signatories are under a common civil condition.

The implementation of the principle of hospitality through one of these forms grants the host a unilateral right to initiate the contract and allows for variation in terms of the conditions offered. The examples of China and Japan in *Perpetual Peace* represent two options compatible with the range of unilateral gratuitous contracts outlined. While China does not allow any kind of contact, Japan allows it exclusively with the Dutch, yet on the condition that they remain segregated from the native community.\(^75\)

In sum, the role of the benevolent contract was to strengthen the capacity of non-European countries to resist hostile advances of European conquerors. This structure also gave visitors an incentive to enter a (cosmopolitan) civil condition, for otherwise they would have no guarantee of the temporary and restricted rights obtained. Furthermore, the range of options offered within this category of contracts allows for the conditions of visits to be adjusted as the world transitions towards a cosmopolitan community. This is consistent with the understanding of the “provisional status” of original possession which supports the transition from a condition of lawlessness (and unilateral will) towards a lawful one in which duties of justice towards one another are acknowledged.\(^76\) However,

\(^{75}\) Kant, *Perpetual Peace: A Philosophical Sketch*, 107.

\(^{76}\) Flikschuh, *Kant and Modern Political Philosophy*, 143.
just as original acquisition seeks to secure “a place on the earth” for every one until a united cosmopolitan will reigns, the Kantian regulation of visits seek to protect the territorial integrity of countries vulnerable to the expeditions of powerful nations.

International inter-connection is expected to result in the gradual creation of a cosmopolitan community, in a process that eventually binds everyone involved and regulates mutual influences. When interactions occur in the context of war and aggression, rather than peace, such civil communities are unlikely to emerge and in their absence the behavior of the aggressive party constitutes an injury. It is this injurious quality that makes visitors inhospitable.

The rationale of the Kantian regulation of hospitality to prevent abusive behavior on the part of conquerors is—as explained above—quite intuitive and illustrated by the numerous examples he offers. In contrast, there is a lack of thorough exploration of cases concerning migrants and refugees, even if these flows were also prevalent. While we tend to think of hospitality as related to hosts receiving visitors, Kant concentrates almost exclusively on the inhospitableness of visitors! His constant reference to Europeans’ inhospitable behavior [das in hospitale Betragen] drives his argumentation. It may seem odd to term visitors inhospitable, yet if cosmopolitan right consists of the right of universal hospitality that strangers have vis-à-vis governments, representatives of European states traveling abroad can violate the cosmopolitan rights of the strangers they

77 Kant, Perpetual Peace: A Philosophical Sketch, 98-99, 110.

encounter. While the encounter itself will be in a land that is foreign to the European
visitors, we are still faced with “individuals in their dealings with states of which they are
not citizens.”

As much as this regulation fits with the historical context, its applicability to
immigration regulation is problematic. In particular, it is clear that sovereignty and the
benevolent contract of hospitality no longer act complementarily. Secondly, in our inter-
connected world of travel and immigration, the possibility for hosts to offer unilateral
contracts to the visitors may not work to make evident the injuries that take place as a
consequence of the sovereign prerogative. In contrast, even when these injuries take place
within the borders of sovereign countries, the combination of the sovereign prerogative
and the unilateral character of immigration regulation obscures such injuries, something
that, given the previous discussion, is unlikely to be compatible with a Kantian
cosmopolitan spirit. The reliance on “benevolence” is something that animated Hannah
Arendt’s discussion of denationalized minorities and the stateless after the First World
War and into the second half of the century. Whatever freedom of opinion or physical
safety these groups enjoyed was thanks to private welfare agencies or the countries that
hosted them, and not conducive to rights. The mere prolongation of their lives was due to
charity, as there was no law forcing governments to feed them, their freedom of
movement was not conducive to residence and their freedom of expression was
worthless, for what they thought was of no consequence.

79 In the Third Definitive Article, Kant refers to the inhospitableness of coastal dwellers in the Barbary
coast, yet the rest of the examples of inhospitableness refer to European states, as do the examples that
illustrate his arguments in the rest of the sketch.


Kant, when addressing the virtue of charity on its own, was not particularly positive towards it either.\textsuperscript{82} He claimed that the instinct of benevolence impels us to “make reparation for what we have unjustly obtained.”\textsuperscript{83} Dealing with the question of how much of one’s resources should be spent in beneficent practices, he concludes that the mere fact of having the resources to practice charity depends on fortune, which is mostly “a result of certain human beings being favored through the injustice of the government,” thus leading to the inequality of wealth that makes others need beneficence. Kant closes by asking if, under such circumstances, “a rich man’s help to the needy … deserve[s] to be called beneficence at all.”\textsuperscript{84}

Only by contextualizing Kant’s derivation of sovereignty and the rights of hospitality we evade the downsides of charity. In circumstances of colonialism a strict conception of domestic sovereignty tied with a restricted right to hospitality does support principles of cosmopolitan right. The benevolent contract puts host countries under no obligation to receive visitors, and locates the conquering/visiting nations as those that must rely on the host’s benevolence. In this case, the re-assertion of the host’s authority works in consonance with cosmopolitan principles. This complies with Kant’s design of a

\textsuperscript{82} Kant only engages extensively with charity as a virtue and its place in the structure of morals in works that appear after \textit{Perpetual Peace. The Metaphysics of Morals}—a book that he claims to be writing from as early 1768 but only publishes two years after \textit{Perpetual Peace}—is where Kant first clearly distinguishes between duties of right and duties of virtue. Roger J. Sullivan, "Introduction," in \textit{Kant: The Metaphysics of Morals}, ed. Mary J. Gregor (Cambridge: Cambridge University Press, 1996), vii. I thank Katrin Flikschuh for pointing this out in an email exchange.

\textsuperscript{83} Kant, \textit{Lectures on Ethics}, 27:415-16. I take as equivalents the concepts of charity [\textit{Wohltätigkeit}], benevolence [\textit{Wohlwollen}], beneficence [\textit{Wohltun}], and kindness [\textit{Gütigkeit}], used by Kant in different essays, given their consistent location vis-à-vis the overall structure of morals and their consonant use by Kant scholars. Allen W. Wood, \textit{Kant's Ethical Thought} (Cambridge: Cambridge University Press, 1999), 269-82. See also Mary Gregor’s translation note, Kant, \textit{The Metaphysics of Morals}, 155n.

\textsuperscript{84} Kant, \textit{The Metaphysics of Morals}, 6:454.
complementary system in which the limitation of the principle of outer freedom in any of the three realms inevitably undermines the framework of the others.85

As discussed in previous sections, non-European countries were neither recognized as sovereign over their own land, nor free to organize collectively.86 A significant move by Kant is to offer a solid justification for expanding the realm of collective organization for states and non-agricultural peoples outside of Europe, strengthening their sovereign claims. In this context, the regulation of cosmopolitan right that subjects the visitor to unilateral contracts drafted by the host strengthens the authority of countries that are otherwise abused by European commercial states. This operation restores the right to a place for the inhabitants of colonized areas, and by denying entry to imperial powers, it reinstates the principle of outer freedom in the cosmopolitan realm.

However, this complementarity between realms and the guarantee of the principle of outer freedom is not achieved with changed historical conditions. Today, asymmetries of power and the potential for injury put immigrants in a vulnerable position. The next section explores a cosmopolitan view of immigration and suggests some avenues to rethink the inter-connected system of right today.

85 Ibid., 6:311.
Travels of Migration, Sovereignty, and Cosmopolitanism

Now it is possible to separate, in the spirit of eighteenth-century humanism, its principle from its content. … It is only by maintaining the principle of that universal dignity—without scattering it among new national, religious, or private regionalisms—that one might consider modifying its content.

Julia Kristeva, *Strangers to Ourselves*, p. 152

As our theorization moves away from imperial expansionism and towards contemporary migration, the assertion of domestic sovereign authority is no longer complementary with cosmopolitanism. In particular, such vision of sovereignty leaves few tools to address the violations of external freedom of immigrants.

While there is arguably a duty to offer charitable conditions to visitors, there is no readily available recourse to migrants when conditions of detention, deportation, and socio-economic exclusion need to be challenged. To the extent that the regulation of visitors is kept in the domain of a benevolent contract, there is no space for migrants, the subjects of cosmopolitan right, to mobilize against the conditions imposed on them. Just as in Kant’s times, it is the population of poorer countries that through travel encounters the government of powerful countries. This time it is the former that do the traveling, but the resulting realm of mutual interaction should—just as before—be regulated through cosmopolitan right.

87 Since the 1990s, immigration policy in the United States has turned punitive, gradually stripping both documented and undocumented immigrants of access to basic public services, rights to hearings, legal representation, and/or appeal in deportation procedures, and due process guarantees while detained. This trend has increased since the attacks of September 11, after which many countries chose to channel anti-terrorist initiatives through immigration law, making immigrants’ condition even more vulnerable. Eminent Jurists Panel on Terrorism Counter-terrorism and Human Rights, "Assessing Damage, Urging Action," (Geneva: International Commission of Jurists, 2009), Susanne Jonas and Catherine Tactaquin, "Latino Immigrant Rights in the Shadow of the National Security State," *Social Justice* 31, no. 1-2 (2004), King and Valdez, "From Workers to Enemies. National Security, State Building and America’s War on Illegal Immigrants.", John Schwarz, "Ruling Says Deportation Cases May Not Be Appealed over Lawyer Errors," *The New York Times*, January 8 2009.
The question is whether in thinking about the problems of our time we should abide by the structure of inter-connected right that we received from Kant, or if the principles, as Kristeva suggests, should be what we take from his endeavor. In this, in contrast with Seyla Benhabib’s influential account examined in chapter 4, I side with the latter.\(^{88}\)

Another influential account is offered by Pauline Kleingeld, whose work on cosmopolitanism has been crucial to rescue the insight that cosmopolitanism is concerned with “the status of individuals in their dealings with states of which they are not citizens,”\(^{89}\) Her exploration of Kant’s framework illustrates the need for cosmopolitanism to address injuries that neither sovereign nor international right cover. To address contemporary issues related to immigration, the author suggests relying on a broader interpretation of the term destruction \([Untergang]\) that conditions the obligation to admit foreigners. The broader meaning covers more than just death, allowing “mental destruction” or incapacitating “physical harm” to count as reasons that trigger an obligation to receive strangers.\(^{90}\) Moreover, she suggests that we can derive from cosmopolitanism limitations regarding legitimate reasons for rejection, excluding those that would involve a rejection before attempts have been made, such as skin color.\(^{91}\) Both moves result in a broader right to hospitality than the one usually read into Kant.

The effort to expand the cosmopolitan realm to address contemporary issues is an orientation I share, yet I argue for a different way to achieve this. In particular, a more


\(^{90}\) Ibid., 77.

\(^{91}\) Ibid., 77.
substantive reformulation of the cosmopolitan realm is needed to maintain Kant’s prescriptions and, in particular, his interest in counteracting international power asymmetries. The only way to maintain the complementary way in which cosmopolitan and sovereign right act in Kant’s system is by acknowledging that guests and hosts have switched places while international asymmetries have remained roughly the same. As argued in previous sections, these changes allow—or even require—limiting the sovereign power in the treatment of immigration in order to remain within the spirit of Kantian cosmopolitanism.

Making the cosmopolitan and sovereign realms work in complementary ways requires acknowledging how globalization affects the communities of physical and virtual proximity that can and will be affected by our actions. It is this potential for contact and thus for injury that guides the Kantian injunction to enter a common lawful state that guarantees equal freedom for all affected. Democratic communities today are extremely diverse, encompassing native citizens, naturalized citizens, undocumented migrants, and documented migrants. The growth in legislation that affects individuals that do not participate in decision-making responds to the unwillingness of formal members to grant newcomers the guarantees of a civil constitution, not the refusal of the latter to accept one. Moreover, rather than an absence of law, there is a differentiated legal system drafted by actors that are not subject to it and imposed on migrants, both documented and undocumented. This violates the Kantian republican principles of freedom and dependence on an equal and common legislation.

A response to these events requires the empowerment of cosmopolitan citizens that face hostile governments and communities, just as Kant’s extension of sovereignty
empowered members of conquered countries. To do this we can rely on the grounding of cosmopolitanism on physical proximity and the injunction to enter a *common* civil constitution in those situations. There is no doubt that immigrants are being injured by the crafting of legal realm that is separated and devoid of the guarantees and tools that democracies grant to those included.

The institutional transformations needed to create a legal framework in which sovereign and cosmopolitan right act in complementary ways may be drastic. It is stunning that less than 50% of immigrants deported in the United States face immigration courts with legal representation, a number that can be as low as 20% in the state of Texas.  

This deficit of legal protections has prompted the intervention of international institutions, such as the judicial arm of the Organization of American States (OAS), the Inter-American Commission on Human Rights. The Commission has accepted petitions to investigate immigrants’ rights violations in the United States including detention conditions and border deaths. Each time these cases have depended on the access of immigrants to *pro bono* lawyers or civil society organizations such as the American Civil Liberties Union (ACLU) to represent them. Moreover, the decisions of the Inter-American commission are not legally binding.

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These cases illustrate how non-citizens address and contest (even if indirectly) the authority that regulates them. These institutions provide better examples of cosmopolitanism than the more commonly cited International Criminal Court. The latter tends to deal with cases of human rights violations perpetrated by individual leaders against their own citizens, and has so far concentrated on prosecuting individuals from non-Western countries. Given the cosmopolitan concern with interaction between individuals and foreign states and Kant’s preoccupation with power asymmetries in the cosmopolitan sphere, the cases brought against the United States in the Inter-American Commission fit better. Similar cases have been encountered by the European Court of Human Rights, which has recently become more receptive of cases denouncing collective expulsions.94

However, to the extent that these institutions were created through agreements between states, they are part of the international realm and their competence can normally not bindingly reach within sovereignty states (as in the case of the OAS). Moreover, the asymmetries of power in the international realm may prevent these institutions from acting effectively or from emerging in the first place. International regulation of immigrants’ rights is a case in point, given that not a single Western country has signed or ratified the United Nations Migrant’s Rights Convention.95


95 The convention came into effect in 2003 and at the time of writing had been signed and/or ratified by 58 countries. See http://www.unesco.org/new/en/social-and-human-sciences/themes/social-transformations/international-migration/international-migration-convention/present-state-of-ratifications-and-signatures/.
An approach to immigration that makes the domestic sovereign and cosmopolitan realms work in tandem requires the creation of cosmopolitan spaces in which immigrants’ political action can lead to a gradual transformation of the regime of sovereignty. Cosmopolitan spaces of politics emerge when immigrants act politically to alter the conditions of admission and incorporation, thus requesting to be part of a mutual agreement. These spaces exist whenever immigrants engage in the task of challenging the conditions of incorporation in favor of inclusion. Examples include the occupation of the church Saint-Bernard and subsequent actions by the sans-papiers in France, as well as the massive immigrant marches in 2006 and 2010 in the United States. Lawmakers have also proposed legislation that could open cosmopolitan spaces for immigrant action, notable among these a recent bill introduced by Senator Robert Menendez that would protect noncitizen workers—including the undocumented—against deportation and retaliation when they file civil-rights or labor-rights complaints or are witnesses in lawsuits against employers.

It is only through the gradual institutionalization of these cosmopolitan spaces that mutual influences between states and non-citizens can be managed in a way that a right to freedom can be guaranteed to all the citizens of the world and their right to a place is not threatened by fear, arbitrary detention, and deportation.

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96 In this vein, James Bohman has proposed a cosmopolitan right to freedom for persons without legal status that would prevent “tyranny and arbitrary rule” and permit all persons to be “self-originating and self-authenticating sources of claims … within the legal order.” James Bohman, “Living without Freedom: Cosmopolitanism at Home and the Rule of Law,” *Political Theory* 37, no. 4 (2009).


Conclusion

In this chapter, I offer a novel interpretation of the application of Kant’s cosmopolitanism to contemporary issues of migration. I show that only a contextualized reading can properly recover normative principles from historical political thought and set the stage for their use in the present time. This interpretation takes seriously the intellectual and historical framework in which the original concepts were devised and attends to how these concepts function in contemporary times.

In colonial times, when Kant wrote *Perpetual Peace*, a unilateral conception of domestic sovereignty complemented the realm of cosmopolitan right by placing the decision of admission of visitors squarely in the countries that were conquered by European nations. Today, in contrast, an unchanged conception of domestic sovereignty stands in tension with cosmopolitan principles and obscures how sovereign states injure immigrants living within.

In the historical and intellectual context of his time, Kant’s assertion of strict sovereignty worked to strengthen the nations that Europeans were conquering and ultimately contributed to prevent violations of cosmopolitan right. This virtuous connection between realms of Right is what should be rescued for our thinking about immigration today.

Contemporary migration results in foreigners being subject to regulations enacted by a sovereign public that does not include them.\(^9^9\) In this context the preeminence of

\(^9^9\) Many countries, including France, Italy, and the United States, have gone beyond this mismatch in the democratic scope by enacting laws that punish citizens that assist undocumented migrants. One can see how the goal of such laws is to structure the relation between sovereignty and cosmopolitanism as one of opposites. These measures confirm that anti-cosmopolitan measures necessarily impinge on the quality of domestic republics, in this case by providing incentives against humanitarian behavior. Randal C. Archibold, "Arizona Lawmakers Back Strict Immigration Bill," *The New York Times*, April 14 2010. Caroline Brothers, "A Filmmaker Wades into a French Divide," *The New York Times*, April 16 2009, Peter
sovereignty thwarts the cosmopolitan guarantee of a right to freedom, failing to prevent the injuries that result from proximity and mutual influence. In order to restore the complementarity of realms, it is necessary to create cosmopolitan spaces within the recipient societies. These questions are urgent given the hostility of discourses and policies directed toward immigrants today.

Moreover, the preeminence of international asymmetries of power in Kant’s theorization alerts us to the importance of considering inequality when thinking about sovereignty. When this focus is maintained we can identify new spaces of injury and domination that characterize the interaction between governments of Western countries and individuals from less powerful countries.

This approach takes seriously the Kantian lesson that sovereignty must follow mandates that emerge from the domestic, international, and cosmopolitan realm. Such scrutiny must proceed with awareness of the way in which discourses of sovereignty—just as ‘cosmopolitan’ discourses in the past—work to obscure the illegitimate rule of governments over foreigners. In other words, the role of sovereignty in regulating trade, visits, and travels should be evaluated by considering how it contributes to a cosmopolitan community that seeks to prevent violations of rights, no matter where these occur.

The remaining chapters further conceptualize cosmopolitan political spaces of immigration politics. They address liberal, deliberative democratic, and agonistic approaches to immigration and complements them in two ways. First, they spell out the domestic effects of the unequal balance of power in the international sphere. Secondly,

Popham, "Tunisian Fishermen Face 15 Years’ Jail in Italy for Saving Migrants from Rough Seas," The Independent, September 20 2007.
they explore the risk that hostility and coercion will have a securitizing (i.e., depoliticizing) effect over spaces of politics that could prove emancipatory.
CHAPTER 3
A WORLD WITHOUT BORDERS, OR JUSTICE AGAINST SOVEREIGNTY

In this chapter I contrast the political cosmopolitan framework with a liberal approach to immigration politics. I focus on the work of Joseph Carens, which addresses the issue of immigration at both the external and the domestic realm of politics. His ideal work on freedom of movement represents the most welcoming stance towards immigration in the existing debate. However, attending to the distance between such ideals and the current context, he proposes a realistic approach in which his prescriptions are more attuned to guiding morality within certain constraints.

In the rest of the chapter I proceed as follows. First, I derive Carens’ ideal framework and argue that an account of freedom of movement is normatively limited in two dimensions. These dimensions are (i) the lack of consideration of the effects of a hierarchical international order over his normative prescriptions; and (ii) the sovereign intent of the liberal reading of the world proposed. Second, I examine Carens’ realist writings. I offer a critique of these writings focusing on two aspects: (i) the exclusive reliance of the normative prescriptions on the benevolence of formal citizens and the concomitant bracketing of political conflict and hostility; and (ii) the lack of political subjectivity granted to actors and, in particular, immigrants. Finally, I introduce a contrasting conception of politics in which immigrants’ political action is central for attaining more just conditions of reception.
Justice against Sovereignty

Freedom of movement theorists argue that basic principles of global egalitarianism and freedom of movement are hindered by the institution of sovereignty.\(^1\) This literature represents a valuable step in incorporating the international realm into the discussion of immigration. It makes clear that a legitimation of sovereignty must take into consideration its effects over those who are not citizens of the country in question.

Joseph H. Carens is the most well-known proponent of a policy of open borders. His argument follows from the global extension of the Rawlsian original position. In the original position all individuals in the world are prevented by the veil of ignorance from “knowing their place of birth or whether they are members of one particular society rather than another.”\(^2\) The result of this exercise under conditions of ideal theory, Carens argues, is that the institution of sovereignty would be constrained morally by the justice principles determined in the global original position.\(^3\) Sovereignty would be evaluated from the perspective of the most disadvantaged by potential restrictions, that is, “the alien who wants to immigrate,” and the resulting prescription would make restrictions on immigration or emigration impermissible.\(^4\)

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3. Ibid., 257-58.

4. Ibid., 258.
The extension of the Rawlsian original position to encompass individuals from all countries is a common strategy to trump the external autonomy of states (i.e., external sovereignty). This has been the way in which cosmopolitans transform the principles of justice that Rawls derived domestically into global principles of justice.\(^5\) This extension is justified by the fact that: (i) individuals are the unit of “ultimate concern;” (ii) the range of this concern is universal, that is, a status that is attached to “every living human being equally;” and (iii) the applicability of this concern is general, that is, persons are ultimate units of concern for everyone, not just compatriots.

Within this ideal framework and to the extent that we accept that state sovereignty must be morally constrained by principles of justice, there are no grounds to restrict migration.\(^6\) Non-ideally, when one considers issues of national security and public order, the case for open borders is not as straightforward. However, the restrictions that could be established to free movement would still be very limited compared to what we observe today.\(^7\)

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\(^6\) Carens, "Aliens and Citizens: The Case for Open Borders," 258, 64. Other theorists share the prescription that countries do not have justifiable grounds to restrict immigration. This conclusion is based on principles of global egalitarianism (as in Carens’ case), humanitarianism, or principles of freedom of movement. These authors share an approach of ideal theorizing that is engaged in the task of theoretically exploring the rights that we, as human beings, are entitled to and their consequences in terms of an ideal institutional design. Debates in this field focus on developing a justification for universal rights, their priority, and the institutions that would most likely bring a world in which they prevail. Ibid, Phillip Cole, *Philosophies of Exclusion, Liberal Political Theory and Immigration* (Edinburgh: Edinburgh University Press, 2000), Michael Dummett, "Immigration," *Res Publica* 10, no. 2 (2004), Chandran Kukathas, “The Case for Open Immigration,” in *Contemporary Debates in Applied Ethics*, ed. Andrew I. Cohen and Christopher H. Wellman (Malden: Blackwell Publishing, 2003).

\(^7\) Carens, "Aliens and Citizens: The Case for Open Borders," 255-64.
In some conceptualizations of freedom of movement, doing away or weakening external sovereignty is a means to the end of reducing world income differences. Given the reluctance of governments to comply with redistributive duties towards poor countries that these theorists prescribe, scholars propose the second-best solution of redistributing income globally through the flows of immigration.⁸ In particular, Carens’ opposition to the sovereign control of borders emerges from the realization that citizenship is one of the single most important determinants of an individual’s income. The success of open borders in equalizing world income depends on the assumption that once free movement across borders is guaranteed, immigration flows would create a transfer of resources that would ease world income differences.⁹

The goal of this theory—and that of those that prescribe open borders by emphasizing the principle of freedom of movement—is to ease world inequality and/or guarantee freedom of movement. In spite of this, freedom of movement carries significant force in today’s debate on immigration. As a consequence, it is important to scrutinize the assumptions that the theory builds upon and the theoretical commitments that they rely on.

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Normative prescriptions, even ideal ones, rely on certain causal assessments about both the origins of injustice and institutional processes that would ensure a just world. In the case of egalitarians that see freedom of movement as a means to end equality, it must be asked whether the institution of sovereignty in itself is what caused inequality to emerge in the first place. In addressing immigration, this causal tie is particularly important because restrictionist approaches to immigration downplay the role of non-domestic sources of underdevelopment.¹⁰

Factual assumptions regarding the current shape of sovereignty acquire normative relevance in two ways. First, the critical scrutiny of current conditions must causally connect its features to unjust actions or institutions. Only once this previous step has been taken and current conditions have been found to be due to injustice, the (ideal) account proposed carries normative weight.¹¹

Second, the consideration of the contemporary shape of sovereignty and immigration politics is important to assess ideal constructions against the existing institutional arrangements in order to theorize the steps between the two. Certain factual assumptions, such as the moral motivations of individuals or the existing structure of

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¹⁰ This is the case of Rawls’ characterization of a realistic utopia in which migration is prohibited so that peoples “cannot make up for their irresponsibility in caring for their land and its natural resources by conquest in war or by migrating into other people’s territory without their consent” (my emphasis). Rawls acknowledges other legitimate reasons for immigration, such as religious and ethnic persecution as well as political oppression or famine. All of these reasons, interestingly, refer to events that take place in the sending countries. John Rawls, The Law of Peoples with 'the Idea of Public Reason Revisited' (Cambridge: Harvard University Press, 1999), 8-9, 38-39.

¹¹ This step is akin to what Lea Ypi, writing about the literature on global justice, identifies as the need to supplement theories of justice with an account of global exploitation. Lea Ypi, "On the Confusion between Ideal and Non-Ideal in Recent Debates on Global Justice," Political Studies 58, no. 3 (2010): 539-40.
society, acquire normative relevance because they will affect the extent to which theories can act as a guide to transition from one stage to the other.\textsuperscript{12}

In what follows, I first consider how the historical evolution of sovereignty and the hierarchies that characterize its contemporary shape affects normative claims about justice and the prescriptions derived. Second, I examine how the preeminence of liberal principles of egalitarianism and freedom of movement in Carens’ argumentation results in a solution that is unaware of the unevenness that has characterized universality. Absent this awareness, Carens prescribes a universalistic and \textit{sovereign} solution based on the aforementioned principles.

\textit{History, Sovereignty, and the Shape of Injustice}

The literature on freedom of movement diagnoses the institution of sovereignty as key in determining life chances and setting up unfair economic structures worldwide. However, the engagement with the institution of sovereignty is restricted to its role as a barrier to freedom of movement. This contrasts with the account offered in the previous chapter. In chapter 2, I argue that the way sovereignty is organized exceeds the limited description of a homogeneously distributed prerogative to close borders that Carens claims to oppose. Liberal principles have historically been deployed with restrictions structured around racial, cultural, or social arguments of hierarchy. As a consequence, we must be attentive to how our present reliance on the conceptual apparatus of sovereignty can also obscure or fail to capture such hierarchies.

A historical look at the institution of sovereignty shows that the current structure is indebted to the way in which the institution originated. The origins of an exclusively

\begin{footnote}
\textsuperscript{12} Ibid., 539.
\end{footnote}
European system of sovereign states structured a world of imperial domination, and its transformations re-organized rather than dismantled discourses of hierarchy and structures of inequality. Sovereignty and its normative justifications emerged from a supposedly universal right to self-determination, yet proved to be pliable to let people in or keep people out depending on the particular configuration of interests of the dominant powers.

Kant’s response to colonialism, explored in chapter 2, deploys liberal cosmopolitan principles to support sovereignty. His critique is tied to the lack of recognition of non-Europeans’ right to self-determination. In this context, his assertion of sovereignty works to prevent abuses of power. As I argue in that chapter, the effect of a strong sovereignty is reversed in the case of immigration, and it results in injury and abuses of power if not counteracted.

A similar deployment of sovereignty was made by anti-colonial movements of independence. In this case, sovereignty claims by non-Western countries resulted in a decrease of world inequality if compared to a world of colonialism. Liberal principles were central in this juncture for justifying the establishment of sovereignty. Christian Reus-Smit notes that “human rights norms provided the moral resources for the delegitimation of colonialism and the subsequent proliferation of new sovereign states in the developing world.”

A historical assessment of the complex means and uses of sovereignty is missing in the freedom of movement literature. Their claims could equally be enriched by the complexity and unevenness that characterizes movement (i.e. migration) today.

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Sovereignty does not restrict freedom of movement *per se* but rather does it for a set of individuals belonging to certain groups. If developed countries' visa policies discriminate positively against other wealthy countries, the problem is not the lack of freedom of movement, but the differential access to it. If developing countries that are receiving countries are significantly more generous in providing the privileges and rights of citizens to newcomers than wealthier countries, then the problem cannot be a universal reluctance to open borders. If access to a legal status in the developed world is tied to employment in the skilled professions, the problem is not the reluctance to open borders but the tying of the freedom of movement to class and country of citizenship, both correlated to skills and access to formal employment. All of these features of the organization of sovereignty and immigration regimes point to a history of conquest and domination that filters the reception of immigrants from poor countries into dominant countries.

Opposition to the sovereign right to control borders will be stronger normatively when it is historicized and its role in structuring a hierarchical world highlighted. Such a contextualization more closely reflects the fact that the unjust effects of sovereign borders result less from their character as simple barriers to movement than from their targeting of select groups and the members of these groups. This targeting results from the organization of the international realm in institutions that rely on racialization, culture, and scientific discourses of skill and productivity that systematically disadvantage certain groups and individuals. A lack of examination of these factors will make the case against sovereignty weaker and prone to be contested by those that trace development and

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underdevelopment to strictly domestic sources. More importantly, leaving out these factors limits our understanding of the sources of inequality, the reasons for its persistence, and what is needed to change towards more just alternatives.

*The Sovereignty of a World without Borders*

Carens supports the argument for open borders by examining contending theories of immigration. Instead of acknowledging conflict and disagreement among political theorists, he portrays other approaches as only mistakenly non-liberal. The author declines to delve into the arguments that support restrictionist arguments. Instead, he deploys principles of egalitarianism, freedom of movement, and human rights to claim that all approaches (including Rawlsian liberalism, communitarianism, and libertarianism) support open borders. Carens does not probe into the theoretical constructions that underlie these theories’ disavowal of the potential of open borders. Freedom of movement paradoxically seeks to reinstate sovereignty, by claiming all approaches ultimately share the prescriptions of freedom of movement and universal equality. In this sense, the initial move to oppose sovereignty is followed by a sovereign move to structure the world according to universal liberal principles. This second move is sovereign in the sense that it relies on a derivation that is external to politics, and uncontestable given its rational derivation.

It is worthwhile to follow the argumentation through which Carens supports his prescription of a world without borders. First, as noted above, he amends the Rawlsian original position to include the whole world. The result of this exercise is a just world ideal without sovereign borders, given their disadvantageous effect over the potentially
most affected party, namely “the alien who wants to immigrate.” Second, he claims his conclusion is supported by two other frameworks: communitarianism and Nozickean libertarianism.

When proposing a Nozickean defense based on property rights, Carens provides an argument for open borders that relies on property rights, instead of global justice or human rights. To the extent that immigrants behave peacefully and respectfully towards existing property owners, there is neither a need for popular sovereignty to prevent their entry, nor for principles of global justice to authorize it. Similarly, Carens notes that Nozickean conceptions of property rights would prevent the state from prohibiting an American employer from freely choosing employees, and a restriction to the entry of immigrant workers would be doing just that.

In his response to Michael Walzer’s communitarian theory of membership Carens extends his liberal argument to accommodate the value of sustaining the ways of life of communities. Allowing for the fact that the preservation of the way of life may be considered a value, he asserts that if liberalism is the “way of life” that we ought to maintain it would be contradictory to restrict freedom of movement. While Carens seems to let go of overarching principles that trump sovereignty, he actually makes liberalism the only possible set of values that communitarian sovereign polities maintain.

When Carens uncovers the contradictions in Rawlsian liberalism, Walzerian communitarianism, and Nozickean libertarianism, his investigation is not into the ontologies that allow these theorists to defend sovereignty in the absence of a coherent philosophical case. His concern is neither the way in which immigration restrictions are

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sustained in practice through the violation of principles of egalitarianism and human rights that he deems characteristically Western. He does not delve into the different and potentially contradictory freedoms embedded in conceptions of property rights and human rights. Instead, in a move that is inherently sovereign, his text seeks to establish a new universal principle, one that he claims to be implicit in each of the theories he opposes.

By a “sovereign” move I mean that liberalism becomes a universal code that transforms all texts into supportive evidence for a liberal interpretation. A liberal reading eliminates and delegitimizes conflicting readings or alternative views. This reading can accommodate alternative values—such as property rights or communitarianism—and is applicable throughout space and time.\textsuperscript{16} Ultimately, the effect of this reading is to anchor a liberal and egalitarian identity as uniquely Western. Deviations from egalitarianism in immigrant receiving countries are depicted as products of lack of reflection, rather than legacies of the relationship between liberalism and empire.\textsuperscript{17}

Two consequences follow from seeking to anchor normative principles to regulate immigration in a uniquely interpretative paradigm. First, the reliance on egalitarianism to justify an opening of borders leaves out the way in which this principle has always been a duplicitous one, applied selectively by declaring certain groups—such as women or non-whites—to be rightfully excluded from it.\textsuperscript{18}


\textsuperscript{17} Jennifer Pitts, "Political Theory of Empire and Imperialism," \textit{Annual Review of Political Science} 13 (2010).

\textsuperscript{18} As Susan Buck-Morss notes, the revolutionary French state did not exactly welcome the cries of “liberté, égalité, fraternité” proclaimed by Haitian slaves in 1794, just as Locke and American revolutionaries were
An exploration of how liberal nationalist and communitarian thinkers condition the application of supposedly universal principles could be fruitful for uncovering such duplicity. However, instead of going this route, Carens explicitly reaffirms that liberal principles embedded on a global original position are characteristic of Western societies. This is most clear in his move to make liberalism the way of life to be defended by Walzerian communitarian societies.

A second consequence of this sovereign move is to fail to examine why and how actual moral motivations sustained by citizens of Western societies may differ from the liberal inclinations he assumes. Liberal inclinations are also read into defenses of property rights. This latter step prevents a critique of the ways in which capitalism is involved in rather than opposed to the problematic management of immigration flows.

Compare this conclusion to that of Phillip Cole, another proponent of complete freedom of international movement. Cole offers a contrasting assessment of liberalism that is worth quoting at length: “if we do take seriously the argument that the commitment to the moral equality of humanity is the defining centre of liberal democratic politics … must lead us to question the extent to which the western capitalist states who most jealously claim the title of liberal democracies have any right to it.”

The fact that Carens carries more weight in the current debate on immigration may have to do with the fact that he limits his criticism to sovereignty, rather than indicting the representation of the West as inherently liberal.

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In sum, my framework and the implied diagnosis that sovereignty is a source of injustice is in principle sympathetic to Carens’ proposal of abolishing borders. However, the same cannot be said about the theoretical underpinnings of Carens’ prescription. The effort to offer a definite answer, one that fits all paradigms and assumes that societies respect principles of equality and freedom, is at odds with the way in which polities face, address, and resolve these controversies. This may be justified by the idealism of his approach, but even if it is, it nonetheless puts forward a depoliticized conception of justice reached through abstract judgment involving subjects devoid of identity.\(^\text{20}\) This presupposes a categorization of the problem before the parties involved have had a say and assigns rights and duties that are ahistorical and universal.

Carens’ ideal theory anticipates some features of his realist work. This framework, in which he addresses the obligations of citizens toward immigrants, is examined in the next section.

**Realist Justice and the Absence of Politics**

In his realistic work, Carens suggests that communities should apply principles of democratic morality consistent with liberal commitments in order to enact fair immigration regulations.\(^\text{21}\) In this section I first describe the framework of democratic morality put forward in Carens’ realist writings. Second, I examine the consequences of

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\(^\text{20}\) A distinction between distributive and relational inequality may clarify the role of structural groups in working towards justice. Unjust inequalities can be conceived of as either consisting of an unequal distribution of relevant goods or as hierarchical relations among people, organized along group lines. The inequalities that are produced by closed sovereign borders seem to be of the relational kind, which are propagated through continuous practices of social interactions of dominant and subordinated groups that involve “violence, exploitation, segregation, discrimination, and stigmatizing speech.” Elizabeth Anderson, “Toward a Non-Ideal, Relational Methodology for Political Philosophy: Comments on Schwartzman’s Challenging Liberalism,” *Hypatia* 24, no. 4 (2009): 132. Carens’ commitment to individuals as the ultimate units of moral concern does not prevent him from conceptualizing and addressing relational inequalities but rather requires him to do that if this is the root of inequality.

relying on benevolence as the mechanism through which formal citizens extend basic human rights to immigrants. I criticize this reliance for its sovereign and depoliticizing dimensions. Thirdly, I explore the conception of politics embedded in Carens’ framework of democratic morality. I pay particular attention to the political subjectivity granted to immigrant political actors.

Carens’ realist work prescribes principles of democratic morality that guide our action regarding immigration regulation. This approach considers politics, power, and interests as constraints. By constraints, he means features that we must accept in order to put forward attainable prescriptions. What is prescribed should not be too far from what we think might happen and what we think our community can in fact do. The realities that he takes as constraints in his theorizing include the organization of the world in sovereign states, the behavioral regularities of individuals, and political feasibility. These constraints result in an approach to immigration that takes sovereignty for granted and concentrates on the domestic politics of immigration.

In this set of writings he explores what immigration regulations are permissible, the question of integration of immigrants, and the issue of undocumented migration. Carens offers arguments in favor of eased immigration restrictions and less punitive

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24 Ibid., 157-59.

approaches to immigration regulation. He also derives specific moral obligations that liberal democratic states have regarding immigrants.

Carens’ realistic approach considers that even if power and interests are constructed they are not infinitely malleable. In this context, possible popular backlashes against immigration and strategic politicians may make certain moral prescriptions impracticable, and they should be eliminated from our theories. Carens claims that:

[T]here is no point in wasting time considering whether the popular reaction is racist or whether the politicians might be able to prevent such reaction if they expended vast amounts of political capital to do so.26

In other words, Carens explicitly identifies “politics” as the expression of opinion from the majority of the population and the existing balance of power, regardless of the source of these arrangements. Once identified, the realm of politics is excluded from the analysis, now concerned with the moral precepts that would be accepted by the group of anti-immigrant voters that the model assumes, or—equivalently—by vote-maximizing politicians. Even the decision of who has access to citizenship, which can be seen as a fundamental part of the political life of the community, is not beyond the purview of “external critics.”27

Once he accepts—for the sake of argument—that states have the prerogative to control their borders he proceeds to focus on which policies of admission liberal democracies can morally enact, as well as on the legal rights that migrants that reside in a country irregularly should have as a matter of democratic morality.28 Importantly, he

26 Carens, "Realistic and Idealistic Approaches to the Ethics of Migration," 160.


28 Carens, "The Rights of Irregular Migrants.,” Carens, "Who Should Get In? The Ethics of Immigration Admissions.”
claims to be scrutinizing the morality of the decisions by appealing to the same moral principles that liberal states endorse.29

In the following sections, I evaluate the realistic morality framework and the prescriptions that emerge from it with respect to two criteria. First, I consider whether the limited reading of immigration politics as benevolent extension of rights is a fair description of the political conflict that characterizes contemporary immigration politics. Second, I critically examine the political subjects embedded in Carens’ framework of democratic morality.

Benevolence and Constrained Politics

Within the limiting assumptions that constitute Carens’ realist approach, the dictates of “democratic morality” prescribe a minimum set of human rights standards that should be guaranteed to immigrants. These liberal commitments are not always upheld by Western liberal democracies in their treatment of immigrants. The gap between these standards and the reality of immigration regulation motivates Carens’ research.

However, instead of exploring the sources of this gap, Carens’ prescription derives its weight from a supposed equation between Western democracies and liberal commitments to human rights. In other words, instead of exploring the gap between an avowed liberalism and the way in which immigration gets managed, Carens in fact closes this gap. Instead of inquiring whether Western democracies are or not committed to liberal principles, or if liberal principles truly live up to their universalist inclination, the approach dictates what polities should do if they act following their liberal commitments. By naming human rights as inherently (ontologically) Western, the way in which power

structures justified in such values may deviate along lines race, class, and gender, is left out.

This framework replaces political struggle with the benevolence of liberal citizens who extend basic human rights and membership under certain reasoned conditions. Just as Carens’ ideal work, this framework can be characterized as sovereign because it constructs a liberal individual uniquely able to reach fair decisions and it excludes political conflict from decision-making. In other words, this strand of liberal theory is still unable to grasp what happens in the political world and thus remains inhospitable to democratic politics.30

In the case of immigration politics, Carens’ stylized depiction of decision-making leaves out the political action that underlies the process through which rights are attained and existing institutions transformed. Immigration flows by themselves alter the nature of politics by adding diversity to political communities and by creating spaces of exclusion and political actors determined to challenge them.

In immigration politics we do not know with certainty who the members of the community are until the political struggle starts. We also do not know the identities of the participants in the debate, for the identities are part of what it is contested. For immigrants, challenging discourses that identify them as irresponsible, religious fundamentalists, outlaws, or criminals is a crucial part of the process in which they establish themselves as political actors. Moreover, only when these identities are challenged it is possible to see that their exclusion is unjust, and that an extension of rights is due.

In contrast, Carens picture of immigration politics is one in which the guiding assumptions and the substance of the decisions is predetermined and unmediated by politics. What is lost in this approach is the contentiousness that characterizes discussions about immigration and the role of immigrants as political actors. The former dimension is lost by assuming that immigration regulations can be derived logically from a set of liberal principles. Regarding the latter dimension, Carens’ model assumes that the reasoned reflection of the privileged will result in inclusionary moves regardless of the political action of immigrants.

The liberal paradigm neatly resolves all paradoxes, dislocations and uncertainties involved in politics to offer its prescriptions. These prescriptions may, if applied, avoid many injustices that exist today. However, to the extent that it provides a closed solution to the messy politics of immigration, it is not helpful to fuel a democratic conversation on the topic and to advance normative arguments that would open spaces where these conversations can take place.

The preeminence of benevolence reflects the broader reluctance to engage with politics that characterizes liberal approaches. Carens argues that taking the existing structure of power relations and interests as given and not exploring the sources of hostility against immigrants is necessary to avoid too large a gap between what is and what ought to be. This strategy, however, has considerable downsides. In the first place, the bracketing of power and hostility results in prescriptions that only aim to work within the existing power structures. Prescriptions dictate rules of civility within an exclusionary polity rather than putting exclusion in question.
Second, the analysis ignores the voices of those that oppose the immigration regime. These voices include those of immigrants but also those of members of the formal community, including civil rights activists, Latina/o activists, and groups that engage in civil disobedience by assisting immigrants at the border or sheltering those with pending deportation orders. One may legitimately ask why a realistic approach could not consist of identifying those areas of policy that are the source of contention and using them as entry points for suggesting more than marginal adjustments, putting the supposedly majoritarian position in question.

In addition to the exclusion of democratic politics, realist liberal prescriptions ultimately have a problem of internal consistency. On the one hand, these prescriptions result from bracketing issues of racially-motivated anti-immigration backlash and decisions taken by vote-maximizing politicians. On the other hand, once these non-liberally motivated facts are taken as given, a liberal framework insists in theorizing as if individuals could accept measures because they were derived in accordance to liberal principles of freedom and equality. In sum, individuals are subsequently described as liberally minded when regulating immigration enforcement and illiberal when supporting the institution of sovereignty or participating of backlashes against immigration.

Even if we accepted that individuals’ behavior exhibited such paradoxical inclination, the guiding role that “democratic morality” provides will not be conducive to the reconsideration of the basic tenets that produce and maintain anti-immigration sentiment. Guiding action according to liberal principles may tame the effects of the institution of sovereignty but it will not open roads for reconsidering the structures that cause and support anti-immigration sentiment, the substance of Carens’ concern.
Moreover, if a sovereign prerogative to control borders is tied to a hierarchical understanding of the international sphere, as argued in chapter 2, migrants will enter the polity dehumanized and will not be considered worthy of membership. In other words, taking sovereignty as given already accepts racialized demarcations that construct certain immigrants as *invading* and illegitimate subjects. In this context, efforts to tame the excesses of sovereignty will be a difficult—if not futile—task.

It may be argued that accepting these constraints is what makes the argument “realistic” (i.e., because it does not try to challenge structures and attitudes that are unlikely to be altered in the short or medium run). Instead, I suggest that it speaks to the limitations of liberalism to address structural inequalities such as those organized along the lines of race and gender.

While liberalism can offer an ideal conception of the world, its capacity to provide a critique of existing institutions is more limited. Liberal theorists’ critiques of institutions tend to rely on the contrast between these institutions and an ideal set that they construct. However, their capacity to grapple with how liberal and supposedly universalistic rules will be particularized in its institutionalization and practice is limited. History and the way in which power enlists (liberal) discourses of legitimation must be theorized. Avoiding these features will misread the origins of liberalism and unproblematically accept its universalism.

Before turning to my own conception of politics, I examine Carens’ framework of “democratic morality” and the conception of politics and subjectivity it contains.
Who is the Subject of Immigration Politics?

Carens’ realist work presents us with depoliticized subjects. The role of the “external critic” that he identifies as his own is the one that carries the most authority within the argumentation. The function of this voice is to provide a critique from a moral philosophical point of view. The authority is derived from the critic’s adherence to the same liberal principles that the polities addressed supposedly abide by. This authoritative discourse, which Sheldon Wolin has identified as lacking demotic and pluralistic dimensions, excludes certain topics, public grievances, as well as diverse languages of protest. In Carens’ case, in addition to the imposition of a discourse of liberal reasonableness, certain outcomes are excluded tout court by their potential to provoke backlashes in the assumed anti-immigrant population. The underlying understanding of politics is one in which the meaning and scope of politics are not the substance of the political struggle, that is, the topic to be settled through conflict and controversies between groups, but rather a question that is settled beforehand.

Other subjects that appear in the realistic examination of the politics of immigration are current members of the polity and strategic politicians. The former, as anticipated, are the potential cause of an anti-immigrant backlash, a fact that must be taken into account when assessing the desirability of adopting a particular policy.

However, rather than taking it “into account,” Carens’ realist framework takes it as “given,” much like behavioralists would consider an agents’ stated opinion.

31 Ibid., 102.
32 Ibid., 98.
33 Carens, "Realistic and Idealistic Approaches to the Ethics of Migration," 160.
In “The Rise of the Social,” Hannah Arendt’s criticizes behavioralist assumptions that replace action with “behavior.” This conception assumes that “men behave and do not act with respect to each other.” Taking politics as given implicitly assumes that we can characterize the political community through a snapshot that describes its potential reaction to alternative scenarios. This snapshot is indifferent to the political struggle that happens within this group, the encounters and disagreements that contribute to the transformation of both the issue under discussion and the identity of the individuals involved.

Extracting laws of behavior from large samples of population is not a harmless ideal, Arendt claims. Rather, it reduces men as wholes to the level of a “conditioned and behaving animal” and it takes conflict, induced by the non-regular behavior of backward classes, to be merely disturbing factors in the attainment of social harmony. The expected backlash against certain immigration policies reflects an approach to political communities that takes them as agents that respond in predictable ways to strategic moves by politicians. Politicians, in turn, are actors that evaluate their decisions weighing the losses to their “political capital” that a certain decision may involve.

Among the political subjects that we do not find in this framework are those within the formal community that actively oppose restrictionist measures and—importantly—immigrants. The former do not have a space within this theory, and the latter are the passive recipients of the policies that a liberal polity may reasonably enact.

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36 Carens, "Realistic and Idealistic Approaches to the Ethics of Migration," 160.
Once the disturbing factors are excluded from the framework (citizens’ opposition to anti-immigrant policies and the political action of migrants) politics is reduced to a game in which actors have pre-determined moves and anticipate the response from the other players. Importantly, this view also assumes that actors arrive in the political arena with set beliefs that are reflected in their behavior and remain unchanged despite their participation in the political process. Ultimately, the measures that the formal community should enact are those dictated by the external observer mentioned above, the sovereign subject *par excellence*.

In sum, the moral reasoning that the theory offers is voiced by an external observer and offered to the existing formal community as a guide to the policies that given their liberal commitments *they ought* to accept and apply to regulate immigration. Subjects in this theory are either sovereign judging subjects that are external to the polity (the “external critic”), behavioral units that respond to stimuli (formal members of the community), or passive recipients of the gifts of liberal rights and freedoms that the privileged grant them (the immigrants). these three sets of subjects have in common that they are wholly depoliticized. They are detached from a political community, as the external critic, or passive recipients of rights (as immigrants). The subjects that are granted rights do not engage in a public process of claim-making regarding injustices and the institutional transformations required to address those. Finally, the strategic politicians and the individuals identified by their homogeneous opposition to certain policies are also depoliticized. Their depoliticization is reflected in their characterization through a predetermined set of behaviors, rather than by their participation in a political sphere in which they engage with others.
A polity that is willing to organize its immigration enforcement following the guidelines proposed by Carens will undoubtedly be one that grants juridical protection to immigrants. In this polity it will be more likely that immigrants receive fair treatment and have reasonable expectations regarding the rules and consequences of their actions. However, this framework is less useful for reflecting how the political action of immigrants—which may or may not speak with a unified voice—goes beyond requesting due process. Immigrants’ claims seek to redefine the meaning of membership and assert the injustice of the institutional arrangements that constrain them. Immigrant activism also struggles against narratives that mark them as permanent outsiders, threats, or criminals. These actions redefine the shape of the community and transforms immigrants into political actors able to voice their claims.37

The political view that I propose to consider immigrants and immigrant political action a central part of the process through which the productive effects of sovereignty are contested.

**Democratic Spaces against Sovereignty**

In this section I outline my conception of politics. I focus on immigrants’ political action as an important force that destabilizes the existing structure of

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37 In recent work directed to broader audiences Carens focuses on immigrants, preceding his proposals for amnesty for the undocumented with the story of an immigrant. The story seems to be directed to acquaint audiences with the conditions of hardship that take individuals to abandon their countries and look for better alternatives elsewhere. It also illustrates the way in which immigrants establish family, professional, and friendship ties in their communities of arrival. These narratives seek to create a sense of understanding and shared humanity between readers in Western countries and irregular migrants (see Carens, "The Case for Amnesty: Time Erodes the State's Right to Deport."). However, this story is not intended to present the immigrant as a political actor, but to convince the reader that immigrants are non-threatening and hard working individuals that should not be feared but rather granted amnesty. The incorporation of immigrant stories into Carens arguments does not alter the exclusive focus on the formal members of the community as political actors with the capacity to alter the boundaries of membership.
sovereignty.\textsuperscript{38} Externally, immigrants challenge the current shape of sovereignty and its claims to legitimacy by traversing borders. Internally, they continue this challenge by inaugurating a realm of politics in which the current boundaries of the demos are questioned. I rely on Jacques Rancière’s conception of dispute or \textit{dissensus} as the event that inaugurates a divided community. I also follow Rancière’s conception of subjects of rights as those that put to test rights that are denied to them.\textsuperscript{39}

Rancière develops a definition of politics and rights that incorporates as subjects of politics and would-be subjects of rights the individuals that are currently denied rights and political inclusion. Action is political when it reconfigures the relationship between the excluded group that is claiming justice and the community to which they request inclusion. Rancière considers that administration and the rule of law are devoid of politics, and conceptualizes them as “the police.” A political event takes place when a logic of administration or police is juxtaposed with a logic of equality.\textsuperscript{40}

Existing institutions of immigration enforcement, and the laws that mark tens of millions of individuals today as \textit{illegal} belong into the realm of police. The contrasting and disruptive logic of equality emerges when subjects that are formally denied political rights act as if they had them. They are not considered

\textsuperscript{38} I am not claiming that this is the only site in which these hierarchical narratives are debated, reasserted and/or contested. One can think of international development organizations, international credit institutions, and global organizations that regulate trade and finance as sites in which this happens as well.

\textsuperscript{39} Rancière, \textit{Dis-Agreement: Politics and Democracy}, 31-33, Rancière, "Who Is the Subject of the Rights of Man?," 304-05.

\textsuperscript{40} Rancière, \textit{Dis-Agreement: Politics and Democracy}, 32-33.
equals but they act as if they were, as if they had a space in the political community. In so doing they inaugurate a new political community, even if at first it is a divided political community. Political subjects are those that are capable of staging such scenes of dissensus through their appearance. They assert their equality in front of those who are currently included and test the power of rights to contest the existing divisions.

When immigrants claim that existing arrangements are unjust, they exercise membership rights that are formally denied to them. The voice of immigrants is not given any formal political authority, yet by speaking publicly they test that formal exclusion and attempt to participate in the debate in equal footing. They address the rest of the community that does not recognize them as rights-holders and argue for an egalitarian inclusion. At the same time that they request inclusion, they perform acts that assume such inclusion. Their claiming for equality and inclusion is a very different picture of politics from a benevolent liberal approach, in which a reasonable external critic grants or denies the justice of certain arrangements.

In contrast, liberalism proposes a “humanitarian” extension of rights. Humanitarianism transforms human rights into the rights of “those who were unable to enact any rights” and had to have their rights had to be upheld by others “in the name of a new right to ‘humanitarian interference.’”

41 Ibid., 32.

42 Rancière, "Who Is the Subject of the Rights of Man?,” 304.

43 Ibid., 298-99.
If political action redefines the meaning of citizen’s rights and human rights, there are no pre-existing rights to be extended.\textsuperscript{44} When guest workers arrived to the United States they were given only temporary admission and had few rights. This changed slowly, through workers’ organizing, inter-racial alliances, and civil rights’ claims that contested the conditions they faced.\textsuperscript{45} The rights were not extended to them prior to the political struggle. Quite the opposite was the case, immigrants and Latina/os were continuously portrayed as undeserving of American citizenship. This history of attainment of rights, among many others, contrasts with the strategy of presenting immigrants as passive subjects waiting for an extension of rights.

The minimalistic conceptions of subjectivity that liberal approaches offer are also insufficient to understand and conceptualize transformation, rights-claiming, and emancipation. Liberal approaches either assume global equality and work deductively to demonstrate the injustice of borders, or focus their criticism on the domestic sphere of politics, conceiving subjects as liberally minded and benevolent.\textsuperscript{46} Both approaches superimpose abstract conceptions of rights and equality over a world of division, hierarchies, and dehumanization. Prescriptive accounts based on these conceptions of subjectivity do not politicize the distance that exists between such an ideal and the inequality and oppression that characterizes immigration politics today. By “politicizing” I mean theorizing


\textsuperscript{46} See Carens, "Aliens and Citizens: The Case for Open Borders.", Carens, "Realistic and Idealistic Approaches to the Ethics of Migration.", Carens, "The Rights of Irregular Migrants."
existing power structures and the discourses of illegality that legitimize them as being subject to political contestation. In contrast, liberalism refocuses our attention in the preeminence of liberal principles without examining the sources of inequality it opposes.

Discourses of illegality depend on an ideology of sovereignty that silences political challenges by delegitimating and transferring them to the realm of police administration. While the ideology and institutions of external sovereignty do not manage to significantly alter the flows of documented and undocumented migrants, they successfully disavow the political character of these transformations. The physical hardening of borders through militarization and the construction of walls can be seen as a brute performance of external sovereignty, which, as any form of power, seeks to suppress the signs that threaten its certainty.

To open spaces of dissensus, immigrants must necessarily contest the ideology of sovereignty that locates them, and particularly the undocumented

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48 There is agreement that the rate of undocumented migration (adjusted for population growth) has been constant in the last two decades despite the construction of the border fence. The main effect of the wall has been, first, to make border crossing more perilous. This has the consequence of increasing the risk of border crossing and the deaths of migrants attempting to cross. This also results in the increased payoff for coyotes who charge thousands of dollars to guide migrants across the border. A second consequence of the fence has been to increase the amount of undocumented migrants living permanently in the United States. This is because the old practice of coming for seasonal work and returning in the off-season is now impractical given the difficulties associated with crossing. King and Valdez, "From Workers to Enemies. National Security, State Building and America’s War on Illegal Immigrants.,” Douglas S. Massey, "Understanding America’s Immigration ‘Crisis’," *The American Philosophical Society* 151, no. 3 (2007), Douglas S. Massey, "The Wall That Keeps Illegal Workers In," *The New York Times*, April 4 2006.

among them, in the realm of administration and policing. Democratic practices of questioning are prevented by understandings of the community as unproblematically closed. This discourse singles out a group (formal citizens) as the sole origin of changes in its shape, including benevolent ones. To sustain an ideology that asserts its sovereignty and marks deviations as threats, a community must engage in practices of policing that sustain this fiction and prevent the surfacing of the tensions that are inherent in the way in which immigration is regulated. Any move to upset this order is declared to be an unacceptable break of the law. The construction of immigrants as law-breakers (i.e., illegal aliens) is a crucial move to depoliticize their claims. Successive efforts to transform the civil violation of “illegal entry” into a crime can be understood in the same way. These are discursive moves to mark all undocumented immigrants as outlaws and criminals (even as the action for which they are judged remains the same) in order to expel them from the political sphere.  

An alternative way of conceptualizing law-breaking should attend to the political dimension of such action. This is what Martin Luther King Jr.’s conception of law-breaking in his Letter from a Birmingham Jail does. In this letter he responds to the criticisms that accuse his movement of creating disorder by engaging in direct action. He suggests that the pressure that they apply is needed to unbury the tensions that are masked by an apparently ordered society. Surprised by the anxiety that white moderate allies express over the protesters’  

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50 As chapter 5 explains in detail, discourses of criminalization are part of broader changes in material and lived space that limit access to the public sphere for racialized immigrants.
willingness to break the law, he notes that the law hides tensions that can only be
dealt with politically once they are made to appear in the surface.\textsuperscript{51}

These yet unnamed grievances will, when unburied, result in tension and
uncertainty, as they involve incorporating the aggrieved as equal, and will
inaugurate a community that many are unwilling to recognize. This effect is not
the consequence of the unruly behavior of the challengers but of the tensions that
were hidden due to the denial to injustice.

Focusing on the political dimension of the \textit{illegality} of immigrants is a productive
way of exploring how ideologies of “legitimate” external sovereignty shape the domestic
politics of immigration. When immigrants enter countries without documents their status
in the polity would seem to be indeterminate, as they are officially \textit{not} there. To be
undocumented at first seems to mean to not be counted among members and residents of
a country. However, the life of undocumented immigrants in contemporary democracies
is far from indeterminate. Undocumented immigrants are not only accounted for, they
also constitute the target of one of the most active realms of policy-making and executive
and judiciary action in the post-9/11 era.\textsuperscript{52} The persecution to which they are subjected is
justified on their status of \textit{illegal}, a term that cancels out their claims to political inclusion
and simultaneously justifies their further exclusion, namely the curtailment of rights and
ultimately deportation. The all-important role of the undocumented status as both a


\textsuperscript{52} This includes policy-making at the federal and local level. Local ordinances have been one of the most active realms of anti-immigration policy-making, with around 1,500 of them having been introduced in the last 10 years, Robin Finn, "Town Divides over Law Aimed at Day Laborers," \textit{The New York Times}, December 27 2009.
barrier to political action and cause for punishment is reflected on the anti-immigrant line
“What part of illegal don’t you understand?”

However, it is precisely the condition of illegal that creates an underprivileged status and thus the need to fight for inclusion. In other words, the status of immigrants is both the catalyst for their activism and the reason adduced for denying them political agency, making their position more precarious, or actually vanishing them from the polity. Their exclusion from membership is repeatedly cited as the reason why no political claims of theirs will be heard. Indeed, proposals to provide a road to citizenship are often quipped with the objection that such a measure would reward those who violated the law. However, many significant social and political conquests are a reward for political action that asserts the injustice of existing laws through the performance of illegal acts. Runaway slaves, civil disobedience during segregation, and other forms of direct action question the justice of the law by acting in explicit opposition to it.53

Once we acknowledge that there are few legal roads of migration for impoverished and racialized individuals that fill the ranks of the undocumented, sovereignty becomes an institution that facilitates the creation of spaces of internal exclusion. These spaces represent the inclusion of a group but subject to regulations that keep them politically excluded. In this case, their incorporation into a polity relies on their status of laborers and proceeds with the condition that they remain political outsiders. The reinforcement of sovereignty and its securitization, in this interpretation, does not work to prevent flows of people but rather to construct dehumanized subjects, and delegitimize their claims for social, economic, and political inclusion.

53 See chapter 4 for an extended discussion of civil disobedience.
The incorporation of immigrants conditional on their exclusion is not a written agreement, yet the pattern of policy-making directed at immigrants nonetheless establishes those conditions. Regulations restrict the internal freedom of movement of immigrants and their access to due process and social protection. Measures legislated in the last two decades include: (i) preventing undocumented immigrants from obtaining driver’s licenses and car registrations; (ii) enlisting the Highway Patrol in the task of checking immigration status; (iii) reducing the already limited guarantees to due process and legal representation; (iv) transferring detainees without notice to family and/or lawyers; (v) imposing collective plea agreements and expedited trials; (vi) enlisting local police and sheriff departments as immigration enforcement deputies; (vii) excluding them from social services designed to assist low-income groups; etcetera.54

I suggest that turning to the political dimension of illegality may transform our understanding of the term. The sovereign prerogative to exclude must be scrutinized as a branch of this powerful structure, rather than an a priori legitimate institution. The challenges against it, represented by the millions of individuals abandoning their countries of origin and settling somewhere else, must be seen as political challenges to the justice of this arrangement. In contrast, today, these challenges are easily categorized as illegal and taken as a legitimate justification for the creation of spaces of unaccountable coercion. We cannot, as even the most welcoming frameworks within political theory do, wait for the existing formal members of the demos to decide on the right moment and conditions for accepting immigrants as members.

54 See chapter 5 and King and Valdez, "From Workers to Enemies. National Security, State Building and America’s War on Illegal Immigrants."
Once the *illegal* actions are seen on a political light, the next step is to theorize their place within frameworks of democratic politics and inquire about the responsibility that a constituted polity has for these groups. I suggest that the uneasiness and intractability of *illegal* immigrants stem from the fact that these individuals no longer belong to their community of origin, yet we refuse to incorporate them to our community. The political action of immigrants is oriented to put an end to this *in-betweenness* by requesting access to the community. The indeterminacy of their status reflects a central feature of democratic politics; that political action operates within the polemic area of rights. By this I mean that democratic politics operates in the gap between what is law and the ideas of justice put forward by political actors. In other words, rights are resignified by groups that are currently not their beneficiaries.\(^{55}\) It is the potential for change and transformation that makes democratic politics uncertain, but also what allows us to imagine transformations in progressive directions. Immigrants’ political struggle seeks to transform their status from non-members to members, yet in the process they also change the meaning of membership, and alter the makeup of the host community.

The part of *illegal* that *we* don’t understand is that it is not possible to draw an internal line that partitions where democracy reaches and where it does not, for the upsetting of dividing lines and the challenge of power structures is what democracy does. In other words, we do not understand that naming will only obscure the political character of immigrants’ claims against oppression. It will only temporarily provide a way to silence claims and will result in the acceptance of the sacrifice of some and the sheltering of others. Sovereignty restricts the view of the consequences of our actions to

\(^{55}\) Rancière, "Who Is the Subject of the Rights of Man?," 306-07.
those that affect us. In this sense, it impoverishes democracy by offering an unrealistic pattern of cause-effect relations of our actions and the wider world (including immigrants that are in our midst, but not within our relevant world).

This curtailment of our willingness to know, learn about, and interact with strangers is based on an already made judgment about the justification of coercion inflicted in the name of sovereign borders. What we refuse to know or learn about others—by denying them political agency—is also what would put into question the certainty and stability of sovereignty, on which we rely to justify exclusion. This refusal to know is partly reflected on the metaphorical treatment of countries as associations and/or marriages, in which desire for comfort and homogeneity prevails. In these arguments, the desire not to know or not to share, is transformed into a normative claim that justifies exclusion. 56

Admittedly, we are far away from a situation in which immigrants are recognized as political actors and their claims heard rather than countered by increased coercion. I believe a necessary first step is for political theorists to incorporate immigrants as active political subjects in their frameworks. The alternative is to ignore immigrants’ participation in opening spaces of politics that coercion seeks to close off. In practice, this reduces our ability to know, learn about and interact with strangers. 57 In theory, it prevents a proper conceptualization of immigration politics and reasserts a picture of benevolent Western humanitarianism.

Conclusion

This chapter offers a critique of ideal and non-ideal liberal approaches to immigration. While welcoming in the substance of their prescriptions, liberals offer sovereign conceptions of justice. In the external realm, freedom of movement is proposed as a universally embraced outcome by theories of migration. Moreover, the justification of freedom of movement does not emerge from the examination of the troubled history of sovereignty and the hierarchical ordering of the external sphere. Instead, it follows from an abstracted thought experiment and uncritically affirms the equivalence between the West and liberalism. Domestically, the sovereign prerogative to close borders is replaced by liberalism’s sovereignty. The latter’s sovereignty is reflected on the dismissal of the role of politics and novel conceptions of rights in the emancipation of immigrants.

Neither the ideal nor the realistic liberal approach concerns itself with understanding the way in which structural sources of inequality based on racialization, international hierarchies and discourses of national security constitute the realm of immigration politics. Neither view recognizes immigrants as political subjects whose identity is partially determined by a history of unequal sovereignty. Neither approach seeks to understand how the construction of immigrants as outlaws prevents the contestation of the widespread coercion that is justified in sovereign principles. Finally, neither ideal nor realistic visions explore avenues for opening democratic spaces in which the existing institutional arrangements and identities could be put into question.

My critique of the depoliticizing effect of benevolence and the lack of concern with the political action of immigrants anticipates some of the features of my own conception of cosmopolitan politics. Building upon chapter 2, I conceptualize politics
following Jacques Rancière and Martin Luther King Jr.. I argue that politics occurs when the law and the shape of the community is put into question. I close by proposing a politicized reading of *illegality*. 
This chapter expands my theorizing of cosmopolitan spaces of politics by engaging with deliberative democratic approaches. Deliberative democracy engages both with the domestic sphere of politics and the cosmopolitan realm yet falls short of recognizing the full emancipatory potential of Kant’s cosmopolitanism. In particular, I contrast the conceptualization of cosmopolitanism as a moral realm with the political interpretation advanced in chapter 2. A consequence of a moral conceptualization is the denial of political subjectivity to immigrants, a fault that echoes the liberal critique in chapter 3. The lack of incorporation of immigrants’ political action is problematic for being unfaithful to what immigrant politics actually is and for constructing a recipient community that benevolently includes outsiders. I critically examine both assumptions (a moral cosmopolitanism and the benevolent community). I conclude that they distort rather than reflect immigration politics and constitute a normatively problematic vision of democratic politics. This examination allows me to analyze instances of immigrant activism and further refine a conception of cosmopolitan spaces of politics.

In her influential book *The Rights of Others* Seyla Benhabib puts forward a theoretical framework to understand contemporary immigration politics.¹ Benhabib theorizes a domestic realm that stands in tension with the cosmopolitan realm of morality.

The author offers a moral interpretation of Kant’s cosmopolitanism. In later work, she further identifies the cosmopolitan realm with the set of human rights that are recognized by the international community. She claims that this set of rights will be adopted and individualized through the democratic negotiation and reiteration of the demos’ dual commitments to “human rights and sovereign self-determination.”

Benhabib’s joint focus on the process through which popular sovereign communities deliberate about the incorporation of cosmopolitan values is more promising than liberal approaches. This is because she theorizes the realm of domestic politics and that of cosmopolitanism jointly and offers a thicker understanding of politics. However, the author ultimately concludes that the paradox that “those who are excluded will not be those who decide upon the rules of inclusion and exclusion” cannot be eliminated. Nonetheless, she expects that the paradox will be rendered “fluid and negotiable through processes of continuous and multiple democratic iterations.”

The promise of fluidity and negotiation offered is, however, restricted by the way in which Benhabib conceptualizes the political process of immigrant incorporation. First, cosmopolitanism is posited as a moral realm, a move that is problematic both for the reading of Kant it proposes and for discounting the role of immigrants’ political action in staging new understandings of rights and community. Second, her understanding of cosmopolitan legal communities and their effect over domestic politics overstates the appeal of the human right to membership in the international realm and minimizes

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2 Ibid., 47.

3 I will discuss at length and critique Benhabib’s concept of democratic iterations later in this chapter. For now, suffice it to say that it consists of repeated instances of democratic deliberation around a certain topic, such as the right to membership. Ibid., 177-78.
relates of forces that may constraint creative processes of interpretation. Third, her conceptualization of the effect of democratic iterations on the self-understanding of the community is overtly optimistic, allowing only for a movement of communities toward a cosmopolitan right to membership, leaving out of the analysis hostile discourses and exclusionary iterations. Finally, the understanding of politics that emerges is one in which the process of extension of membership is unilaterally led by a benevolent formal community.

I rely on the interpretation of Kantian political cosmopolitanism developed in chapter 2 to contest Benhabib’s understanding of that realm as exclusively moral. A contextualized reading of Perpetual Peace reveals that sovereignty and cosmopolitanism acted complementarily, rather than in tension, in time of colonialism. This is coherent with the required complementarity between realms in the Kantian system of Right. Moreover, Kant’s cosmopolitanism was concerned with countering the negative effects of the unequal power in the international realm over the relation between governments and noncitizens. My political reading of Kant’s cosmopolitanism offers a cosmopolitanism that is grounded in domestic spaces of politics in which foreigners contest the conditions of inclusion.

Once the normative need for domestic political cosmopolitan spaces is established, I conceptualize democratic politics building upon Jacques Rancière’s conception of dissensus. This view contrasts with the privileging of consensus or agreement that characterizes Benhabib’s deliberative democratic framework. My

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4 As Kant notes in the Doctrine of Right: “if the principle of outer freedom is lacking in any of these three possible forms of rightful condition, the framework of all others is unavoidably undermined and must finally collapse.” Kant, The Metaphysics of Morals, 6:311.
discussion of immigration politics is attentive to the risk of depoliticization associated with the dehumanization of immigrant subjects or the silencing of their voices.

The rest of this chapter is structured as follows. In the next section I trace Benhabib’s derivation of the Kantian cosmopolitan realm and offer a contending political interpretation of how cosmopolitanism interacts with popular sovereignty, putting the tension between sovereignty and cosmopolitanism in a new light. In the third section, I argue that without granting immigrants political subjectivity iterations may result in injury, or the sedimentation of the existing borders of the public sphere, leading to stasis or divergence with principles of cosmopolitanism. This section further illustrates the limitations of a moral cosmopolitanism. Finally, in section four, I outline a conception of cosmopolitan immigrant politics that incorporates immigrants as political subjects. A political community is founded by the politicization of the exclusion of immigrants, that is, by the assertion of the equality of those that are currently excluded. The last section examines the film The Three Burials of Melquíades Estrada. The film reflects on the process of denial (burial) of the issue of immigration and the refusal to acknowledge the humanity of migrants and their claim for their lives to be honored and their deaths mourned, a refusal that is the task of politics to challenge.

Cosmopolitanism, Moral or Political?

Based on a reconstruction of Kant’s inter-connected system of right, Seyla Benhabib conceptualizes a “paradox of democratic legitimacy.” Benhabib sees in Perpetual Peace’s inter-connected system of right the demarcation of “the tensions between the injunctions of a universalistic morality to offer temporary sojourn to all and

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5 Rancière, "Who Is the Subject of the Rights of Man?,” 304.
the legal prerogative of the republican sovereign not to extend such temporary sojourn to full membership.”⁶ She names this tension “the paradox of democratic legitimacy” and relies on it to orient her theorizing about immigration, which charts an expected progression in which “the people” (i.e., citizens) renegotiate and reiterate their dual commitments to human rights and self-determination, gradually embracing the former as part of their sovereign schedule of rights.⁷

After following Kant in his derivation of the realms of sovereignty and cosmopolitanism in *Perpetual Peace*, she deems the cosmopolitan right to hospitality that Kant offers to be too weak, and proposes instead a cosmopolitan right to membership. The Kantian right to hospitality allows the newcomer to attempt to establish contact, her admittance being dependent on the benevolence of the host community.⁸ This admittance, when it happens, is nonetheless only temporary. To this Seyla Benhabib opposes a human right to membership for temporary residents, justified on principles of “universalistic morality.”⁹ This human right, however, is still subject to “terms and conditions” that “remain the prerogative of the republican sovereign.”¹⁰

In sum, even if Benhabib puts forward a human right to membership, she nonetheless defers the decision to grant such a right to “the republican sovereign,” thus constructing the aforementioned tension or paradox of democracy.¹¹

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⁷ Ibid., 43-48, 134-41.

⁸ Kant, *Perpetual Peace: A Philosophical Sketch*, 105-06.


¹⁰ Ibid., 42.

¹¹ Ibid., 42.
However, the tension that Benhabib identifies in Kant is not a tension when applied to the conquest expeditions that Kant described. As explained in chapter 2, in colonial times cosmopolitan right and sovereignty worked in tandem to expand the realm of external freedom available to the individuals that belonged to colonized countries. Kant uncovers the fundamental hypocrisy between the principle of sovereignty guaranteed in Europe and the repeated violations of such principle in the colonial wars. His affirmation of the humanity of non-European peoples and the extension of the cosmopolitan realm to encompass them, however, is not effective enough in the face of the evident asymmetries of power between Europe and the rest of the world. In this context, his move to assert the sovereign claims of non-Europeans works to strengthen the weakest nations, those at the receiving end of European military might.

Benhabib positions herself explicit in opposition to Kant. She sees the Kantian cosmopolitan right as too restricted and conceptualizes membership as a human right. However, she fails to consider how the changed context alters the effects of his interconnected system. As a consequence, the unilateral moderation of the tension she identifies becomes the prerogative of self-reflecting sovereign entities, which in our contemporary world happen to be Western countries receiving immigrants. In other words, cosmopolitan right becomes a principle that is actualized by those that are not in need of its guarantees, namely, formal members of host countries. I consider this conclusion to be at odds with Kant’s cosmopolitanism, which must regulate the coexistence of states and non-citizen individuals standing in an external relationship of “mutual influence” by submitting to a “common lawful state.”

12 Kant, Perpetual Peace: A Philosophical Sketch, 97n.
Kant’s writings as a response to the active injuries that the governments of Europe were inflicting on the rest of the world. In contrast to Kant, Benhabib’s regulation of immigration reinforces the existing asymmetries of power at the international level, by making the terms and conditions under which membership is granted subject to certain human rights constraints but ultimately the prerogative of the most powerful actor in immigration politics, “the republican sovereign.”

The Kantian emphasis on the mutual influence between governments and non-citizens as the concern of cosmopolitan right is lost in Benhabib’s transformation of that realm into one of universal principles of morality, the realm of norms. She does not make the design of cosmopolitan institutions responsive to the fact of proximity, mutual influence, and the possibility of injury, all issues that are at least more prominent in our era of globalization and mass immigration than in the colonial past. Instead, her approach takes cosmopolitanism to be a principle, one which democratic communities conform to gradually as they pursue processes of deliberation.

In sum, I consider that Benhabib’s reliance on Kant for thinking about immigration misinterprets three crucial dimensions: the need for complementarity between cosmopolitan and sovereign right, the grounding of cosmopolitan right on mutual interaction and the possibility of injury, and the way in which the inter-connected system of Right must work to counteract international asymmetries of power.

It may be worthwhile to compare Benhabib’s work on immigration with later writings on democratic iterations not concerned with immigration. In this later work, she

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14 Ibid., 44.
focuses on cases in which transnational law is appropriated by people “as their own” in order to enhance their communicative freedom. She relies on examples of laws affecting “Muslim women” in several countries and the way in which they organize to contest their second-class citizenship with tools obtained from international conferences and treaties such as the Convention to End All Forms of Discrimination Against Women (CEDAW).

Two significant contrasts exist between the use of cosmopolitan norms and democratic iterations in the case of immigration and the more recent example. In the example, the subjects that can claim the cosmopolitan norms as their own are those that are excluded and must challenge existing institutions. Women are able to enhance their communicative rights by relying on universal norms contained in treaties such as the CEDAW and tailoring them to their own struggle. In contrast, in her treatment of immigration, Benhabib is clear that it is the pre-existing community rather than the excluded group that deliberates successively and, through these iterations, re-constitutes the demos gradually converging toward the acceptance of a cosmopolitan right to membership. Secondly, in her later work she expects cosmopolitanism to enhance democratic sovereignty, something that only applies when members of the community utilize these principles against their governments, but not when foreigners seek to challenge the conditions imposed by their hosts. However, it was the latter relation, that

16 Ibid., 700.
17 Ibid., 702.
between states and non-citizens, that Kantian cosmopolitanism was designed to address.\footnote{Kleingeld, "Kant's Cosmopolitan Law: World Citizenship for a Global Order," 72.}

The differences in the way in which Benhabib applies her framework in her earlier and later work result in widely diverging conceptions of politics. In the case of women activists in the Third World cosmopolitanism is appropriated and politicized to oppose the unjust conditions they face. In the case of immigration, in contrast, it is the privileged that are supposed to appropriate cosmopolitan discourses and extend it to the excluded.

I consider the latter conclusion to contradict the function of cosmopolitan right, which in *Perpetual Peace* worked to empower those individuals that were likely to be injured by European powers traveling abroad. This empowerment was achieved by giving the visitors only a charitable reception and by positing the sovereign prerogative of non-European countries.\footnote{The rationale of extending the sovereign prerogative to non-European countries is evident once one considers the intellectual debate in which Kant was intervening. Europe was posited as the superior civilization, and commerce was deemed a force through which its superior customs could be spread. Colonial travels were justified on this inferiority and the fact that the non-settled status of these cultures qualified the land as "ownerless." Even cosmopolitan authors shared this hierarchical vision or, alternatively, conceived Europe as the universe to which cosmopolitan values applied. See chapter 2 and Inés Valdez, "Perpetual What? Injury, Sovereignty, and a Cosmopolitan View of Immigration," *Political Studies* forthcoming (2011).} In contrast, a similar move today, and particularly its coupling with a strong sovereign prerogative, maintains immigrants in a position of vulnerability, "between legality and illegality."\footnote{Benhabib, *The Rights of Others: Aliens, Residents, and Citizens*, 154.}

Benhabib’s conceptualization of cosmopolitan right and democratic iterations does not consider the normative effects of the principles she adapts from Kant on the changed global context, affected as it has been by globalization and migration flows. Once we bring into the picture the power imbalance that characterizes the relationship between immigrants and host governments, we should explore seriously the tendency of
political communities to deviate into hostility rather than converge toward cosmopolitanism.

In the next section I address the consequences of incorporating issues of international power imbalance and into Benhabib’s framework through a critical revision of jurisgenerativity and democratic iterations. In particular, I examine the potential for democratic iterations to deviate into a forceful affirmation of the sovereign power to exclude that is “indivisible, transcendental, and self-referring.”  

I first reconstruct Benhabib’s conception of jurisgenerativity and democratic iterations. Second, I contrast Benhabib’s conceptualization of these two terms with alternative understandings to explore the possibility that legal international communities (i.e. the source of jurisgenesis) may contain non-cosmopolitan narratives of law and that—partly as a consequence—iterations may result in the hardening of the borders of the public sphere, rather than its gradual convergence toward cosmopolitan ideals.

**Power and Politics at Work**

A look at major newspapers in the United States and Europe at the time of writing makes the idea that polities are progressively moving toward accepting a cosmopolitan right to membership look optimistic.  

Recently, the state of Arizona passed a law that would allow local enforcement to check identification on anyone they may suspect may

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22 In this section I refer to Benhabib’s moral understanding of “cosmopolitan right to membership,” “cosmopolitan realm,” or “cosmopolitan norms” regardless of the disagreements with such conceptualization expressed in the previous section. This strategy facilitates the examination of the other dimensions of her framework, namely, jurisgenerativity and iterations. The closing discussion of immigration politics, however, returns to a view of immigrant political action as a grounded and political form of cosmopolitanism.
be in the country “illegally” and detain anyone who is unable to prove otherwise. In the last British general election campaign, the Labor Party hoped (and failed) to gain voters by advertising that they “deport someone every eight minutes.” France recently banned full Muslim veils (burqas) from public spaces, and Switzerland voted on a referendum to ban new construction of minarets in their territory.

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23 It is important to note that Arizona law SB1070 that has elicited so much opposition from civil rights groups and the Department of Justice is a legal tool that simply generalizes the implementation of existing federal programs to the whole state of Arizona, preventing counties and localities to “opt out” from programs that inter-connect local law enforcement with federal immigration enforcement. A few measures in Arizona’s SB1070 go beyond federal law by declaring it a state crime to be in Arizona without documents, establishing penalties for harboring or transporting and undocumented immigrant, and relaxing the conditions under which police can stop someone suspected of being in the country without documents. However, it should be noted that the Immigration and Nationality Act already makes it a crime (as opposed to a civil violation or a misdemeanor) to be in the country without documents. This sparsely implemented measure was re-activated at the border through Operation Streamline, which the Bush administration inaugurated in 2005. According to the University of Syracuse Transactional Records Clearinghouse, the Department of Homeland Security has relied on this tool increasingly, making the crime of “illegal re-entry” the “most prosecuted by federal authorities” in 2010. Regarding the criticism that the Arizona law promotes racial profiling, it is worth remembering that profiling has been prevalent in immigration enforcement, as ACLU legal actions preceding the Arizona law and recent Freedom of Information Act requests by Professor Jacqueline Stevens show. In sum, the publicized Department of Justice legal case against the Arizona law hinges on the constitutional issue of plenary power, that is, the preeminence of executive authority to set law in the area of immigration rather than the substance of the practices authorized by the law. In fact, annual totals of immigrants deported have reached historical record numbers in each of the years of the Obama administration. See next chapter in this dissertation and ACLU and National Immigration Forum, "Operation Streamline Fact Sheet," (Washington, DC: National Immigration Forum, 2009), Tom Barry, "Obama Right and Wrong About Arizona Law," in Borderlines, ed. Tom Barry, Center for International Policy (Washington, DC: Center for International Policy / Transborder Project, 2010), Inter-American Commission on Human Rights, "Report on Immigration in the United States: Detention and Due Process," in OAS Official Records (Washington, DC: Inter-American Commission on Human Rights, 2010), King and Valdez, "From Workers to Enemies. National Security, State Building and America’s War on Illegal Immigrants.", Julia Preston, "Deportations from U.S. Hit a Record High," The New York Times, October 6 2010, Jacqueline Stevens, "U.S. Government Detaining and Deporting U.S. Citizens as Aliens," Virginia Journal of Social Policy and the Law 18, no. 2 (2011).


25 I am aware that these measures do not target immigrants exclusively, but rather Muslim minorities in each of these countries, however, I follow Etienne Balibar in taking “immigrant” to be a catch-all category that combines ethnic and class criteria and into which foreigners—but not all foreigners and not only foreigners—are lumped together. In this sense, spaces of exclusion justified on foreignness get extended—through discourses of race and cultural fitness—to racialized citizens, like Latino/as in the United States, citizens of Algerian and Moroccan descent in France, etcetera. To the extent that these discourses seek to exclude racialized non-immigrants from a political community’s sphere of concern, a cosmopolitan response is still relevant. An exclusion predicated on delegitimizing racialized non-immigrants’ claim to citizenship, if successful, pushes these individuals outside of the concern of the constituted community. A
These developments are only the recent highlights of an anti-immigrant escalation of several decades. Regarding the American case, there is a broad inter-disciplinary consensus regarding the evolution of immigration enforcement techniques in the United States. Sociologists, geographers, anthropologists, and political scientists agree in characterizing the last two decades (and, in particular, the post-911 period) as one of unprecedented escalation in anti-immigrant rhetoric and institutional resources devoted to enforcement as well as in the numbers of immigrants detained and deported as a consequence.\(^{26}\) The situation has warranted the intervention of the Inter-American Commission on Human Rights (IACHR). The IACHR considers the reliance on detention to be a disproportionate response for many or even the majority of cases of immigrant detention.\(^{27}\) It also recommends that the United States eliminates the 287(g) program that


allows cooperation between the federal and local level, that it eliminates home raids unless related to individuals with serious criminal records, and that it makes mandatory that warrants utilized by immigration enforcement are issued by a judge.28

We get few tools in political theory for grappling with the instances of hostility and state coercion exemplified above. Benhabib acknowledges that the treatment of foreigners is a test of polities’ “moral conscience” and of the “political reflexivity of liberal democracies,” yet in her conceptualization of politics this reflexivity is assumed to gradually progress toward accepting a universal right to membership.29

In this framework, the incorporations of foreigners into the polity depends on a fluid relation between cosmopolitan norms and democratic legislation, one in which domestic polities embed cosmopolitan norms through a process of democratic iterations. The process through which polities reflect and self-legislate to redefine and negotiate the

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28 Ibid., 145-47. It is important to note that the incontrovertible escalation at the aggregate level does not imply a full and homogeneous implementation of measures at the state and local level. Indeed, immigration enforcement is a privileged site to observe the fragmentation of sovereignty and the importance of political activism to shape the formal and informal institutions that regulate immigration. This variation allows for cities to adopt “sanctuary policies” that prohibit law enforcement from inquiring about the immigration status of individuals unless they are suspected of being involved in violent crime. Law enforcement also has considerable leeway regarding their actions when they stop an individual in the street or on the highway. Not even entering the individuals’ personal information on an immigration database is mandatory, given that many jails do not have the necessary equipment (although the Obama administration is seeking to expand the database program—Secure Communities—to cover all jails in the country by 2013). Moreover, even if they have access to such databases through participation in Secure Communities, counties may choose not to bring individuals to jail for minor traffic infractions (a prominent source of immigrants’ first contact with law enforcement, transfer, and deportation), rather choosing to issue citations. This is the reason why Durham and Wake counties in North Carolina both have jails that apply the program Secure Communities but widely diverging rates of transfer of immigrants to Immigration and Customs Enforcement. Next chapter focuses centrally with the ream of immigration enforcement, which I see as a move to securitize spaces of politics and deflect rather than address legitimate political challenges to the terms of inclusion. See Coleman, “The ‘Local’ Migration State: The Site Specific Devolution of Immigration Enforcement in the Us South.”, Immigration Policy Center, “Secure Communities: A Fact Sheet,” in Immigration Policy Center Fact Sheets (Washington DC: Immigration Policy Center, 2010).

meaning of the *we* and gradually incorporate cosmopolitan norms is conceptualized as jurisgenerativity.\(^{30}\)

*Jurisgenerativity: Interpretation, Domination and Living in Defiance*

Benhabib’s focus on a normative universe that exceeds the domestic sphere is useful to see how legal communities external to the polity contribute to the development of new vocabularies of public claim-making and new forms of subjectivity. The hope is that these new vocabularies facilitate the challenge of relations of power at the *domestic* level.\(^{31}\) It is through the jurisgenerativity of legal norms that democratic citizens incorporate into their schedule of rights a right to membership. This appropriation takes place through a repeated process of public arguing and redefinition that political communities engage in. For Benhabib, the jurisgenerativity of cosmopolitan norms creates vocabularies that are incorporated into deliberations and lead to the renegotiation of the meaning of community and eventually to the re-constitution of the polity and the destabilization of power structures that restrict acceptance of new members.

The author takes from Frank Michelman the concept of jurisgenerativity, originally coined by Robert Cover, to represent “the law’s capacity to create a normative universe of meaning that can escape the ‘provenance of formal lawmaking.’”\(^{32}\) The meaning of laws emerges from contexts of signification that are beyond their (the laws)

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\(^{30}\) Ibid., 178-79.


control; their meaning is borrowed from “materials created by social activity” and can be expected to exercise a destabilizing influence over power.\textsuperscript{33}

Two dimensions of the process of jurisgenesis as first introduced by Cover are worth expanding for their relevance to the topic of immigration. First, the interaction between the creative process of interpretation and the violence imposed through the state’s law enforcement is not harmonious. Second, the communities that sustain alternative creative narratives that have the potential to destabilize power are groups with commitments to an “unofficial interpretation” that may defy the law if they decide to act in accordance to their vision.

Regarding the first dimension, when Robert Cover developed the concept of jurisgenerativity he emphasized that the creative processes and narratives that surround the law give rise to multiple communities espousing alternative interpretations of “right and wrong, of lawful and unlawful, of valid and void.”\textsuperscript{34} These communities of meaning are diverse and may contradict each other, as Cover’s examples of Bob Jones University and the civil rights movement illustrate. However, the jurisgenerative processes that maintain and transform these communities “never exist[] in isolation from violence.”\textsuperscript{35} It is worth noting that in the international sphere, discourses about development, foreign aid, and immigration are indebted to a hierarchical past and an unequal present. These narratives are not egalitarian and the identities constructed and sustained through


\textsuperscript{34} Cover, "Foreword: Nomos and Narrative," 4.

\textsuperscript{35} Ibid., 40.
interactions delegitimize immigrants’ claims to membership and attempt to legitimize coercion over them.

There are as well narratives of immigrant’s rights and justice in the international sphere such as those embedded in the United Nations Convention on Migrant’s Rights. However, as noted in chapter 2, the normative community that has chosen to support this covenant is quite limited, and does not include a single Western country. Moreover, an alternative set of international covenants and institutions has grown in importance in the last decades. These include inter-country agreements between Europe and migrant sending countries in which the latter agree to take action to prevent emigration from their lands or even accept deportees without documents or proof of nationality.\textsuperscript{36} More importantly, inter-governmental organizations such as the International Organization of Migration (IOM), the European Union border agency FRONTEX, and private contractors, among others, operate coercively in the international realm, managing migrants and preventing movement across borders.\textsuperscript{37}

The IOM, an inter-governmental organization engaged in humanitarian work that legitimizes itself with discourses of transnational human rights, is also involved in border enforcement and “transport and detention practices that contain[] rather than facilitate[]

\textsuperscript{36} This is formally prohibited by international law, yet the maneuver has become common in response to immigrants last resort strategy to “lose” their documents to avoid deportation. Antje Ellerman, "Undocumented Migrants and Resistance in the Liberal State," Politics & Society 38, no. 3 (2010).

human mobility.” These institutions impose coercively a law that is neither consonant with the minimalistic standards of the UN Convention nor a more stringent one of a human right to membership.

Bringing into the discussion the institutions of immigration enforcement that operate in the international sphere provides a richer understanding of competing narratives of legality that claim superiority over human rights’ narratives. When laws or institutions can mobilize violence to ensure compliance, there is a chance that it will shut down “the creative hermeneutic of principle that is spread throughout [normative] communities.” In the international sphere, the risk is that the narrative of a human right to membership gets shut down through the use of force legitimated by state’s claims to a sovereign control of borders. Based on her analysis of European Union (EU) policies, Benhabib recognizes that the likely future policy in will be “to restrict access to borders more severely rather than dismantling the rights of resident foreigners.” However, if the human right to membership will only be applied to current residents—for lack of specification, one may assume regardless of their status—then the “human” qualifier of those rights may have to be dropped. Moreover, in reality the United States and Europe are limiting the universe of potential beneficiaries of such right. This is accomplished through the detention and deportation of undocumented immigrants as well as an increase in the range of issues that make legal immigrants deportable.

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39 Cover, "Foreword: Nomos and Narrative," 44.

The second dimension of jurisgenerativity referred above is the “multiplicity of implicit and explicit commitments” that each community of interpretation holds. Robert Cover identifies as “justifiable disobedience” the decision to act accordingly with “an understanding of the law validated by the actor’s own community but repudiated by the officialdom of the state, including its judges.” This definition immediately incorporates a dimension of political action to jurisgenerativity that is absent in Benhabib’s framework. In particular, the examples offered by Cover make clear that it is those that are directly affected by the laws that will engage in acts of justifiable civil disobedience, such as Amish communities in the United States or “fugitive” Black Americans fighting for abolition. Embedding civil disobedience into a framework of normative communities, actions such as civil rights’ sit-ins become at the same time disobedience to the laws segregating public accommodation and obedience to the group’s own understanding of the constitutional guarantee of equal protection.

Robert Cover is well known for theorizing violence as inherent to legal decisions. In the case of jurisgenerativity he notes that the judge facing defiance must choose between “affirming his interpretation of the official law through violence against the protesters and permitting the polynomial of legal meaning to extend to the domain of social practice and control.”

This choice between violence and acceptance of an alternative legal meaning is fruitful to understand the granting of paths to citizenship for undocumented workers in

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41 Cover, “Foreword: Nomos and Narrative,” 46.
42 Ibid., 46.
43 Ibid., 47.
the United States and Europe. The last time the United States Congress legislated a path to citizenship, through the 1986 Immigration Reform and Control Act (IRCA). Through this legislation, 3 million out of an estimated 3 to 5 million undocumented immigrants applied for legalization.\(^4^5\) In Spain’s latest regularization process in 2005, over 700,000 immigrants without papers (out of an estimated 820,000 eligible ones) regularized their situation.\(^4^6\) In other words, this type of legislation involves the refusal to coerce and expel those individuals that have entered in violation of the laws, choosing instead to provide a path to permanent residence and citizenship. The recognition is extended to a community of people, undocumented immigrants, which knowingly and willingly broke laws that regulate the movement of people across borders.\(^4^7\)

The two dimensions of Robert Cover’s framework of jurisgenerativity highlighted above permit a reading of the prevailing narratives on *illegality* that is both more critical and more radical. Its radical potential resides in the incorporation of immigrants as political subjects that belong to a community of interpretation and defy the coercive institutional arrangements that characterize immigration regimes today. In other words, the transformation of immigration regimes is also indebted to the political action of


\(^4^6\) El Mundo, “Termina El Proceso De Regularización De Inmigrantes Con Cerca De 700.000 Solicitudes Presentadas,” in *El Mundo* (Madrid: 2005). Unlike the American case, the Spanish legislation also covered those that complied with the minimum residence period after the law was passed.

\(^4^7\) This is not to claim that individuals who cross their border or overstay their visas belong to a pre-existing normative community. However, the experience of border crossing and the shared identity as undocumented has proved to be politically fruitful for becoming part of activist communities in their country of destination.
immigrants, a question that the next section addresses through the critical analysis of iterations.

The critical dimension involves recognizing a world of domination that prevails in the international sphere. This situation is not lost to Benhabib. She expresses the need to decriminalize the worldwide movement of peoples, and acknowledges that crossing borders is part of a search of human betterment in a world that we must ultimately share with our fellow human beings.\(^48\) Further, she recognizes that the lines that separate members from non-members are often based on prejudices, historical injustices, and administrative fiat.\(^49\) If incorporated into her understanding of cosmopolitanism and domestic democratic politics, these issues could complicate the normative pre-eminence of popular sovereignty or the legitimacy of border controls. However, the lack of connection between these injunctions and her theoretical framework prevents us from tracing those implications.

***Iteration, Sedimentation and Subversion***

In addition to jurisgenerativity, Seyla Benhabib’s framework relies on the complementary work of democratic iterations to bring domestic communities toward the eventual acceptance of a universal right to membership. In this section I identify two difficulties with the way in which iterations are conceptualized in Benhabib’s framework: the allowed range of variation that iterations can produce and the assumption of convergence toward a pre-determined ideal.\(^50\) I explored in the previous sub-section the

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\(^49\) Ibid., 178.

\(^50\) See also Thomassen’s discussion of this point, Lasse Thomassen, “The Politics of Iterability: Benhabib, the Hijab, and Democratic Iterations,” *Polity* 43, no. 1 (2011): 136-43.
difficulties of identifying a norm of “cosmopolitanism” or positing an uncontested narrative of a “human right to membership.” In this section I argue that it is unwarranted to assume that polities will move toward incorporating immigrants through the acceptance of such right, even if it existed. This is particularly the case if one embraces the full range of variation of political communities’ political reflections that is implied by the concept of iteration. As explained below, iterations may result in the fortification of the boundaries that separate us from those excluded, which in the process are constructed as abject subjects.

The concept of iteration, introduced by Jacques Derrida, suggests that the repetition of a concept or a term never produces a simple replica of its original use and intended meaning. Instead, every repetition is also a form of variation that involves transforming its meaning, adding to it, and enriching it in subtle ways. Benhabib relies on this concept to illustrate how polities, in the process of repeating a term or a concept, produce variations, making sense of an original authority in the new context, repositing and resignifying the antecedent, and potentially leading to a loss of authority, for the transformed as well as the original rule.

Benhabib defines democratic iterations as follows:

[C]omplex processes of public argument, deliberation, and exchange through which universalist rights claims are contested and contextualized, invoked and


revoked, posited and positioned throughout legal and political institutions as well as in the associations of civil society.\(^{53}\)

Each democratic iteration or act of self-legislation changes the circumscription of the community, and thus becomes an act of “self-constitution.” According to Benhabib, it’s not only “the general laws of self-government which are articulated in this process” but also “the community that binds itself by these laws defines itself by drawing boundaries as well, and the boundaries are territorial as well as civic.”\(^{54}\)

Through iterations, an original document (such as a law or a constitution) is reappropriated and made sense of in a new context. Through this process the authoritative original is diluted but at the same time preserved through its “continuous deployment.”\(^{55}\) At the same time, the cosmopolitan right to membership derived by Benhabib as “moral” and/or potentially present in international regimes of law is also appropriated and negotiated in ways that are particular to the self-government of the community in question. Jurisgenerative politics represent a “space of interpretation and intervention between transcendent norms and the will of democratic majorities.”\(^{56}\) However, this space will only be altered at the initiative of those that are already included (the “democratic majorities”). This means that immigrants participation as political actors is not allowed. Indeed, the exclusion of immigrants from discursive will-formation is identified by Benhabib as a paradox that can never be eliminated.\(^{57}\)


\(^{54}\) Ibid., 45.

\(^{55}\) Ibid., 180.

\(^{56}\) Ibid., 181.

\(^{57}\) Ibid., 177.
The framework sketched above can be productively contrasted with Jacques Derrida’s original conceptualization of iterations. Lasse Thomassen notes that in Derrida’s view of iterability there is no presumption that iterations’ effects will be positive.\(^{58}\) In fact, there is no inherent progression or even a particular outcome expected in Derrida’s conceptualization.\(^{59}\)

Unlike J. L. Austin, from whom Derrida adopts the term, Derrida is interested in iterations as acts that “fail” to make sense given the context. It is in failed performances that politics emerges for Derrida, the possibility of founding something new, a rupture, a beginning or an event.\(^{60}\) This view contrasts with Benhabib’s use of iterations as convergent toward an already known cosmopolitan ideal and as being enacted by a select group of formal members of the community. In other words, an already known outcome (i.e., the right to membership) replaces the potential for novelty and the range for the unexpected “failure” of iterations is also restricted through the selection of a bounded “juridico-legal” community as the originator of renegotiations and reiterations.\(^{61}\)

In order to critically examine the theoretical adequacy of a process of iterations that is assumed to converge to an external ideal of cosmopolitan hospitality, I contrast it with the use of the concept of iterations by Judith Butler. Butler’s work is illuminating because she analyzes iterations as a process that may result in the fortification of the lines

\(^{58}\) Thomassen, "The Politics of Iterability: Benhabib, the Hijab, and Democratic Iterations," 132.

\(^{59}\) Ibid., 132.


\(^{61}\) As Lasse Thomassen notes, there’s an “authoritative original,” such as the law or the constitution that is also safeguarded in Benhabib’s framework. Thomassen, "The Politics of Iterability: Benhabib, the Hijab, and Democratic Iterations," 137-38.
that divide us from those that are excluded. The strengthening of the boundaries, which set up the limit between the human and the abject takes place through sedimentation. Sedimentation refers to a process of accumulation that is temporal and material. Temporal because it takes place in time, through the repetition of norms, and material because the reiteration of norms and practices have effects over the subjects that are included and those that are excluded.62

For sedimentation to occur, practices of exclusion must be reiterated, referencing a history of exclusion, and relying on this history for supporting the present claims. This may happen, for instance, if a community that was originally constituted through exclusions based on race is now called to deliberate on the subject of racist speech.63

In this conception, the repetition of ritualized practices may work as injury because it draws its force from exclusionary conventions that constituted a given community.64 The repetition and sedimentation around the boundaries of this community mark those that are outside as abject, and unable to make a political appearance and claim for their lives.65 The Butlerian interpretation of iterations, based on the same original

62 While Butler is interested in the process through which sex becomes “natural” I see this process as delimiting a racialized body of the citizen that determines their capacity to speak in public or to be shunned as an abject and disposable/deportable source of labor. This is consistent with her use of “norm” and “normative” as referring to “constraints that not only produce but also regulate various bodily beings.” Judith Butler, Bodies That Matter: On the Discoursive Limits of “Sex” (New York: Routledge, 1993), x, Introduction.

63 Judith Butler, Excitable Speech: A Politics of the Performative (New York: Routledge, 1997), 90. Lasse Thomassen rightly notes that Benhabib’s relegates the violence of the founding to the origin, with iterations safeguarding “the original positive content of the constitution.” Thomassen, “The Politics of Iterability: Benhabib, the Hijab, and Democratic Iterations,” 138.

64 Butler, Excitable Speech: A Politics of the Performative, 51-52.

concept coined by Derrida, is better suited to illuminate the processes through which hostility against immigrants builds up in societies.

Foundational debates of immigration at the turn of the 20th century revolved simultaneously around migration, national identity and the nascent imperial role of the United States and resulted in hierarchical and racialized immigration policies. Regarding immigration’s constitutional narratives of origin, there are no rules in the American constitution regulating immigration. In 1889 the Supreme Court for the first time develops constitutional jurisprudence on the issue, unanimously deciding to consider migration a “form of commerce,” a position quickly reversed by the 1894 decision on the Chinese Exclusion Case.66 This decision defines immigration as an issue of security from foreign aggression. The decision further argues that “[i]t matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us.”67 The potential for this origin to taint iterations contrasts with Benhabib’s expectation that the deliberative reconsideration of the issue of immigration will only refer to the non-violent dimensions of founding documents.

A possible retort would be that hostile practices are not accepted within a model of deliberation as the one prescribed by discourse ethics. The driving elements of the model of democratic deliberation are: (i) the rationality of discourse, and (ii) the guaranteed participation in discourses for all the subjects potentially affected by the


decisions to be taken. However, to the extent that the group doing the deliberating is that composed by only the formal members, the second requirement cannot possibly hold. To the extent that this second condition does not hold in the treatment of immigration, we can certainly expect polities to rely on a representation of community indebted to pre-existing exclusions rather than on expansionary conceptions of membership. It is here that Benhabib is forced to rely on the assumption of a benevolent community that willingly extends membership to foreigners.

But even if all the subjects involved were formal members, as is the case in Butler’s text, discourses may still partition the community along lines of race, gender, class, sexual orientation, etcetera. In fact, it is remarkable that Benhabib’s own case studies of the headscarf affairs in France and Germany are concerned not with foreigners but with citizens that are singled out as not “French” or “German” enough for their choice of attire!

The vicious cycle in which iterations may work to “impoverish and manipulate meaning” has been acknowledged in Benhabib’s most recent work, in which she claims that conditions of practical discourse guarantee only necessary conditions for convergence. She adds that an inquiry into these processes of manipulation and the way to overcome them can only be addressed by a theory of judgment.

The deferral to a theory of judgment contrasts with an approach to iterations that locates the exclusionary tendencies in the original act of constitution that is cited and

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70 Ibid., 698n.
repeated through iterations. In the case of immigration, as explored in chapter 1, legacies of colonialism and conquest often underlie hierarchical relationships between host community and immigrants, and these narratives may be heightened by the securitization of immigration.\(^1\) In such a scenario, the challenges will be repelled as unauthorized trespassing, and we cannot discard that the repetition of such claims to exclude will result in the hardening of the boundaries that first authorized the deliberations.

While these exclusionary effects no doubt may—and indeed, should—be countered, there is not enough work on Benhabib’s part to see how her understanding of iterations would make that happen. In particular, it is difficult to see the work that a moral cosmopolitan realm may do when non-citizens face instances of injury without having recourse to actionable rights. To the extent that cosmopolitanism in Benhabib is only a norm waiting to be appropriated by the privileged members of the community, it obscures the trends that prevail in contemporary cases of immigration politics. These trends are not steering polities toward a universal right to membership but rather cyclically moving back and forth or, in the worst case scenario, simply away from it.

Butler offers specific ways in which speech that separates and declares certain groups abject can be countered. In reflecting on the visual discourse that surrounds the video of the police beating of Rodney King, she exposes how the body of Rodney King, as a Black male, cannot but be read as a threatening body, thus making the actions of the police officer actions of self defense. The way of countering the sedimented/naturalized

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quality of "dangerous" that is attached to the bodies of Black males is to intervene to
contest the dominant speech. This intervention should involve repeating and publicizing
alternative readings that further an antiracist hegemony over the visual field.\textsuperscript{72} Readings
that disrupt accepted understandings of subjects as aggressive and deserving of police
control, or disposable and utilized as fodder for ritualized exercises of mass detention and
deporation, depends on the instabilities that open in the process of iterations.\textsuperscript{73} In other
words, the repetition of injury has the potential to sediment but the materialization of
those boundaries is never quite complete. This allows for practices of subversion to upset
the historical chains of iteration.\textsuperscript{74}

These practices of subversion depend on the existence of areas of instability and
are made evident in performative contradictions. Performative contradictions emerge
when norms posited as universal "fail," either by the production of a meaning that
challenges the overarching claims of universality, or by the staging a challenge by the
speech of those that are not authorized to speak.\textsuperscript{75} The gap that is opened is indeed what
makes democratic politics possible in Butler’s account.\textsuperscript{76}

The question that emerges is whether Butler’s suggested mechanisms of
subversion are effective in a world with deeply entrenched structures of oppression. Lisa

\textsuperscript{72} Judith Butler, "Endangered/Endangering: Schematic Racism and White Paranoia," in Reading Rodney

\textsuperscript{73} Butler, Bodies That Matter: On the Discursive Limits of "Sex", 2.

\textsuperscript{74} Ibid., 187, Butler, Frames of War. When Is Life Grievable, 182.

\textsuperscript{75} Butler, Excitable Speech: A Politics of the Performatve, 83-84, 91.

\textsuperscript{76} Ibid., 86-91. Butler’s conceptualization of “performative contradiction” corresponds with Rancière’s
aesthetic conception of politics, in which the excluded subject is the “conflictual actor” that carries a right
“not yet recognized” or witnesses an injustice “in the existing state of right.” Jacques Rancière, "The
Ethical Turn of Aesthetics and Politics," in Dissensus: On Politics and Aesthetics, ed. Steven Corcoran
(London: Continuum, 2010), 189.
H. Schwartzman contends that the possibility of the resignification and subversion of speech having effects over structures of power depends crucially on political movements, an influence that Butler underestimates or at least does not theorize explicitly. In the case of immigration, the transformation of illegal subjects into political actors, and their legitimacy to put forward alternative conceptions of membership depend on a process of social and political mobilization that disrupts accepted discourses that deny their subjectivity. The framework offered by Benhabib does not account for the possibility that immigrants may engage in political activism. My interpretation of Kant’s cosmopolitanism, in contrast, requires it.

**Between Law and Justice: Illegality and Democratic Politics**

This section puts forward a conception of immigration politics that focuses on the potential of political action to disrupt understandings of community and superimpose a logic of equality over exclusion. To illustrate this conception of politics, this section also examines specific instances of immigration politics, including a follow up of the cases analyzed by Seyla Benhabib in *The Rights of Others*. These cases show both the worrying closure of political spaces through securitization and the crucial role of immigrants as political actors that put forward alternative narratives of incorporation.

Undocumented workers are called to respond to the question: “What part of illegal don’t you understand?” I suggest that what is legal, and by extension what is illegal should be the subject a democratic politics that does not limit the group of people that can legitimately speak. Chapter 3 proposed an understanding of illegality as catalyst to political action. In contrast to this understanding, today the adjective illegal is akin to

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processes of legitimation that determine a priori who are the members of the authorized community that will lend legitimacy to the law. This strategy leaves unexamined claims for inclusion uttered by those who are not authorized to speak and denies their political subjectivity. This strategy also leaves out the examination of broader conditions that underlie migration, or the unjust economic incorporation of migrants that illegality facilitates.

The focus of Jacques Rancière on the role of an egalitarian logic in disrupting accepted understanding of community is useful to further conceptualize democratic politics. In one of his theses on politics he asserts:

If there is someone you do not wish to recognize as a political being, you begin by not seeing him as the bearer of signs of politicity, by not understanding what he says, by not hearing what issues from his mouth as discourse.  

To legitimize a priori a community that excludes them and prescribe a benevolent expansion of rights (i.e., without the political participation of the beneficiaries) involves not recognizing immigrants as political beings.

In contrast, Rancière conceptualizes politics as always provisional and embedded in forms of domination. Politics involves an opposition between logics that “count” the community in opposing ways. The egalitarian logic is the logic that counts those that currently have no part in the community. “Police” logic, in contrast, is a symbolic constitution of the community that denies the existence of those uncounted, a denial that is upset by politics.

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79 Ibid., 35.

80 Ibid., 36-37.
Politics involves opening a rift or a gap in accepted meanings of community in order to move in more democratic directions. This view is consonant with Derrida’s understanding of democracy. He claims that “the entire history of a right or a law (either national or international) … is always unequal to justice” and democracy seeks its place “at the unstable and unlocatable border between law and justice.”

This disruption of accepted meanings interrupts the process of sedimentation around an exclusionary norm theorized in the previous sub-section. If successful, the rift transforms the abject subjects who cannot be heard and opens a space for democratic politics to take place.

This conception, in which politics happen when those without rights claim them nonetheless and in the process reconfigure the shape of the community, stands in stark contrast with a recognition of a “right to membership” that cannot be claimed by those that need it because it has to be extended to them by the privileged.

Practices that challenge our understanding of the law in democratic directions can only flourish if anxieties about difference, fear of strangers, and hierarchical conceptions of citizenship and identity are democratically engaged without restricting a priori the source of the challenge. We owe an illustration of such anxieties to the Department of

81 Jacques Derrida, Rogues : Two Essays on Reason (Stanford, Calif.: Stanford University Press, 2005), 38-39. This grounding of Derrida’s conception of democracy in a framework that takes into account the reality of domination can be more illuminating of the challenges that egalitarianism faces in contemporary democratic politics. I find this approach more helpful than recent agonistic and Derridean critiques of Benhabib who identify shortcomings in her framework but offer only indeterminacy or agonist politics in its place. While I agree on the ultimate indeterminacy of politics, I consider the spelling out of the conditions of domination and the hierarchical identities that structure politics to be a necessary first step to illuminate the potential for indeterminacy to tilt in egalitarian and inclusionary directions. Robert W. Glover, "Radically Rethinking Citizenship: Disaggregation, Agonistic Pluralism and the Politics of Immigration in the United States," Political Studies 59, no. 2 (2011), Thomassen, "The Politics of Iterability: Benhabib, the Hijab, and Democratic Iterations."

Homeland Security (DHS) and its division of Immigration and Customs Enforcement (ICE), which introduced the legal innovation of using identity theft laws to transform the infraction of undocumented work into a criminal offense. This maneuver was later declared invalid by the US Supreme Court.83 While taking a job is not necessarily a political action, labor organizing has been a prominent way through which Mexican-Americans act politically. This legal maneuver is part of the continuous construction of the undocumented as criminal. In this case the crime is to deceptively take the identity of rightful Americans. DHS took as its own the mission to police the gaps between the identities given to illegals by external sovereignty and those of workers.84 They seek to pre-empt the contestation of an unjust regime of enforcement and deportation by disqualifying immigrants’ standing through unconstitutional means. The response to illegalities with unconstitutionality is necessary to achieve the overarching goal of criminalization/depoliticization. This event shows that the gaps between identities reflect an uncertainty inherent in a democratic regime. This uncertainty can only be denied at the expense of public spaces, active practices of democracy, and the continuous questioning of received notions of community.

Undocumented migrants and their allies have emerged as visible political actors in the context of the escalation of anti-immigration legislation in Europe and the United

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83 Liptak and Preston, "Justices Limit Use of Identity Theft Law in Immigration Cases."

84 In Paper Citizens Kamal Sadiq investigates the use of false documents by undocumented immigrants residing in developing countries such as India and Malaysia. He argues that the accessibility of false documentation allows immigrants to access benefits of citizens while bypassing the sovereignty of the state as the granting agency. While his argument is restricted to developing countries, the picture in Western countries is partially similar, in that the access to documentation is sometimes heterogeneous and determined by city and state authorities. Efforts to eliminate such heterogeneity by establishing universal and homogeneous requirements for identification are currently under way in the United States through the implementation of the Real ID Act. These measures, as well as those designed to revamp proof of identity requirements for voting, are sure to disenfranchise the poorest members of the community and the elderly, in addition to the targeted undocumented migrants.
States. Their activism demanding legalization, challenging detention and deportation procedures, and claiming for labor rights has been significant. Actions have involved taking buildings as the *sans papiers* in France, marching in the streets requesting immigration legislation that recognizes them as human rather than threatening subjects, and challenging in international courts of human rights the legality of anti-immigrant measures. These actions disrupt the claims of a popular sovereignty that is only inclusive of the formally authorized members because through the performance of political subjectivity immigrants deny their exclusion. The political action of immigrants also contests their labeling as security threats and dangerous subjects, thus weakening claims of external sovereignty that derive their legitimacy from their supposed role of protecting the homeland.

However, an unrestricted understanding of iterations like the one defended in the previous sub-section implies that the opening of a gap in meaning may also allow for a slippage in exclusionary directions. This is the case of the utterance “Latina/o” or “Hispanic” becoming equivalent to “immigrant,” and this in turn appearing as equivalent to “illegal,” which since 9/11 is increasingly confounded with “terrorist.”

A recent tragic case of such a slippage occurred in Germany, when an Egyptian woman was insulted by a German man in the park, being called “islamist,” “slut,” and “terrorist.” When appearing into court to respond for his deeds (after the woman, Marwa

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85 The use of “terrorist” has been more prominent in government reports and discourses that justify the expansion of resources for border fortification, or in the justification of ICE enforcement operations. In a recent operation in a dairy farm in Colorado in which 11 undocumented workers were detained ICE’s News Release read: “Document and benefit fraud pose a severe threat to national security and public safety because they create a vulnerability that may enable terrorists, criminals and illegal aliens to gain entry to and remain in the United States.” Immigration and Customs Enforcement, “11 Arrested Following Their Grand Jury Indictment for Using Fraud Documents to Gain Employment in the Us,” *News Releases*, June 1 2011.
el-Sherbini, filed a legal complaint), the accused uncovered a knife from under his clothes and proceeded to stab el-Sherbini to death. The police, responding to the incident, proceeded to shoot in error the husband of the woman, following once more the equivalence between “islamist” and “terrorist” that gave rise to the event. This may seem an isolated incident, but it is worth remembering that the winning side of the Swiss referendum on minaret construction advertised its position with posters that included veiled women next to minaret towers that resembled missiles. The French government, on the other hand, recently redefined the issue of appearance of fully veiled Muslim women in public spaces as one of “public order.”

The evolution of the headscarf affair, one of Benhabib’s cases of cases of democratic iterations, is yet another reminder of the politicization of difference may result in a process of closure, hardening of borders, and reassertion of exclusion. The decision of the French state that Benhabib criticized has been upheld by the European Court of Human Rights. Furthermore, the transformation of women’s attires and women’s bodies into avowed markers of female subordination that disqualify them as political subjects has become more widespread. Recently, the French state prohibited

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87 Cumming-Bruce, "Swiss Ban on Minaret Building Meets Widespread Criticism."


89 The European Court of Human Rights is an institution that fairly approximates Benhabib’s definition of this realm as the “various human rights covenants” that originate through treaty-like obligations.” Benhabib, "Claiming Rights across Borders: International Human Rights and Democratic Sovereignty,” 695.

full Muslim veils known as *burqa* and *niqab* from public spaces.\(^{91}\) These trends are illustrative of an increasing visibility of Muslim women that does not translate into the recognition of their political agency and claim for inclusion. Instead, the visibility highlights difference, threat, and the impossibility to assimilate. The exclusionary measures directed at Muslim women are invested in aligning the community with universal values of sex equality and secularization, yet their interventions necessarily partition the space of politics and mark these women as unable to speak in public.\(^{92}\) As Lasse Thomassen notes, even Benhabib’s opposition to the measures locates the “majority population” on the side of the universal. In her work, Benhabib encourages French citizens to learn to apply universals evenly in order not to “stigmatize the Muslim minority.”\(^{93}\) The “girls” wearing the headscarf, on the other hand, should “learn to cast their claims in a universalist and secularist language.”\(^{94}\) This is an example of how benevolence works to re-inscribe hierarchies that mark the West as aligned with universal human rights. Non-Western subjects, on the other hand, are pictured as subjects that are not yet capable of acting politically because they are only gradually “learning” the language of universals.

Even discourses that are thought to be pro-immigrants and seek to transform public space in more democratic directions, but work to sediment and reinscribe existing

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\(^{91}\) Erlanger, "France: Full-Face Veil Ban Approved."

\(^{92}\) Mann and Valdez, "Secularism or Veiled Exclusion? Muslim Women and the French State ".

\(^{93}\) Thomassen, "The Politics of Iterability: Benhabib, the Hijab, and Democratic Iterations," 142.

trends of exclusion. This sedimentation is not arbitrary, but rather re-enacts and performs in a new context the discourses of national security and foreign aggression that founded the U.S. immigration regime. Two examples that embed pro-immigrant discourse in the framework of national security illustrate this process. First, the existence of regularization programs that grant citizenship to immigrants willing to serve in the army. Second, the claim of immigrant advocates who request legalization of immigrants that participated in the cleaning of ground zero, appealing to patriotic conceptions of “a nation under attack” in order leverage their claims. These actions do not contest the framework of national security, the same one that constructs identity based on fear, racialization, and rejection of difference.

A further example was the recent Congressional debate of the DREAM Act (Development, Relief, and Education for Alien Minors Act) in December 2010. If passed, the DREAM Act would have provided a path to citizenship for children of undocumented immigrants that arrived to the U.S. when they were under 16. This bill would have given conditional residency to undocumented youth who graduated from US high schools, were of “good moral character,” and had been in the country continuously for at least five years prior to the bill's enactment. The condition for obtaining conditional residency was for them to serve for at least two years in the military or complete two years of study at a four-year college. Those who complied with either requirement would obtain

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95 Also, other political pitfalls follow from the emphasizing of the characterization of immigrants as hard working and willing to perform labor that the rest of the community despises. See Beltrán, "Going Public. Hannah Arendt, Immigrant Action, and the Space of Appearance," 611-16.


“conditional residency” for a period of five years that could be renewed for an additional five years of (still) conditional residence. During this time they would have to pay regularization fees and taxes but would not qualify for federally provided financial aid or to the newly available benefits enacted with the 2010 Health Reform. The version passed by the House was the most restrictive version ever drafted of a bill that has been introduced repeatedly since 2001, and its success, though limited, is no doubt indebted to the addition of the military track. Given the host of conditionalities imposed, the Migration Policy Institute (MPI) estimated that only about 38 percent of those that would initially qualify would succeed in attaining citizenship status after 10 years.

The DREAM Act was amended with the military clause and pushed by Democratic leadership with the explicit support of the Pentagon when hopes of passing comprehensive immigration reform were lost. The bill was ultimately defeated in the Senate through filibuster. House Speaker Nancy Pelosi announced the victory of the bill in the House by claiming that:

It is important for us to recognize the children who are here … their identity is all American, some of them don’t even speak the language of the country of origin of their parents, so many of them come here with this great patriotism, and their families come with this great patriotism. Many of these young people serve in the military, and so they strengthen our national security. Secretary Gates has said:

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99 Chishti, Bergeron, and McCabe, "Dream Act Passes in the House During Lame-Duck Session, but Faces Uphill Battle in Senate."

the DREAM Act represents an *opportunity to expand the recruitment and readiness of our armed services* … (Emphasis added)\textsuperscript{101}

The executive director of an organization supporting comprehensive immigration reform declared about the victory:

This is a huge victory for high-achieving young immigrants who want to go to college and serve in the military, and for the American values of decency, compassion and opportunity. We congratulate the House for this historic vote.\textsuperscript{102}

The most salient dimension of the DREAM Act that was approved in the House is that it does not put in question the justice of the current immigration regime. In fact it is the claim of “innocence” of the children brought in as minors that made this the most palatable immigration bill with a path to citizenship since 1986. The second problematic feature is the definition of the “deserving immigrant” that is implicit in the bill. The highly unequal quality and access to education and higher drop out rates among minorities, coupled with higher poverty rates among undocumented immigrants constitute far from a fair playing field. Without problematizing this the requirement of a high school diploma and the limited options regarding financial aid will necessarily result in a eligible pool that leaves out youth deemed undeserving. High school academic performance ranks applicants according to their deservingness. Based on this ranking, it excludes those in the lower end as undeserving, while channeling those with a high school diploma but no resources into a more straining (and potentially lethal) path to citizenship through military service.


\textsuperscript{102} America's Voice, "Live-Blogging Dream Vote: Today."
More broadly, it singles out patriotic and/or overachieving individuals as the only deserving immigrants, categorizing the rest—by extension—as foreigners not to be trusted or not hard working enough for being granted admission to the American Dream.

A consideration of this legislation from a Butlerian perspective shows that two sets of abject subjects are created. First, the undocumented parents that brought the children into the United States that—by opposition to their children—knowingly and willingly broke immigration laws and trespassed national borders. Second, the undocumented children that are not eligible for the DREAM Act, or that lose eligibility while on the conditional period. Such a group is identified with academic failure, criminality or gang activity, and lack of individual work ethic.

Those that would have been eligible for the DREAM Act, in contrast, are shaped as the idealized subjects that reinforce faith on the myth of fairness that sustains the legitimacy of an otherwise unequal American society. While this group is not singled out as abject, its incorporation reinforces the myth of autonomy and individuality that liberal conceptions of rights presume. In Kirstie McClure’s terms, rights attained through the DREAM Act are not a “problem for sovereignty” but rather a source of reaffirmation or even its necessary product.103

A regulatory intervention (or iteration) such as the DREAM Act involves the partition of the population of immigrants into a privileged few that will attain a certain status based on their potential as highly skilled economic members of the community or as soldiers. Aging or low skilled individuals are in turn denied inclusion and left in the vulnerable (undocumented) status that feeds a replaceable labor supply.

Ironically, the failure of the DREAM Act to pass the Senate and the grim prospects for its advance in the post-election context gave way to productive internal critiques within the youth activist group known as Dreamers. In March of 2011, the Immigrant Youth Justice League (IYJL) organized a set of National Coming Out of the Shadows rallies around the country, and created a website that collected the stories of undocumented youth that publicly declared their status as undocumented. The motto that accompanies the new campaign is “Undocumented, Unafraid, Unapologetic.” Alaa, an immigrant and activist, calls the failed bill “an insult” and recounts her past of denial:

[Keeping my head down whenever I was told I don’t belong here, that my parents are criminal lawbreakers, taking advantage of the system. I was ashamed.]

Today, in contrast, she defines herself as “unafraid and unapologetic” and refuses to blame her parents. She strongly criticizes her own past activism and the compromises made:

We fought this battle on their terms and arguments. We were constantly on the defense. Every time, they yelled “Your parents broke the law. Legalizing you rewards them!” we threw our hands in the air and said “But we were young! We didn’t know! It wasn’t our choice.”

Other “Coming Out” posts by immigrants and allies echo these narratives and call for other undocumented to “come out of the shadows” and “reclaim your identity” regardless of hate and discrimination. Many of these entries are videos of youth identified only by their first names recounting stories with three landmarks: their country

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of origin, the moment in which they found out they were undocumented, and the moment in which they decided to “come out” as undocumented. The life stories suggest a transformation in their self-understanding and the attainment of a political subjectivity through the overcoming of shame, the articulation of a discourse of justice (rather than one of apology), and the participation in collective organizing around the DREAM Act.

The Coming Out stories and the self-depiction of activists as “unapologetic and unafraid” can be seen as a radical intervention in the political sphere. Undocumented immigrants are often described as living in the shadows, something that implies a lack of public and thus political status. Declaring their undocumented status publicly and asserting the injustice of the laws that mark them as such is an act of civil disobedience that requires a commitment to “live in defiance” of immigration laws. In political terms, their appearance and claim for equality involves reconfiguring the public space and declaring themselves part of a community that has chosen to ignore their existence. The logic of egalitarianism ruptures the commonsensical perception of the privileged community that has chosen to ignore them or acquiesced to the detention and deportation regime that keeps them in the shadows.

In parallel to these events, activists are pursuing the strategy of pushing for the introduction of state versions of the failed law, a step that California, Connecticut, Illinois, Maryland, and New York have already taken. These versions cannot regularize citizenship status but would nonetheless make these states “safe havens” for them. The laws proposed would allow eligible undocumented immigrants with residence on those states to qualify for in-state tuition and financial aid as well as obtain a driver’s license,
work authorization, and health care. Moreover, this tactic addresses the state level, one of the most dynamic and contentious spaces of contemporary immigration policy making. Finally, this tactic also asserts the possibility of struggling for novel configurations of rights, not tied to national citizenship and territorial sovereignty.

In sum, the failure of the DREAM Act, and the emergence of novel discourses of rights and justice in its wake provide an example of transformations of subjectivities of immigrant youth and a rupture with exclusionary conceptions of community based on militarization and moral fitness. Their political action takes place in the interval between written rights and the rights that they claim, or—in Derrida’s terms—in the gap between law and justice. Their political activism and Coming Out rallies constitute novel and radical forms of political subjectification that involve rejecting the notions of legal and illegal subjects that currently structure immigration politics. Finally, their continuation of the political struggle in local arenas also problematizes the territorial character of immigration regimes and—in the process—external sovereignty.

Conclusion

This chapter develops a conception of immigration politics through a critical dialogue with Seyla Benhabib’s neo-cosmopolitan framework.

The trust in the passage of time and the expectation that self-reflecting communities come to the realization of their mistake to extend membership to outsiders is historically inaccurate and theoretically insufficient. Dr. Martin Luther King Jr. called his white moderate allies to “reject the myth concerning time in relation to the struggle of freedom,” denying that there is something on the “very flow of time that will inevitably

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cure all ills.”

Time “can be used either destructively or constructively,” he suggested. In immigration, time can be used to challenge the borders of the demos and consider the harms and abuses of power that underlie the regulation of immigration, or to reassert a sovereign prerogative to exclude. I suggest that recognizing the political role of immigrant in upsetting the boundaries of the public sphere and the meaning of membership may be a valuable first step.

A conceptualization of politics that politicizes of the gap between law and justice is more fruitful for the purpose of understanding and critique. Regarding the former, it clarifies that the escalation of anti-immigrant hostility and immigration enforcement aim at closing this gap. Regarding the latter, it illuminates the disjunctures, instability of meaning, and ultimately open the possibility of democratic politics. Such a framework is suggestive of the need to create spaces of politics that allow cosmopolitan subjects to stage their opposition of the conditions of incorporation they are offered and—in the process—to destabilize acquired conceptions of membership and (popular and external) sovereignty.

As the next chapter suggests, dismantling the immigration security apparatuses that permeate the spatial experience of racialized immigrants is a crucial step to create the conditions in which proximity and mutual interaction in a world of migration can be dealt with politically.

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108 King, "Letter from a Birmingham Jail."

109 Ibid.
Coda: Redrawing Borders in *The Three Burials of Melquíades Estrada*

A recent film reflects on the themes discussed in this chapter while avoiding the common risk of immigrant stories to offer a progressive story of success or constructing an ideal immigrant that elicits sympathy from the audience. Using this film, I contend that the borders of the demos are determined by our capacity to acknowledge immigrants as subjects. This coda complements the rest of the chapters focus on the lack of acknowledgment of immigrants as political subjects.

*The Three Burials of Melquíades Estrada* starts with Melquíades’ death, immediately establishing the narrative opposition to the idea of convergence toward cosmopolitanism, staging as well from the start the falsity of the progressive chronology of the American dream.\(^{110}\) The structure of the film evokes the gaps and tensions on existing political communities brought about by the existence of immigrants as members of the community and the response to this challenge reflected by the effort to deny their existence. This denial occurs politically by relegating them to an area of exclusion that is nonetheless regulated, and symbolically by dehumanizing them and making them undeserving of a public life and a proper mourning. The events that drive the narrative forward are, first, the killing of Melquíades and the search for his corpse and the shooter, and, second, the southward pilgrimage of the Border Patrol officer who shot Melquíades. As I suggest below, this travel works to subvert the terms of invisibility that currently characterize the incorporation of immigrants in society. The film depicts possible paths through which our conceptions of borders and community can be transformed.

In the film Pete (Tommy Lee Jones) welcomes Melquíades to the United States and to the Texan ranch in which he works. When they first meet, Pete addresses Melquíades in Spanish, as he will do often when they are alone and talking to each other, and after finding out he is a cowboy [vaquero], he offers him a job at the ranch where he also works.

Most of what we learn about Melquíades is shown retrospectively and in a piecemeal fashion, at the same time that the chronology moves forward with Pete’s quest to give Melquíades a just burial after he is killed. The structure of the film with constant cuts and flashbacks allows us to learn about the development of a friendship between him and Pete. Along the way, Melquíades and Pete exchange gifts, as when the former offers his horse to Pete, or when Pete invites him along when going out with his lover, quite literally offering a friend of hers to Melquíades. They also exchange promises, as Melquíades needs Pete to ensure that he will not be buried away from his hometown, in Coahuila. Pete promises to take him back home if this was to happen.

Pete is probably Melquíades’ only friend, and the only one that struggles for justice when he is accidentally shot dead by the border patrol. Two dimensions of this film offer a perspective on the way in which democratic politics fail in their task of receiving immigrants, or dealing with difference. In the first place, the repeated burying and unburying of Melquíades Estrada, which provides the title for the movie, evokes the tension between the evident existence and need for immigrants as laborers and the effort

111 The patriarchal bent of the narrative in the film is reminiscent of the culture of horse-riding and pastoral life dominant in folklore tales about “Border people” a narrative prominent in foundational Tejano/Chicano texts such as Américo Paredes, “With His Pistol in His Hand,” a Border Ballad and Its Hero (Austin: University of Texas Press, 1958). Chicana feminists such as Gloria Anzaldúa and Cherríe Moraga, among others, have been crucial in juxtaposing views that are critical of the foundational texts and able to put forward a feminist view of the Borderlands. Sonia Saldívar-Hull, "Introduction to the Second Edition," in Borderlands/La Frontera: The New Mestiza, ed. Gloria Anzaldúa (San Francisco: Aunt Lute Books, 1999).
to deny their existence, both by politically relegating them to an area of exclusion that is nonetheless highly juridified, and by de-humanizing them and making them undeserving of a proper mourning.

The second theme is that of imagination and enlarged thought (or lack thereof), that is, the possibility for members of the polity of acknowledging rather than muting the political challenges that immigration flows create in a polity, thus in the process expanding the realm of the demos to include them. The forced pilgrimage across the border that Pete imposes on the officer responsible for Melquíades’ death represents a sort of recognition of the travels that immigrants go through, a recognition that results quite literally in the expansion of the relevant borders of the political community.

*Burying and unburying immigration*

Melquíades is buried three times. The first time, Mike, the border patrol who shot him, tries to cover up his crime by burying Melquíades in the same spot in which he shot him, close to the border and unidentified (undocumented). He’ll be found some days later by hunters. After he is found, and the corpse is sent to the Sheriff, he is buried a second time, now with a plaque made out of a wood that reads “Melquíades Mexico.” The burial follows the decision of not investigating the killing, after the Sheriff is contacted by the killer’s superior (Captain Gómez) and asked to meet him outside of the town diner, in which most of the community converges. The captain explicitly asks for no investigation or prosecution to ensue, after which he and the Sheriff close the deal by shaking hands.

The secrecy of the management of the issue and the leeway for the law enforcement authorities to go ahead with legal procedures is made possible by the categorization of immigration as an issue of security and the concomitant
dehumanization. These issues converge in making immigrants’ lives ungrievable, illustrating how our cultural frames “set limits on the kinds of losses we can avow as loss.”

The film depicts this disavowal of the loss of an immigrant’s life by showing that Melquíades’ death is not brought to the public, it is discussed outside of the diner instead of inside it, where the community gathers. While the lack of legal papers further results in a public invisibility while immigrants are alive, in death, their lack of claim to the public remains. Just as their exploitation at the workplace cannot make it to the public sphere, their death at the hands of border patrol officers or in the process of crossing borders happens in the realm of defense, depoliticized and streamlined judicial controls in order to serve better the purpose of preempting security threats.

The two first burials are marred with hostility and denial of the humanity of Melquíades, made possible by the management of the case in the realm of border security and police. This realm, to which immigration is largely confined in democratic polities, is devoid of deliberation, contestation over values and alternative conceptions of justice. It is a realm in which guarantees are not set to protect the prosecuted, but those to which he/she is deemed to be a threat. It is significant that in the first two burials, Melquíades’ individual identity is irrelevant. In the first case he is not named, and in the second, his name is followed by his country, as if his belonging to such a group is all that was needed to locate him outside of the realm of politics. Once he is identified as Mexican, admittedly only by his looks, he is categorized as immigrant, and illegal at that, and thus

no further identification or care is necessary. Along the film, he is referred to as “that
dead Mexican” and “that wetback.”

Before the second burial takes place, Pete confronts the Sheriff and requests that
he investigates the case and prosecutes the crime, but the Sheriff refuses and even
threatens Pete with jail. Pete’s actions are a direct confrontation of the shape of the demos
and, in particular, of the status of immigrants (Melquíades) as outsiders. As a friend, he
respects Melquiades’ humanity and expects his death to be prosecuted and his burial
wishes to be fulfilled. In this, he clashes with the conditions that societies offer to
undocumented immigrants. Moreover, by clashing he puts in question the stability of the
symbolic partition of the space of politics, and the limited scope of imagination that
results from it. The threatening response of the Sheriff should be understood on these
terms. Pete is threatened with jail for requesting what would be standard treatment for a
citizen, or a treatment guaranteed by international rights regimes, but that does not apply
for undocumented immigrants, and increasingly neither for documented ones.\footnote{I refer here to the increasing trend in restricting basic welfare services, streamlining legal processes, and legislating an extensive range of grounds that justify the deportation of legal immigrants. Susanne Jonas, "Reflections on the Great Immigration Battle of 2006 and the Future of the Americas," \textit{Social Justice} 33, no. 1 (2006), Jonas and Tactaquin, "Latino Immigrant Rights in the Shadow of the National Security State."} Pete is
threatened because he in turn has threatened the disavowal of the violence and loss that
the polity relies on. This scene suggests how the general environment of hostility and
criminalization of immigration affects also those members of the community who are not
invested in maintaining this exclusion. By preventing these welcoming stances from
coming to the surface, it effectively extends intimidation to citizens as well, further
constraining the amount of contestation that can take place regarding immigration.
A second scene reflects the same phenomenon. While the second burial is taking place, Captain Gomez physically expresses some remorse, making the Christian sign of the cross. He receives an angry look from Mike, signaling that such gesture is not welcome, as it signals the inclusion of Melquíades on a community (the Christian one) and thus the humanity of the body being buried and—only then—the guilt of the officer and the naked power that animates the actions of the state. It signals that Melquíades is mournable and blesssable, a quality until then denied to him.

The third burial will happen only at the end of the movie, after Pete abandons hope that the authorities will handle the case justly and takes it into his hands to unbury Melquíades and take him where he wanted to have his final resting place. What happens between this unburying and the final burying, however, is almost as important, as this time the corpse of Melquíades is handled by someone who mourns him and respects his will. This stance takes Pete to politicize Melquíades’ death by involving Mike, his killer, in the travel that is as much geographic as a symbolic process of recognition and avowal, which necessarily culminates in changed borders of the polity. In the next sub-section I investigate how this politicization happens in the film, as it could happen in democracies.

*Imagination and Travels*

The film is invested in making salient the limited scope of our democratic imagination. It does so by choosing a symbolically hostile member of the community, the border patrol officer, to engage in a process of traversing borders and acknowledging the *other* as a subject.

Once Pete finds out that it was Mike who shot Melquíades, he kidnaps him and forcibly has him unbury the body for the second time. After unburying Melquíades, the
two men head south, carrying Melquíades’ corpse. They cross the border in search of Melquíades’ town, where he wanted to be buried, close to his family.\footnote{The fact that force is used to prompt Mike to face the experience of border crossing and care for the corpse of Melquíades may be seen as problematic. However, practices of civil disobedience are often seen as efforts to “force” the consideration of issues that are hidden under a surface of order. Martin Luther King Jr., in particular, noted that societies may not grapple with certain problems unless they have “been forced” to do it, by unburying the tensions that are hidden by the rule of law. Martin Luther Jr. King, "I've Been to the Mountaintop,“ Speech Delivered at Mason Temple, April 3 1968, King, "Letter from a Birmingham Jail." Hannah Arendt, writing on civil disobedience, also underlined the role of instigating change of this practice and the common traits between civil disobedient and revolutionaries, both of which may seek to accomplice changes that “can be drastic indeed.” See Hannah Arendt, “On Civil Disobedience,” in The Crises of the Republic, ed. Hannah Arendt (San Diego: Harcourt Brace & Company, 1972), 75, 80. Cited in William Smith, "Reclaiming the Revolutionary Spirit. Arendt on Civil Disobedience," European Journal of Political Theory 9, no. 2 (2010): 152.}

The reasons for choosing Mike to unbury Melquíades and for making the trip southward are multiple. The first and most obvious is that he is the killer, and as such he is the one who deserves to be punished. However, as a punishment it is a somewhat convoluted and unnecessarily costly for Pete. Instead, I want to suggest that the step that Pete takes is a continuation of his contestation of the borders of the demos, a quest for expanding this scope, which involves forcing Mike to face his fears, to alter the meaning of immigrant that his task depends on, thus transforming Melquíades in a member of the community, deserving of respect, care, and proper mourning. Moreover, the fact that Mike is a border patrol carries the significance that as he moves south the border moves with him.\footnote{As Douglass Massey notes, the category of illegal immigrant did not exist until the creation of the Border Patrol in 1924. Douglas S. Massey, Categorically Unequal. The American Stratification System (New York: Russell Sage Foundation, 2007), 122.}

As noted above, this extension of the demos to include Melquíades goes beyond a simple traversing of the frontier, in that it involves a profound transformation of Mike, and his relationship with Melquíades, whose body he is forced to care for during the trip. In this sense, I see this travel as the process through which the humanity of Melquíades is
acknowledged, the difficulties of the immigrant crossing trip experienced. Ironically, this process only takes place once Melquíades has passed away, an issue that is not devoid of problems. However, it is Melquíades’ will, and Pete’s promise to fulfill it that underlies these actions.

In the case of Mike’s southward travel of recognition, initially by force, I argue that a more profound transformation is at stake, and one that incorporates immigrants into the polity in a way that exceeds enlisting them behind a pre-fabricated conception of national identity or a drive to unity that seeks to eliminate contingency and difference.

One more feature of this travel that must be underlined is the fact that the only face-to-face encounter that Mike has with Melquíades happens when the latter is already dead, and the corpse already in an advanced stage of decomposition. This setup, then, makes salient the strangeness, fear, and even disgust that characterize an encounter with the unknown other. The obligation that Mike has of caring for a decomposing corpse, then, speaks to process of sedimentation of difference and separation that was discussed in the previous sections, of the difficulties of overcoming the set limits to our imagination. The travel, orchestrated by Pete, but ultimately responding to Melquíades’ request, involves the facing of these fears and their overcoming and corresponds to his broader task of upsetting the certainty of a stable and homogenous community in order to uncover the instability of the political.

In dealing with immigration and borders, contingency and difference cannot be eliminated, and it’s not desirable to do so. Iris Marion Young contends that in the absence of the arduous process of communication and exchange that politics require, one is
unlikely to let go of fantasies, prejudices, and misunderstandings about the other\textsuperscript{116}. Instead, she encourages us to start with the assumption that we cannot see from the other’s perspective given that the social reality which we share, including social relations, experiences, and interests, limit the way we perceive, and the possibilities open to each of us.\textsuperscript{117} She suggests instead that we approach communication with a stance of moral humility, hoping to be able to reconstruct together those processes that lie between us and underlie situations of privilege.\textsuperscript{118}

My reading of Mike’s journey across the border transporting and caring for Melquíades involves a process in which he comes to recognize him as a fellow member of the community. At the end of this process, Mike is able to mourn Melquíades as well as the violence done to all immigrants. This process, however, would not have been possible without the recognition of Melquíades as a political subject, whose claims and requests must be heard and honored. A second reading of this recognition is historical and is fitting with the chronological structure of the film given that, after all, we only learn about Melquíades’ life in the United States through flashbacks. In this sense, the journey involves as much honoring Melquíades as about acknowledging the violence and death that the border has witnessed. This acquisition of knowledge is crucial for developing a sense of community [\textit{sensus communis}], which Hannah Arendt, relying in Kant’s work on judgment, takes to be the context in which our political action and our


\textsuperscript{117} Ibid., 350-60.

\textsuperscript{118} Ibid., 360.
political judgment takes place, and that can only be made to happen by letting our imagination visit and by becoming a world citizen in standpoint.\textsuperscript{119}

The very core of democracy is the conflict concerning visibility. And correspondingly, democracy is the state of things in which nobody is very sure of what he or she is seeing because nobody is at his or her “own” place.

Jacques Rancière

The last two decades have witnessed a dramatic transformation of immigration enforcement practices in the United States. In this chapter, I explore the spatial dimension of these changes and the consequences for democratic politics. Immigrants depend on access to public spaces to advance political claims, to resist anti-immigration measures, and to contribute to the transformation of the meaning of membership. I suggest that the built environment that immigrants—Latina/os in particular—face should be a concern for democratic theorists. This is because these spaces produce as well as rely on racialized and exclusionary conceptions of subjectivity and sovereignty. The domestic enforcement of immigration necessarily conflicts with a democratic orientation by representing an exclusionary authority of national security. Federal, state, and local initiatives that target undocumented migrants and “deportable” legal immigrants emerge from particular understandings of community and the law. These conceptions are at odds with a

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conception of democracy like the one defended in chapters 3 and 4. According to this conception, immigrants are political subjects, whose political action questions the justice of their *illegality* and demand incorporation into the political community.

However, chapter 4 also warned about the possibility that polities enact and reaffirm exclusionary conceptions of membership. Iterations may result in the closure of contestation when legacies of racially restricted citizenship laws or racist immigration regulations are brought to the present through hostile political discourse. The increasing in the policing, detention, and deportation of immigrants can be thought of as an anti-democratic iteration, which reasserts the racialized founding of the United States. These iterations are engraved in the spatial transformations narrated below. Its effects are to reduce spaces of politics and the opportunity of immigrants to act politically. It attains this through altering the lived spaces and built experience of immigrants and non-immigrants and by constructing abject racialized subjects deemed illegitimate to appear in public. The closure of spaces is not homogeneous within the United States. I examine Illinois (in particular, the city of Chicago), as examples of places in which immigration activism successfully contested advances of immigration policing and attained progress in immigrant’s rights. This case, together with select others, stands in contrast to the stasis or regression in immigrants’ rights prevalent in the rest of the country in the last two decades.

This chapter also illustrates the intertwined character of the sovereign prerogative to exclude and domestic democratic politics conceptualized in chapter 2. A cosmopolitan approach illuminates the inter-connection and complementarity of realms and anticipates that internal spaces of injury will exist if spaces of politics are prevented from emerging.
The present chapter also extends the critical arguments on the liberal approach. The critique of Carens’ liberal approach in chapter 3 argues that its understanding of the international realm is too abstract to properly appreciate how sovereignty works today. I also criticize Carens’ decision to theorize the domestic and external realm as isolated entities. The present chapter shows how external sovereignty—symbolized in the regime of immigration enforcement—turns inward and layers over potential spaces of politics, ultimately deporting democracy.

Immigration regulation and the spatial transformations it has produced in the United States restrict and close spaces in which politics can take place. Racial profiling, intimidation, and excessive use of punitive instruments such as detention and deportation are measures that seek to silence dissent and critical reflection over the changed shape of the community. Immigration regulations and their implementation in racially unequal polities structure segregated spaces and layer disparate sets of experiences for differently racialized individuals imposes a sensible world in which exclusion and injustice cannot be politicized. This is because the actors that may engage in such politicization are marked as foreign and driven into invisibility. Underlying these policies, actions and discourses is a view of the rule of law and the political community that takes both to be static, unchanged, and not open to reconsideration or contestation.

A public arena in which an open political struggle about immigration can be staged will only exist if immigration policies that rely on widespread policing of residential and urban spaces, detention, and deportation are dismantled. These measures create constrictive spaces in which fear and insecurity dominate the lived experience of American citizens, documented migrants, and undocumented migrants that are racialized
as foreign. These spaces constrict the possibilities of these actors to act politically, to encounter others, address them, and be addressed by them. Anti-immigration laws and—increasingly—executive measures create a broken public space—to use a favorite adjective of the immigration debate. The situation of restricted mobility layers over the already segregated structure of American cities and suburbs to create a network of labor flows and intensive policing, detention, and deportation that circulates without appearing in the landscape of the lives of good citizens. If we take processes of migration to be challenges to the existing shape of sovereignty, and the political action of migrants a crucial step in upsetting the legitimacy of the existing membership boundaries, the spatial transformations of the past two decades are alarming news. These transformations reduce the chances of immigrants’ political claims to advance and stage a struggle for inclusion and for the acknowledgement of the multiple voices and identities that migrants bring to our community. The layering of the spatial transformations of immigration enforcement over domestic spaces in the United States seeks to mute the inherently democratic political action staged by the excluded.

In the rest of this chapter I refer quite generally to the growth in policing and surveillance of immigrants and racialized Latino/as. I can confidently attest to the massive increase in aggregate levels of detention and deportation. Suffice it to say that the United States has deported more immigrants in the last decade than during the previous century (1899-1999). The immigration regime has detained and deported thousands of (racialized) American citizens, an estimated 100,000 parents of citizens, as

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2 Coleman, "The 'Local' Migration State: The Site Specific Devolution of Immigration Enforcement in the Us South."
well as thousands of documented migrants eligible for deportation. Scholarship is also in agreement regarding the qualitative change in the way in which immigration enforcement is implemented, an issue that I also explore in the sections below. However, I do not wish to imply that these transformations take place homogeneously around the country. In fact, the implementation of supposedly sovereign and unique immigration regulations has become a central point of contention in the American polity. Political clashes take place between federal and state authority, between localities and states, localities and the federal level, and between activist groups and all the aforementioned levels. Politics can even be found within Immigration Customs Enforcement (ICE) and the Department of Homeland Security (DHS).

In other words, we observe new mappings of “sovereign” authority that are heterogeneous, segmented, and tentative, that is, non-sovereign. This is why a critique of the way in which immigration enforcement creates racialized spaces of vulnerability must also account for history, resistance, political action, and localized victories. A focus on space considers the built environment as malleable and multi-dimensional yet ultimately localized. By localized I mean that the resulting configuration is shaped by the political context that receives the measures of immigration enforcement. The examination of the case of Chicago in the penultimate section of this chapter attests to this.

3 The technical term for “deportations” used by ICE is removal, but I refer along this paper to deportation for the greater familiarity of the term. The cited figures include exclusively those that were removed from the interior, that is, excluding border patrol apprehensions and subsequent returns. ibid, Stevens, “U.S. Government Detaining and Deporting U.S. Citizens as Aliens.”

Despite recognizing the reality and importance of heterogeneity, an investigation of the exact geographical deployment of immigration enforcement and/or an ethnographic examination of immigrants’ lived experience is beyond the reach of this chapter (and dissertation). The goal of this chapter is rather to reflect on the effects of the built environment on democratic politics and inquire about the way in which immigration enforcement affects such environment.

I develop my argument in the next three sections. The next section introduces the theoretical framework used to analyze space and politics. I discuss Henri Lefebvre’s multi-dimensional conception of space. Next, I explore the political dimensions of space, and their relation to democratic politics. The subsequent section argues that the built environment influences processes of racial formation or racialization. I illustrate this with three spatial realms of immigration enforcement: roads, home and workplace raids, and immigrant detention. This analysis shows how immigration enforcement creates spaces that elicit divergent experiences for differently racialized members of a political community and evacuate politics. Finally, I explore instances of sustained political activism that allow polities to resist the advances of immigration enforcement and struggle for maintaining public spaces that are safe and open for democratic politics.

**Space, Politics, and Democratic Theory**

*What is Space?*

Material spaces like the “outside” or the “border” are interpreted through representations provided by governmental and popular discourses. This set of representations of space (i.e., “conceptual space”) organizes socio-political life.\(^5\)

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\(^5\) I rely on David Harvey’s account of the Lefebvrian concept, this category is also known as *representation of space*. David Harvey, "Space as a Keyword," in *David Harvey: A Critical Reader*, ed. Noel Castree and
building of a multi-billion fence at the US-Mexican border is an example of a materiality that follows from representations of space that tie this space to threat, terrorism, and crime. The fence along the U.S.-Mexico border has grown continuously since its inauguration with Operation Gatekeeper in 1994, yet experts and academics insist on the impossibility of sealing the border. The claims that associate the border area with crime and danger prevalent during the recent debate about Arizona law SB1070 were falsified by FBI and DHS data recently released. As a consequence, the threatening quality of the border is better understood as a powerful representation that mobilizes politicians, bureaucracies and contractors in the construction of a material fence that matches such narrative.

Just as state action relies on discourses that conceptualize space in particular ways, individuals experience these spaces in particular ways. These lived spaces involve the “imaginations, fears, emotions, psychologies, fantasies and dreams” that spaces elicit on us. To continue with the example of the fence, the experience of walking along such a fence will certainly be different for a racialized Latino/a than for an Anglo, as will be the encounter of an armed patrol in such a space.


7 This data shows that the top four big cities in America with the lowest rates of violent crime are all in border states, including Phoenix, Arizona. Also, it shows that Border Patrol agents are less likely to be assaulted than sheriff deputies. Randal C. Archibold, "On Border Violence: Truth Pales Compared to Ideas," The New York Times June 19 2010.

8 I refer here to lived space or space of representation, again following Harvey and through him Lefebvre. Harvey, "Space as a Keyword.", Lefebvre, The Production of Space.

9 Harvey, "Space as a Keyword."
It is *material, conceptual,* and *lived* space that together constitute a determinate political subject and structure as inter-subjective relations.\(^\text{10}\) As I show in the sections below, racialized representations of space abound in the politics of immigration. These representations condition individuals’ lived experience according to their appearance and also the perception of these subjects by government officials and differently racialized individuals.

Debates about immigration are filtered through the intelligible structure composed of material, conceptual, and lived space. As a consequence, certain understandings of the issue of immigration will be precluded by a framing of the outside as threatening and the concomitant push to address the issue through policing and militarization. Similarly, the capacity of certain individuals to appear in public and make their voices heard will be prevented by the perceived hostility of spaces. As a consequence, the possibility of non-racialized individuals to become acquainted with difference, the experience of migration, and the transnational economic flows that are at the root of migration will be significantly reduced through the spatial *framing* effect as well as by the lack of encounter with certain political actors.

A conceptualization of subjectivity as constructed by the built environment is a productive way to approach the issue of immigration. Immigration involves the movement in space and the traversing of borders that demarcate territories and political communities. The heavy use of material and spatial metaphors in the debate about immigration—terms such as invasion, broken, border, crossing, etc.—emphasize that we cannot understand immigration without thinking about space, its representation, and the

\(^{10}\text{Lefebvre, *The Production of Space,* 230.}\)
way it is experienced. The significant transformation of immigration enforcement and its effects over the built environment, provides us with an entry point to investigate the hierarchical processes of subjectivization and the sensory world that acts as a context for the politics of immigration.

*Space and Democratic Politics*

The focus on public spaces and the way in which they structure democratic politics illuminates the processes of creation and negotiation of the meaning of community and membership. Public spaces, such as streets, parks, and shopping malls are continuously “shaped, reshaped, and challenged by the spatial practices of various groups.”

Public spaces may constrain the actions of certain subjects, such as women or non-whites, who can in turn make that exclusion political and counter it by forceful actions to *take* space.

Subjects rely on structures of intelligibility to understand politics and act politically. By structures of intelligibility I mean the aesthetic experience of a world that incorporates existing hierarchies between the inside and the outside and between racialized and non-racialized members of the community that are marked as outsiders. Hierarchies that structure the international system and identify underdeveloped countries as traditional, chaotic, and always in need of assistance mark immigrants even before their arrival to Western countries. I expect these representations, embedded in discourses

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that link immigrants with crime, drug trafficking, and the draining of welfare, to permeate policy-making and *materialize* in space.

An aesthetic understanding of politics recognizes the role of received sensory representations in structuring our political experience and of the radical potential of imagining and working towards alternative arrangements. The denial of the common belonging that spatial orderings may produce restricts the range of responsibility that citizens take as their own and creates spaces of naked power within democracies.

Through public spaces democratic politics allows for its own shape to be put in question. If conceptions of membership are built upon exclusionary identities or coexist with inequality, the possibility of democratic politics depends on putting these structures into question. Political action by the excluded enact a denial of such exclusion by the mere act of taking space and acting as political subjects entitled to be heard. This staging of a (Rancieran) *dissensus* relies and transforms democratic politics. It relies on democracy by taking public space to make a claim to equality, yet it also transforms the existing reach of democracy by transforming the reach of equality and its meaning by including subjects to whom this equality was thought not to apply.

A *dissensus* (as opposed to consensus) presents the community with an alternative world that is in conflict with the received and intelligible world that excludes certain groups.\(^\text{13}\) The intelligible world of immigration enforcement, described in this chapter, consists of laws and spaces that portray as “common sense” the representation of immigrants as *illegals, criminals, and fugitives*.\(^\text{14}\) These representations silence them as

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\(^{14}\) Ibid., 8-9.
political actors. The capacity of politics to open a rift between this sensory world and one based on equality is what Jacques Rancière identifies as the aesthetic dimension of politics.

An implication of Rancière’s approach to democratic politics is that the democratic political community is not a pre-determined entity, but one that is reconstituted every time an excluded group puts forward a new understanding of community through *dissensus*. The idea of community put forward by the excluded will not be unopposed, but it will have the chance of engaging politically with the existing understanding of community. Immigration enforcement as is structured today prevents this political engagement from taking place. As a consequence, it fortifies the existing shape and meaning of membership with dire consequences for the vitality of democracy.

The built environment shapes subjectivity by creating a uniform group that is marked as threatening and similarly constructs the privileged as under threat. Policed spaces also condition inter-subjectivity, by preventing individuals—on grounds of their group belonging—from accessing public spaces in order to challenge stereotypical perceptions, express dissent, contest existing institutions, and encounter others in a public arena. Moreover, when the racially targeted character of the enforcement coincides

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16 Interestingly, this feature has been uncritically captured by the literature on residential segregation by referring to the presence of racial minorities in cities as “minority threats” and operationalizing such variable as “percent black.” See Daniel T. Lichter et al., "Residential Segregation in New Hispanic Destinations: Cities, Suburbs, and Rural Communities Compared," *Social Science Research* 39, no. 2 (2009): 224-25.
geographical segregation, disruption is absent from the experience of those not marked as foreign, further depoliticizing this issue.

The racialization effects of immigration enforcement go beyond excluding immigrants. They also prevent certain racially marked members of the *formal* community from inhabiting the public sphere and being heard. Moreover, they condition the capacity of the public to assess the issue of immigration unaffected by the pre-conceptions imposed by an exclusionary environment.\(^{17}\)

Pre-conceptions obscure the reality of mass migration and deny the political upheaval it is likely to produce. These political transformations do not fit well with the search for comfort that rules the life of privileged citizens, a desire that immigrants partly satisfy by participating disproportionately in caring and service sectors. This search for comfort shapes the way in which individuals deal with the disturbances that characterize diverse communities.\(^{18}\) Resistance, the experience that rouses bodies to take note of the world around them, is shunned in favor of the ability to move without obstruction.\(^{19}\) A law enforcement approach to dealing with transnational migration seeks to purify public and private spaces of “fear, discomfort and uncertainty.”\(^{20}\) This affects the way in which the *formal* community of citizens regards politics and who they recognize as a member of the political community or a legitimate political actor.

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\(^{17}\) This is what chapter 4 conceptualizes as sedimentation and the creation of abject subjects.


Through these mechanisms, the political consequences of global transformations on the receiving countries are muted, even when they are of their own making. The benefits of the undocumented movement of labor are reaped, but the political dimensions that are brought by incorporating members to the community are forcefully denied. In other words, the sensible structure of the polity serves to obscure the fact that illegality is legislated jointly with a system of policing, detention, and deportation that produces the subject of immigrant as threatening, expelling her from the space of politics. Instead of grappling with the socio-economic upheavals brought about by unequal development, trade agreements, and a segmented labor market, external sovereignty acts domestically to shelter the privileged members of the polity from these factors.

Given the context described above, the work of democratic politics must involve opening political spaces and subverting established conceptions of racialized borders, work that immigrants and other members of civil society are currently engaged in. In the absence of such action, one may expect actions in the public sphere to reinforce and re-enact historically rooted practices of racialization.21

Before turning to the analysis of the three realms of immigration enforcement I would like to point out that the contemporary racialization of spaces of transportation, detention, and policing of urban and suburban spaces does not take place in a vacuum. Rather, it is indebted to nostalgic imperial memories of constructions of Mexican-Americans as foreigners and undeserving of citizenship. A postcolonial view of spatiality is central to understanding how relations of power and difference that belong to the colonial past “linger on and are frequently reactivated in many contemporary First World

21 Butler, Excitable Speech: A Politics of the Performative, 51.
cities.” Current transformations reorganize pre-existing categories in order to maintain the authority of the “civilized” by marking it on the subject of the “uncivilized” and—I would add—the space they share. According to Jane Jacobs:

The politics produced by places in the process of becoming or being made anew is, then, also a politics of identity in which ideas of race, class, community and gender are formed. … It is undeniably a politics that occurs and is concerned with the city, but for many groups it is also a politics constituted by a broader history and geography of colonial inheritances, imperialist presents and postcolonial possibilities.

The instances of immigration enforcement that are the subject of this chapter (i.e., immigrant detention, the policing of roads, and the intervention of immigration officers in domestic operations) are different yet related to the historically vulnerable standing of Mexican Americans in the United States polity. Mexican American experiences of land expropriation after the war of conquest, mass deportations, and difficulty accessing public spaces are all features of their historically vulnerable access to public spaces.

The United States never conducted enforcement activities domestically at the levels it does today, kept immigrants in detention on account of immigrant violations, or relied on local law enforcement for detection of “deportable” immigrants. In spite of this, traces of a history of conquest and internal exclusion resonate in the racialized discourses and spaces that organize immigration enforcement today.

Mass deportations, in particular, are not a novelty in American history. Immigration authorities uprooted Mexican-American families in the 1930s, 1950s, and 1970s. These deportations were justified on economic and/or national security reasons. In these instances, the geographic concentration and social isolation of undocumented

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migrants—particularly agricultural workers—facilitated their localization and apprehension. In the case of “Operation Wetback,” which took place in 1954 during the Red Scare, the role of the outside space was crucial—just as today—for justifying these measures. Indeed, arguments about the presence of communists in Mexico, and the possibility that they would enter the United States through an unguarded border, figured prominently in the debate.

Hostility was also elicited when Latino/as visibly occupied urban spaces, acted “uppity,” spoke Spanish too loudly, or—in the case of women—rejected the sexual advances of Anglos. The riots that attacked Mexican-Americans dressed in “Zoot Suits” were allowed to go on without official intervention, as were the earlier lynchings that often became events akin to public spectacles or celebration. The spectacular character of these violent events again brings us into the present, by signaling how the ritualization

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25 Astor, "Unauthorized Immigration, Securitization and the Making of Operation Wetback," 14-19. Even before the 20th century, the spatial vulnerability of Mexican-Americans was actively constructed by intimidation practices that included an estimated 600 lynchings. Lynching, murder, and other violent actions against Mexican-Americans came in response to their refusal to leave their land or cede their mining rights to Anglos in Texas and California. Even though Latino/as had a legal right to their land and to citizenship through the Treaties of Guadalupe Hidalgo and Gadsden, it was evident that their de facto ability to occupy and work their land and remain in their native towns would not be guaranteed by courts’ and congressional interpretations of these treaties. After the 1836 constitution in Texas was enacted, many Mexicans left the newly created Republic toward Mexico to avoid persecution. The abandonment of their communities and means of subsistence is a telling anticipation of some features of deportation. The uprooting of racialized Latino/as then, as the uprooting of the racialized immigrant Latino/as now, can be understood as the effect of processes of exclusionary construction of national identity. Francisco Arturo Rosales, Chicano! The History of the Mexican American Civil Rights Movement (Houston: Arte Público Press, 1997), 6-8. For an account of sources and estimates of lynching see Richard Delgado, “The Law of the Noose: A History of Latino Lynching,” Harvard Civil Rights - Civil Liberties Law Review 44, no. 2 (2009): 299.


27 Ibid., 299-303.
of practices of exclusion is a crucial part of the denial of a share of public space to racialized others.

**Immigration Enforcement and the Closure of Political Space**

*Spaces of Immigration Enforcement*

I offer below examples of three realms of immigration enforcement. Road, raids, and detention are spaces that constrain immigrants’ lived experience with incremental intensity.

1. **Roads**

   You road I enter and look around,  
   I believe you are not all that is here.  
   I believe that much unseen is also here.

   Walt Whitman, “Song of the Open Road”

   In the last two decades state and local police forces have assumed functions of immigration enforcement. Inter-agency collaboration in matters of immigration enforcement was codified in section 287(g) of the Immigration and Nationality Act, added through the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IRIRA). At the time, the Department of Justice prevented its full implementation, a position reversed in 2002. The decision stated that: “[s]tates have the inherent power, subject to federal preemption, to make arrests for violations of federal [civil and criminal]

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immigration law.\textsuperscript{30} In this section I focus on one dimension of the implementation of local enforcement of immigration legislation: traffic patrols and checkpoints.

The highways and roads of the United States have become a trap for immigrants. State and local law enforcement officials, including highway patrols, are enabled by agreements of cooperation with ICE to notify immigration authorities when they find that individuals they apprehend are undocumented.\textsuperscript{31} Many of these patrols have instant access to DHS immigration databases. The prevalence of this mode of detection, and the disproportional number of Latino/as among the motorists stopped has raised issues of racial profiling.\textsuperscript{32}

Although ICE does not release disaggregated data, field research is gradually producing and publicizing this information. For example, data from the North Carolina Sheriff Association and the Franklin county jail in Ohio reveal that among the charges that led to transfers of immigrants to ICE around 50\% are related to traffic enforcement.\textsuperscript{33}

\textsuperscript{30} Ibid., 114.

\textsuperscript{31} While sometimes the agreement does not explicitly include highway patrols, it includes jails to which immigrants are taken in the event of being stopped for a traffic violation and found to be driving without a license. At the time of writing (June of 2011), ICE reported in its website 69 Memoranda of Agreement with local law enforcement entities. Immigration and Customs Enforcement, "Delegation of Immigration Authority Section 287(G) Immigration and Nationality Act," in \textit{Fact Sheets} (Washington, DC: U.S. Immigration and Customs Enforcement, n/d).

\textsuperscript{32} See, for example, lawsuits filed (and some already won or settled) against Sheriff’s Offices in Butler County’s (OH) and Maricopa County (AZ) and the police departments of Alexander (AK), Little Rock (AK), and Scituate (RI). ACLU, "Rhode Island Police Settle ACLU Racial Profiling Lawsuit " \textit{American Civil Liberties Union}, February 3 2005, ACLU, "Sheriff Arpaio Sued over Racial Profiling of Latinos in Maricopa County " \textit{American Civil Liberties Union}, July 16 2008, FOX16.com, "Alexander Officer Found Guilty of Racial Profiling," FOX16.com, March 18 2010, Lauren Pack and Josh Sweigart, "Is Ohio Law on Illegal Immigrants Too Weak?," \textit{Dayton Daily News}, April 28 2010.

\textsuperscript{33} For Franklin county jail 54\% of the charges that gave way to transfers between 2002 and March 2010 originated in traffic violations, while North Carolina figures were 56 and 55\% for 2007 and 2008, respectively. Coleman, 'The 'Local' Migration State: The Site Specific Devolution of Immigration Enforcement in the Us South.', \textit{The Columbus Dispatch}, "Top Charges Leading to Deportation," \textit{The Columbus Dispatch}, December 26 2010.
Similarly, despite the explicit focus of enforcement programs on “criminal aliens,” the overwhelming majority of charges leading to transfers and deportation in these two jurisdictions are misdemeanors.  

The vulnerability of migrants in the highways is constructed through federal, state, and local legislation that prevents undocumented migrants from complying with car and driver license’s regulations. Local regulations were replaced and unified through the 2005 Real ID Act. This act requires that all applicants prove citizenship or lawful immigration status and creates differentiated licenses for permanent and temporary immigration statuses. Even in the absence of traffic violations, states such as Alabama, Arizona, Georgia, and Indiana allow law enforcement to stop individuals when there is “reasonable suspicion” that they may be in the country illegally. Similarly, some states require citizenship or immigration status proofs for the registration of cars. Based on the imposition of such a requirement, the Ohio Division of Motor Vehicles (DMV) cancelled

34 For Franklin county jail 89 and 84% of transfers were for misdemeanors in 2008 and 2009, respectively. For Wake County the 2009 figure is around 80%. Coleman, "The 'Local' Migration State: The Site Specific Devolution of Immigration Enforcement in the Us South.," The Columbus Dispatch, "More Misdemeanors Lead to Charges," The Columbus Dispatch, December 26 2010.

35 National Council of La Raza, "Real Id Act," in Policies (n/d).

over 40,000 car registrations in December of 2008 after their owners failed to provide the required proof of citizenship or legal status.\textsuperscript{37}

The entrapment that awaits racialized Latina/os and undocumented immigrant drivers is compounded by checkpoints. The Investigative Reporting Program at the University of California, Berkeley established that the California Office of Traffic Safety established sobriety checkpoints disproportionally around Hispanic neighborhoods.\textsuperscript{38} While the checkpoints did catch some drunk drivers, they resulted in more impoundments of cars of unlicensed sober drivers, most of them undocumented immigrants.\textsuperscript{39}

The actions mentioned above rely on inter-agency cooperation agreements as well as on hundreds of state and local level initiatives passed in recent years, 208 in 2010 alone.\textsuperscript{40} Together, they have significantly changed the lived space that immigrants and racialized Latina/os face every day.

The description above contrasts with the unequivocal sensation of freedom elicited by cars, speed, and highways in the American imaginary. No description could be

\textsuperscript{37} Randy Ludlow, "Court Backs Dmv's Plan to Revoke Car Registrations," \textit{The Columbus Dispatch}, December 8 2009.

\textsuperscript{38} While Hispanics make up “a quarter of the residents of San Rafael,” 10 out of 12 sobriety checkpoints took place around Hispanic neighborhoods. Ryan Gabrielson, "Sobriety Checkpoints Catch Unlicensed Drivers," \textit{The New York Times}, February 14 2010.

\textsuperscript{39} The same trend was visible in Los Angeles Police Department that recently, after a wave of criticism, decided to allow undocumented immigrants to contact a licensed driver to avoid impounding. Ibid, Joel Rubin and Ari Bloomekatz, "Lapd Limits Impounding of Unlicensed Drivers' Cars," \textit{Los Angeles Times}, March 12 2011.

further from the lived experience that undocumented immigrants have when driving in the highway in policed areas. Given the transformation of roads and highways into prime spaces of immigration enforcement, the experience of many immigrants, rather than a sense of freedom, is one of risk, vulnerability, and extreme awareness of their surroundings.

The tension between freedom and entrapment that highways embody today can be seen as connected to the contradictory functions that highways serve. Historically, the building of interstate highways was justified by the twin goals of military mobilization and national integration. Approved during the Korean War, the Federal Highway Act extended and prioritized the construction for the National System of Interstate and Defense Highways initiated through the 1944 Federal-Aid Highway Act. However, the goal of integration through seamless communication was ultimately defeated by the predominance of principles of business autonomy and local initiative in the implementation of the bills.

The transformation of highways and roads into realms of policing and detention adds a new layer of meaning to these spaces. The strategic location of checkpoints and patrols results in the creation of contrasting experiences for drivers, depending on their

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41 This does not imply that the experience of all non-Latino/as is free and homogeneous. African-Americans are reportedly targeted for stops in larger proportions than their share of the population, particularly when they circulate in “white neighborhoods.” Cotten Seiler notes that until the Civil Rights Act of 1964 the idea of “getting out on the open road, finding yourself, heading for distant horizons” was a privilege of white people. Celia McGee, "The Open Road Wasn’t Quite Open to All," The New York Times 2010, Seiler, A Republic of Drivers: A Cultural History of Automobility in America.


class (car) and race. The car is an object of individual consumption and status that allows for a privileged mobility (vis-à-vis ‘public’ alternatives) and retains a strong individualistic character for the privileged.\textsuperscript{44} These notions of freedom and mastery are absent in the experience that immigrants have of these same spaces. Driving becomes intertwined with fear, with the ever present possibility of being stopped, detained deported and/or—at the least—having one’s car impounded.

2. Raids

Just as the police has metamorphosed into a border patrol, ICE forces increasingly engage in domestic policing activities. In this section I discuss home and worksite raids that extend the reach of immigration policing from public spaces to private spaces of home and spaces of work. Mass worksite raids have been implemented in conjunction with secret trials and the use of identity theft laws to criminalize immigrants, press for collective plea agreements, and expedited deportations.\textsuperscript{45} Operations aimed at homes have been sponsored by special programs focused on the removal of “criminal aliens.” These programs gradually deviated from their original goal and engaged in controversial house searches, involving individuals that were not named in warrants, let alone had a criminal background.\textsuperscript{46} According to ICE data, total detentions made by Fugitive


\textsuperscript{45} Erik Camayd-Freixas, "Interpreting after the Largest Ice Raid in Us History: A Personal Account," \textit{Latino Studies} 7, no. 1 (2009), King and Valdez, "From Workers to Enemies. National Security, State Building and America’s War on Illegal Immigrants."

\textsuperscript{46} Moreover, it should be noted that this strategy in consonance with the well-researched racial biases of the criminal system provide for a process of denationalization of sorts. In fact, it was during the 1990s wave of naturalizations that Congress passed bills requesting more extensive background checks on applicants, at the same time that it was enacting tough-on-crime legislation. Additionally, many of the programs mandate an immigration check without requiring the suspicions of a crime, let alone a conviction, only that individuals are physically brought to local jails. Bess Chiu et al., “Constitution on Ice: A Report on Immigration Home Raid Operations,” (New York: Cardozo Immigration Justice Clinic, 2009), King and
Operations Teams (FOT) increased from 1,900 in 2003 to 30,407 in 2007. Approximately 90% of those arrested in 2007 were immigrants without criminal convictions and/or ordinary status violators.\(^\text{47}\)

A recent report by the Cardozo Immigration Justice Clinic describes home raids as involving “teams of heavily armed ICE agents making pre-dawn tactical entries into homes, purportedly to apprehend some high priority target believed to be residing therein.”\(^\text{48}\) At the time of the report, over 100 FOTs existed, teams that were found to enter and search houses illegally (i.e., without a court warrant and without consent) and detain individuals that were not their targets. Among these “collateral detentions,” over 85% were Latina/os.\(^\text{49}\) Home raids were also conducted by local law enforcement authorized to enforce immigration laws through inter-agency cooperation agreements.\(^\text{50}\)

Home raids involve “pushing or breaking their way into private residences,” seizing “illegally” non-targeted individuals, “seizing innocent people in their bedrooms” and in front of their children, and “illegally seizing individuals based solely on racial or ethnic appearance or on limited English proficiency.”\(^\text{51}\) These extreme measures are justified by the threat that immigrants represent to the community. Special programs

\(^{47}\) Valdez, "From Workers to Enemies. National Security, State Building and America’s War on Illegal Immigrants."

\(^{48}\) See graph 9 and discussion in King and Valdez, "From Workers to Enemies. National Security, State Building and America’s War on Illegal Immigrants," 169.


\(^{50}\) Ajay Chaudry et al., "Facing Our Future: Children in the Aftermath of Immigration Enforcement," (Washington, DC: The Urban Institute, 2010), vii.

involve the chasing of fugitives (who may be unaware of having received a deportation order or missed an audience), immigrants with a criminal background (who may have already been the subject of a trial, conviction, and jail time), and/or said to be involved in gang activity or sexual crimes (crimes that were targeted by special ICE programs, “Community Shield” and “Operation Predator”).

Worksite raids extend the policing and criminalization of immigration from the home to the workplace. Since the first mass raids took place in December of 2006, targeting Swift & Company meatpacking plants in six states, worksite raids have become punitive rituals of immigration enforcement. In the words of an interpreter and university professor called to assist in the aftermath of the 2008 Postville raids, “It is no longer enough to deport them: we first have to put them in chains.” Since 2002, over 18,000 immigrants have been detained in worksite raids. Of these, approximately 15% were criminally charged through the (unconstitutional) use of identity theft laws. The small significance of these numbers with respect to the hundreds of thousands of immigrants detained and deported every year does not reduce the importance of these raids as symbolic operations that subject immigrants to expedited legal procedures in secluded locations.

52 Ibid., 1.

53 Camayd-Freixas, "Interpreting after the Largest Ice Raid in Us History: A Personal Account," 134.


These extreme forms of coercion go beyond policing public spaces and invade spaces of work and family. The framework of material, conceptual and lived space can still help us make sense of the multiple dimensions of this phenomenon.

The expansion of immigration policing into immigrant communities, the home raids, and “collateral arrests” rely on discourses that mark immigrants as criminal and fugitive. This type of policing operates over residential and work spaces that are segregated, so that raids and policing can occur without affecting the lives of privileged citizens. The lived experience of the space of home for immigrants, their families and Latino communities more generally is no longer one of safety. The lived experience is further bifurcated by gender, given that the most vulnerable members of the household and potential victims of domestic violence are hesitant to contact law enforcement for fear of deportation.

Worksite raids—justified through discourses that seek to protect “American jobs”—also affect significantly the lived experience of racialized workers. Employers have been known to collude with ICE regarding raids after workers organized to request improvements in working conditions and they may also threaten to turn in their

56 The residential segregation of Latina/os is particularly prevalent among non-natives, lower income, and newly arrived immigrants. Segregation is a crucial factor in separating spaces of comfort and shelter from spaces of violence and immigration enforcement. This segregation does not mean that families or communities are homogeneously comprised of undocumented immigrants, rather, one out of ten children lived in mixed-status families in the United States in 2001. Mixed status families are those that contain at least one parent that is not a citizen and one child that is a citizen. Michael Fix, Wendy Zimmermann, and Jeffrey S. Passel, "The Integration of Immigrant Families in the United States,” ed. The Urban Institute (Washington DC: The Urban Institute, 2001), John Iceland and Melissa Scopilliti, "Immigrant Residential Segregation in U.S. Metropolitan Areas, 1990-2000," Demography 45, no. 1 (2008), John R. Logan, Brian J. Stults, and Reynolds Farley, "Segregation of Minorities in the Metropolis: Two Decades of Change,” Demography 41, no. 1 (2004).

57 There have been several documented instances of women being detained and transferred to ICE after contacting the police to denounce domestic violence. Human Rights Immigrant Community Action Network, "Injustice for All: The Rise of the U.S. Immigration Policing Regime,” ed. National Network for Immigrant and Refugee Rights (Portland: National Network for Immigrant and Refugee Rights, 2010), 32.
workers.\(^{58}\) This has resulted in a documented deterioration of working conditions for immigrant workers as well as a sense of fear while at the workplace.\(^ {59}\)

3. Detention

This isn't a question of whether or not we will detain people. We will detain people, and we will detain them on a grand scale.

John Morton, Assistant Secretary of Homeland Security and Head of ICE, 2010

The transformation of the spaces of immigration enforcement includes the dramatic growth of immigration detention. In contrast to previous procedure that allowed immigrants to remain free while legal procedures were ongoing, ICE now imprisons almost 400,000 immigrants per year (up from under 100,000 in 2001).\(^ {60}\) On any given day, over 30,000 immigrants are in prison (up from under 20,000 and 5,000 in 2001 and 1994, respectively).\(^ {61}\)

A second emerging practice is the transfer of immigrants away from their communities, families, and opportunities for legal aid.\(^ {62}\) The percentage of detained immigrants with access to legal representation is consistently lower than 50%.

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\(^{58}\) Rebecca Smith, Ana Avendaño, and Julie Martínez Ortega, "Iced Out: How Immigration Enforcement Has Interfered with Workers’ Rights," (AFL-CIO, American Rights at Work, and NELP, 2009), 5.


\(^{61}\) King and Valdez, "From Workers to Enemies. National Security, State Building and America’s War on Illegal Immigrants."

\(^{62}\) Human Rights Watch, "Locked up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States."
Consequentially, many individuals who could have fairly contested their removal get deported. Finally, ICE has been found to maintain poorly publicized detention sites, to offer poor medical attention to the ill, and to have detained and deported thousands of American *citizens* in the last two decades.63

The creation of an overarching detention system with scant due process rights or due publicity is probably the most significant example of closed spaces produced by immigration enforcement. The criminalization of a civil offense, such as immigrating without the proper documentation is enacted by housing all detained immigrants in facilities designed for convicted criminals or detainees awaiting criminal trial. The lack of public access to these facilities, the jailing of families and the secrecy that surrounds procedures in immigration courts further constructs extra-political and extra-legal spaces that affirm and reiterate a fiction of external sovereignty that is enacted domestically.64

Immigration detention has become a contentious issue between the United States and international organization such as the United Nations (UN) and the Organization of American States’ Inter-American Commission of Human Rights (IACHR). The UN Special Rapporteur on the Human Rights of Immigrants visited the United States in 2007 and noted serious concerns regarding detention and deportation. In his report, he singles out the lack of due process surrounding immigrants’ “ability to challenge the legality or length of their detention. While he had been invited by the United States government and


64 Hansen and Stepputat, "Introduction," 7.
had arranged visits to two detention centers, the invitations were cancelled without a satisfactory explanation.  

The IACHR also requested permission to visit detention centers and was able to perform “on-site observation” of six of these sites in the United States. The goal was to “ascertain whether the immigration policies and practices were compatible with the United States’ international obligations in the area of human rights.” They conclude that:

in many if not the majority of cases, detention is a disproportionate measure and the alternatives to detention programs would be a more balanced means of serving the State’s legitimate interest in ensuring compliance with immigration laws.  

Regarding inter-agency cooperation agreements, the report claims that:

The IACHR is disturbed by the rapid increase in the number of partnerships with local and state law enforcement for purposes of enforcing civil immigration laws. … ICE has failed to develop an oversight and accountability system to ensure that these local partners do not enforce immigration law in a discriminatory manner by resorting to racial profiling and that their practices do not use the supposed investigation of crimes as a pretext to prosecute and detain undocumented migrants.  

The intervention of international organizations responds to the fact that detaining immigrants for their immigration violations does not straightforwardly follow from a sovereign right to exclude. By detaining immigrants, a prerogative to exclude is transformed into a prerogative to confine. While sovereign borders prevent people from entering the country, detained immigrants face a much more radical restriction. Moreover, the anxiety that this confinement produces is used by immigration officers to

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67 Ibid., 6.
coerce immigrants into signing away their rights to a hearing, even if legally they could have a chance to fight their deportation.68

The growing and routinized reliance on detention of immigrants inaugurated in the mid-1990s must be understood as the material extension of the construction of all immigrants as criminals, fugitives, and potential terrorists. The lived experience of imprisoned immigrants is too broad a subject for the purposes of this chapter. However, it can be said that the isolation, lack of legal aid, uncertainty, and distance from their relatives and communities when transferred are undoubtedly part of immigrant's experience of detention.

Closure, Fear, and the Deportation of Politics

Metaphors of fugitives and illegality suggest an image of an invaded domestic space that needs to be constantly policed and scrutinized for aliens. These discourses support policy initiatives that restrict the capacity of immigrants to rent in certain neighborhoods, stand at certain corners, or be capable of driving legally.

Governmental discourses ultimately express a desire for a public space empty of immigrants. These discourses support regulations and policing that promote immigrants’ anxiety and reduced mobility at best, and detection and deportation at worst.69 These

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69 The DHS founding document on immigration enforcement “Operation Endgame” proclaims the “endgame” of immigration enforcement to be “the removal of all removable aliens” and encourages the Office of Detention and Removal to “strive for 100% removal rate.” The official report was removed from ICE’s website after the ACLU referred to it in a Boston Globe Op-Ed. ACLU of Massachusetts, "Endgame' Documents: Before and After," American Civil Liberties Union, April 4 2007, Department of Homeland Security, "Endgame: Office of Detention and Removal Strategic Plan, 2003 - 2012 Detention
discourses offer a dramatic shift vis-à-vis the discourses that interpelate non-racialized members of the communities that populate spaces. Highways and roads, ICE raids, and detention become elements of exclusion and oppression that serve to vanish undesirable individuals from the community without disturbing the lives of those not racialized as immigrants and thus unaffected by these measures.

Racialized immigration policing may operate in the same space that non-immigrants populate but makes the lived experience diverge. The sections above explore roads and highways as areas of risk for immigrants, home and work as spaces of vulnerability, and detention as characterized by uncertainty and separation from the community. This experience contrasts with the alternative narratives regarding freedom in the road, privacy in the home, safety in the workplace, and access to legal aid in criminal proceedings.\(^{70}\)

The perception of immigrants themselves, the fears, emotions, and fantasies that these spaces elicit from them, is quite different from what non-racialized immigrants perceive. Immigrants experience public roads and highways as hostile, and the activity of driving (or even being driven!) as a dangerous one. The knowledge of the linkages between local law enforcement and federal immigration agencies feeds into anxiety about

family separation, detention and deportation. This translates into a denial of the right to the place where they live, where their families and communities are located.

Recent surveys and ethnographic studies provide further evidence regarding Latino/as’ perceptions of vulnerability. For example, a recent Pew Hispanic Center survey of Latino/as conducted in August and September of 2010 found that two thirds (68%) of foreign-born Latino/as worry about deportation. This number decreases to 52% when the sample is all Latino/as. Moreover, one third of all Latino/as (32%) say they know “someone who has been deported or detained by the federal government in the last 12 months.”

A March 2011 Latino Decisions survey that polled exclusively Latino/a citizens registered to vote found that immigration reform ranked first (above the economy) as “the most important issue” their community was currently facing. Three quarters (76%) of Latino/as registered to vote thought that an “anti-immigrant” environment exists in United States’ public discourse. Finally, a majority of them (53%) knew someone that was undocumented, and a quarter (25%) knew a person or family “who has faced detention or deportation for immigration reasons.”

Ethnographic studies of border areas and recent research on several counties of North Carolina further attest to the perception of vulnerability and “entrapment.”

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72 Ibid., 11.


74 Coleman, "The 'Local' Migration State: The Site Specific Devolution of Immigration Enforcement in the Us South."., Jones-Correa and Fennelly, "Immigration Enforcement and Its Effects on Latino Lives in Two
Guillermina Núñez and Josiah Heyman’s ethnography of the region near the US-Mexican border define “process of entrapment” as a dynamic phenomenon through which “police and other state agencies impose significant risk on movement of undocumented people.”\footnote{Núñez and Heyman, "Entrapment Processes and Immigrant Communities in a Time of Heightened Border Vigilance," 354.} Undocumented immigrants, in turn:

exercise various forms of agency by both forgoing travel and covertly defying movement controls. ... people are not so much absolutely nailed to the ground as they are partially and complexly impacted by the movement control system.\footnote{Ibid., 354.}

Focus groups among Latino/a immigrants in Siler City (Chatham County) and Roxboro (Person County) in North Carolina convey a similar picture. Michael Jones-Correa and Katherine Fennelly report that “police are a powerful, perhaps arbitrary, presence shaping their daily lives, particularly around the issue of drivers’ licenses.”\footnote{Jones-Correa and Fennelly, "Immigration Enforcement and Its Effects on Latino Lives in Two North Carolina Rural Communities," 22.} The sense of fear “diverts people’s plans to stay in the community, to bring in relatives, or to build homes.”\footnote{Ibid., 25.}

Both Jones-Correa and Fennelly and Núñez and Heyman note that communities rely on word-of-mouth to warn each other about road checkpoints. People will change their routes to avoid them or forgo driving; sometimes denying themselves needed services, such as medical attention.\footnote{Ibid., 26-29, Núñez and Heyman, "Entrapment Processes and Immigrant Communities in a Time of Heightened Border Vigilance," 357.} Finally, Jones-Correa and Fennelly note that the

\begin{footnotesize}
\footnote{\textit{North Carolina Rural Communities."}, Núñez and Heyman, "Entrapment Processes and Immigrant Communities in a Time of Heightened Border Vigilance."}
\footnote{Núñez and Heyman, "Entrapment Processes and Immigrant Communities in a Time of Heightened Border Vigilance," 354.}
\footnote{Ibid., 354.}
\footnote{Jones-Correa and Fennelly, "Immigration Enforcement and Its Effects on Latino Lives in Two North Carolina Rural Communities," 22.}
\footnote{Ibid., 25.}
\footnote{Ibid., 26-29, Núñez and Heyman, "Entrapment Processes and Immigrant Communities in a Time of Heightened Border Vigilance," 357.}
\end{footnotesize}
undocumented immigrants they surveyed are most fearful of home raids. They note that anxiety and fear does not necessarily follow from actual raids, but that even rumors may be “as consequential in their effects as actual ICE raids.”\(^{80}\) The results of this research are particularly notable because neither city has cooperation agreements with ICE.

Finally, it must be said that a feeling of vulnerability is the stated goal in political discourse about immigration enforcement. Bipartisan discourse on immigration openly coincides in the goal to make immigration enforcement as “tough” as possible.\(^{81}\) Opposition to regularization programs is based on them being “too easy on aliens.”\(^{82}\) In other words, the language of vulnerability, fear, and anxiety that I use in this chapter is the other side of the explicit goal of “toughness” that drives immigration enforcement, legislation, and the immigration debate itself.

In sum, material, conceptual, and lived space produce layered spaces polities in which the privileged are able to circulate and benefit from the comfort of infrastructure, speed, and the myriad of services offered by the service/consumer society. This structure consecrates ignorance and disavowal of responsibility for our political choices and reduces the diversity of people that we will encounter in our daily lives, and our knowledge about their experiences. It shrinks the space of politics and the range of


\(^{81}\) For instance, two Democratic senators from Montana that opposed the 2007 bill claimed that the law under consideration did not “go far enough in strengthening the country’s borders” or have “tough enough enforcement measures.” Stevens, States without Nations: Citizenship for Mortals, 10. Emphasis mine.

discourse that can be heard in public. It constructs a sensible world in which privileged subjects do not need to incorporate others’ perceptions or experience, as homogeneous and stereotypical portrayals are readily available.

In conjunction, the materiality of space, the discourses of immigrants as threatening or fugitive, and the production of an experience of fear among racialized members of the community create a polity that can perpetually categorize certain groups as foreign and refuse to attend to them politically, preferring a strategy of policing and silencing. Immigration enforcement transforms space with the goal of making immigrants invisible. The obstacles to their public participation create a realm of democracy that is populated by homogenous individuals and narrow conceptions of responsibility.

Most political theorists accept that the initial founding and territorial delimitation of nation states was achieved through violent means. The question is whether the continued reliance on violence and coercion to secure those borders is legitimate. I suggest that a more apt response to today’s mobility and interconnection is to open spaces of contestation in which politics can provide for new meanings of membership and borders.

Political contestation is already occurring, a proof that the widespread policing of roads and highways has not been fully successful in preventing immigrants from taking spaces and transforming areas that seek to exclude them into public spaces. Taking spaces requires a transformative action on the part of those who are in principle excluded from those realms. By taking spaces, immigrants must put forward understandings of membership that contradict the messages that spaces of immigration enforcement convey.

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Politics and the Taking of Spaces

Sanctuary cities are an example of spaces that offer an alternatively understanding of membership and democratic politics. In the rest of this section I examine the case of the city of Chicago, which has managed to maintain a space sheltered from the most extreme advances of immigration policing. As I show below, these spaces were not given to immigrants and Mexican-Americans but rather had to be taken through political struggle.

Historically, access to space was problematic for Mexican immigrants and Mexican-Americans since their arrival as replacement labor during World War I. Mexican-Americans were prevented from settling in all but two Chicago neighborhoods when they first arrived. In the 1970s, they were displaced from one of their traditional neighborhoods, the Near West Side by projects of urban renewal. These communities faced housing discrimination in their new areas of settlement and had to contend with police hostility. Their access to space was also vulnerable to immigration enforcement. Mexican-American communities were decimated through deportation during the Great Depression and the 1970s.

In response to these vulnerabilities and to address broader issues of education, health, and poverty in the community, immigrant and Mexican-American communities

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84 Lilia Fernández, "From the near West Side to 18th Street: Mexican Community Formation and Activism in Mid-Twentieth Century Chicago," *Journal of the Illinois State Historical Society* 98, no. 3 (2005): 163-64.


gradually built thick networks of community organizing. Much of this activism took place during the politicized time of the civil rights and anti-war movement, but it engaged with concerns specific to Mexican-Americans and immigrants in Chicago. In 1976, the Immigration and Nationality Service for the first time in history opened a “community relations committee” in Chicago, in response to mass demonstrations against deportations in 1974 and 1976. In the 1980s, political organizing and alliances with African-American leadership allowed for advances for minorities’ representation in elected office. In 1983, Chicago elected its first African American mayor, Harold Washington, who created the city’s first Advisory Commission on Latino Affairs.

Immigrants’ political influence was strengthened by the path to citizenship granted by legislation in 1986 and the federal funding for community organizing that this law provided. New waves of immigrants were also given a voice through forums such as Local School Councils and workers’ centers. Finally, the emerging immigrant friendly leadership of the AFL-CIO expanded its immigrant membership and organizing efforts towards the service sector. This organizing network was crucial to fund and organize the Chicago branch of the massive 2006 immigrant marches, as well as local demonstrations and direct action against anti-immigrant initiatives.

Amalia Pallares and Nilda Flores-González note that many of the leaders of the immigrant rights struggle started their activism in the 1970s and 1980s in community

87 De Genova, Working the Boundaries: Race, Space, and 'Illegality' in Mexican Chicago, 127.
89 Ibid., 15.
90 Ibid., 16.
organizations. Moreover, they claim that a significant departure from previous activism is that today’s Latino/as are no longer divided regarding the struggle of the undocumented, as they were in the past. The authors suggest this change is grounded in “political and social solidarity in a period of perceived persecution” as well as “cultural and transnational affinities in an increasingly globalized world.”

This is a necessary context to understand the passage of a sanctuary ordinance for the City of Chicago in 2006 and other non-cooperative positions taken by Chicago and Illinois public officials facing advances of federal immigration enforcement. Chicago staged the biggest immigrant marches in 2007 and 2008, and it is home to the first church to provide sanctuary to an undocumented immigrant (Elvira Arellano, whose story opens this dissertation).

Most recently, the state of Illinois opted out from Secure Communities, a federal program that mandates states to run every individual detained by law enforcement through a DHS immigration database. The decision to opt out of the program followed

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92 This does not mean that no immigrant from Chicago is detained or deported, but that certain mechanisms of cooperation through which immigrants are channeled into federal custody are resisted by Chicago or Illinois authorities and law enforcement. ICE officers can still conduct raids in the area, and jail screenings and other ICE programs can be as well implemented. Sanctuary provisions also does not prevent neighboring localities from enacting ordinances that target immigrants, as it has been the trend in the outlying parts of Chicago’s metropolitan area. Gzesh, "Latino Immigrant Leadership in Chicago: Historical Antecedents and Contemporary Questions," 17, Judy Keen, "Big Cities Reluctant to Target Illegals," USA Today, June 19 2006, Lynn Tramonte, 'Debunking the Myth of 'Sanctuary Cities.' Community Policing Policies Protect American Communities,' in Special Reports (Washington, DC: Immigration Policy Center, 2011).


94 In the letter to ICE, Governor Pat Quinn justified his decision in the deportation statistics for Illinois, which attested that 30% of those deported under this program had never been convicted of any crime, and that less than 20% of all deported had ever been convicted of a serious crime. He argued that this constituted a deviation from the stated purpose of the program, “to identify, detain, and remove from the
activists and immigrant’s rights groups’ complaints. These groups pressed the governor and documented cases of deportation, family separation, and abuse experienced by immigrants. Some of the same groups that opposed Secure Communities participated in lobbying and campaigning for the state DREAM Act. In particular, the Illinois Coalition for Immigrant and Refugee Rights (ICIRR) and the Immigrant Youth Justice League (IYJL) were crucial in pushing through the first state level version of this legislation. Early in June of this year, the Illinois DREAM Act passed the Senate and the House and is currently awaiting the Governor’s signature.95

The experience of Chicago shows that the political action of immigrants and their allies is necessary to keep spaces of politics open and free of racialized policing. Decades of political organizing facilitated a democratically inspired defense of a right to public space that resonated with the Chicago community. This allowed the city and—to a lesser extent—the state of Illinois, to defend public space against the exclusionary logic of sovereignty.

More generally, this case shows that access and protection of public spaces has become a central arena of struggle in immigration politics. Egalitarian and democratic logics clash with racialized assertions of sovereignty that police, detain, and deport. Immigrant groups’ activism has also figured prominently on New York and

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Massachusetts’ decision to opt out of Secure Communities.⁹⁶ In taking this decision, these three states openly challenge Homeland Security, which asserted that the program is mandatory and localities cannot decide to “exclude themselves.”⁹⁷ Political activism is not always successful in delegitimizing the existing sensory world that marks all immigrants as criminals and partitions space racially.⁹⁸ Moreover, vocal groups that oppose sanctuary provisions and demand an even harsher approach to immigration enforcement exist and carry weight in numerous states and localities.⁹⁹ The efforts of the DHS to mandate states to implement surveillance measures as well as federal raids conducted in states’ jurisdictions are further evidence of an advance of sovereignty in domestic spaces.

Conclusion

In this chapter I outline the transformations of domestic spaces of immigration enforcement and theorize the consequences over democratic politics. Through a combination of federal, state, and local initiatives, immigration enforcement has invaded spaces of transportation, work, and home. This spatial transformation has resulted in a palimpsest, where built environments provide divergent lived experiences to differently

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⁹⁸ For example, former New York Governor Eliot Spitzer’s executive order to grant driver’s licenses to undocumented immigrants was quickly overturned by the NY Senate. The governor had vowed not to “permit the DMV to become a surrogate Immigration and Naturalization Service.” Nicholas Confessore, "Senate Votes to Stop Spitzer Plan to Give Illegal Immigrants Driver’s Licenses," *The New York Times*, October 23 2007, Carla Schuster and Susana Enriquez, "N.Y. To Allow Drivers Licenses for All. Illegal Immigrants Will Soon Be Able to Drive in the State Legally," *Los Angeles Times*, September 22 2007.

⁹⁹ One of the provisions of Arizona’s law SB1070 was to disallow any locality from adopting sanctuary provisions, a directive that Texas Governor Rick Perry hopes to pass for his state as well. Ross Ramsey, "Special-Session Time, but to Whose Advantage?," *The New York Times*, June 2 2011.
racialized subjects. The same spaces transmit contrasting messages of access versus exclusion, freedom versus imprisonment, and security versus fear and vulnerability. The transformations construct subjectivity and inter-subjectivity and—when successful—exclude racialized individuals by marking them as threatening fugitive aliens that cannot speak in public.

The fear of detention and deportation curtails the capacity of migrants to take spaces by restricting their physical mobility and their capacity to enjoy privacy in the home and safety in the workplace. These practices of exclusion prevent processes of democratic renegotiation of the meaning of membership and result in the fortification of the borders of a racialized community.

Immigrants struggle through political action to prevent and retract these transformations. Their activism involves taking the spaces invaded by immigration enforcement, requesting acknowledgement as part of the community, and putting forward novel and egalitarian understandings of membership. Through immigrant political actions, concepts of law, sovereignty, and membership remain open to democratic contestation. The availability of public spaces where dissent can be enacted and diverse political subjects can meet is crucial for these struggles to take place.
CHAPTER VI
COSMOPOLITAN POLITICS AND FRAGMENTED SOVEREIGNTY

In this dissertation I make a contribution to the debate on immigration. I theorize a political cosmopolitan realm that leads to a reconceptualization of both external sovereignty and democracy. A cosmopolitan approach incorporates immigrants as political subjects and recognizes their role in challenging sovereignty from within.

Figure 1 shows that immigration involves three crucial actors: (i) individuals (immigrants and citizens in receiving countries); (ii) domestic governments (which represent both recipient countries’ government, vis-à-vis citizens, or the governments of countries from which immigrants come from, vis-à-vis immigrants); and (iii) foreign governments (countries where immigrants reside). The inter-dependency between these three actors defines three different realms: The interaction between individuals and domestic government is the domestic realm; the interaction between governments (domestic and foreign) is the international realm; and, finally, the interaction between individuals and foreign governments constitutes the cosmopolitan realm.
The existing literature has so far not focused on the cosmopolitan realm.¹ Scholarship focuses instead, on the one hand, on the international realm of sovereignty in order to scrutinize the legitimacy of sovereign immigration controls. On the other hand, scholars assume the legitimacy of sovereignty and examine immigration through the lens of democratic theory. This approach retains the community of formal citizens as those leading the decision-making in the domestic realm. This is worrisome, given the growing importance of cosmopolitanism in a world of mass migration. In such a context, neither domestic governance structures nor international organizations constitute a legitimate authority to regulate interactions between governments and non-citizens. My dissertation, in contrast, argues that the cosmopolitan realm is a necessary starting point for a

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¹ While Seyla Benhabib’s work focuses on the cosmopolitan realm, she defines it as a realm of values, as chapter 4 discusses at length.
normative critique of immigration politics. This critique maintains a cosmopolitan orientation even while it reaches into the realms of sovereignty and domestic politics.

In a world of mass migration, the legitimacy of the international and the domestic realms in isolation is insufficient to legitimize their authority over migrants. Regarding the international realm, inequality of power in the international realm prevents certain states from ensuring the protection of their own citizens abroad. This produces spaces of domination and potential injury when migrants from poor countries reside in Western countries and requires cosmopolitanism to prevent it. Regarding the domestic realm, a traditional conception of popular sovereignty locates immigrants within spaces of domination. As a consequence, it is normatively necessary to theorize a complementary cosmopolitan realm. The cosmopolitan realm provides a justification for recognizing immigrants’ contestation of such situation as political and complementary to a conception of democracy that emphasizes the need for open spaces of discussion and negotiation of its own shape.

The political conceptualization of sovereignty proposed in chapter 2 relies on a novel reading of Immanuel Kant’s cosmopolitanism. This reading recovers the concern of Perpetual Peace with hierarchy in the international sphere and complementarity between the domestic, international and cosmopolitan realms. No approach to immigration today considers the unequal international balance of power to be a feature relevant to theorizing. I show that when this feature is explicitly incorporated, the justification for sovereign border controls grows weak, given the potential for injury that it creates in an unequal world. The emphasis on a political conceptualization of cosmopolitanism highlights that it is immigrants who as (non-citizen) members of polities who act
politically to put in question the existing shape of sovereignty. This contrasts with prevalent moral readings of Kant’s cosmopolitanism and results in the normative focus on immigrants’ legitimate challenges to both external sovereignty and the self-understanding and shape of the democratic community.

Cosmopolitan spaces of politics emerge whenever non-citizens contest the conditions of sovereignty and the existing shape of the community (the people). By ignoring this realm of politics, theorists take sovereignty and existing shape of the community to be static constructs and grant them a priori legitimacy. As this dissertation explains, ignoring the cosmopolitan realm of politics also prevents theorists from uncovering spaces of injury within democracies.

A political cosmopolitan approach, in contrast, reveals that in a world of mass migration sovereignty is not a coherent authority emanating from states. Rather, it is a force that operates domestically and transforms spaces of politics. In these spaces, sovereignty is politically contested, fragmented, and localized. In other words, it becomes non-sovereign.

Chapter 3 criticizes liberal approaches of freedom of movement for their stylized and depoliticized treatment of sovereignty. Hierarchy in the international sphere plays no role in the principled opposition to external sovereignty. Politics, in turn, is absent from the opposition to sovereignty, which is fully justified on liberal principles of world equality and/or freedom of movement. I argue that Carens’ reliance on universal principles and the assumption that Western societies should extend them to immigrants runs into two problems. The first is the equivalency that Carens constructs between the

2 An exception to the latter claim is Joseph Carens’ ideal work that explicitly challenges the legitimacy of sovereignty.
Western world and human rights principles, upon which his argument is built. As chapter 2 (and the growing literature on Enlightenment and Empire) shows, universal principles of equality and self-determination were continuously curtailed in scope through hierarchical arguments. Related to this is the second problem, namely, that the mechanism through which immigrants are incorporated into their new communities is a benevolent extension of membership by the hosts. This misrepresents the way in which extensions of membership are won but also significantly obscures the role of politics and democracy in this process. Ultimately, a humanitarian extension replaces contentious immigration politics.

The fragmentation of sovereignty referred above does not mean that this institution is easily malleable or fully indeterminate. Chapters 4 and 5 reflect on the phenomena of anti-immigrant hostility and growth in domestic immigration enforcement. When exclusionary origins and dehumanizing discourses permeate the political sphere, political contestation is prevented. Immigrants, declared abject subjects, find it difficult to appear publicly and make a legitimate claim against their exclusion. The example of the failed DREAM Act is illustrative of how national security frames the immigration discussion in the United States. Given this framework, only an initiative legitimized through its contribution to “military preparedness” was able to make it to a vote in Congress. If successful, the DREAM Act would have further solidified the exclusion of those that were not young, achieving, and patriotic subjects.

Chapter 5 expands the theorizing to the spatial dimension by analyzing the transformation of spaces of immigration enforcement in the last two decades. A broad expansion of domestic policing, detention, and deportation has resulted in transformed
lived experiences for racialized immigrants. The deployment of immigration enforcement, however, had to contend with varied local contexts, pointing again to the importance of immigrant political activism, current and past. State and city governments in the United States have been active in passing legislation that prevents, tailors, or contradicts the sovereign authority of the federal government. The role of immigrant activists (as well as, naturally, nativist and anti-immigration advocates) is crucial to understand the legal and spatial changes that have taken place in these localities. In this interpretation, harsh anti-immigrant initiatives passed by Arizona, Indiana, and Alabama curtail the authority and legitimacy of what they claim to be asserting; national sovereign borders.

It is in this complex context in which immigrants act politically. As noted above, their action challenges and influences the shape of both external sovereignty and the democratic community. The resources of coercion that are deployed against them are significant, and barely measured by the deaths at the border and the violence involved in the enforcement of immigration legislation. In the light of this dissertation, state actions appear as an intervention devoted to close off spaces of politics in which immigrants and their allies can stage their case for justice and equality. These actions involve the spatial and discursive interventions that frame immigration as an issue of crime, national security, and illegality. While policed spaces discourage immigrants’ mobility and participation, hostile discourses delegitimize their voices.

Through this dissertation I have relied on a conception of democracy that privileges disagreement and dissensus over the rule of law. Rancière defines politics as those actions that resignify right and expand the range of application of equality. Spaces
should facilitate the action of the excluded who will *use* rights that they do no have to unseat commonsensical conceptions of who is equal and deserving of membership in a community. In this context, I see immigrants’ political action as an inherently democratic force, one that relies on the contentiousness of equality and justice to argue against their restricted scope. Within this framework it is difficult to legitimize any kind of immigration enforcement that operates domestically. This prescription applies particularly to polities characterized by racial hierarchies, given how immigration enforcement layers over and intensifies these markers of exclusion.

A theory of immigration will always be interrogated about its prescription regarding territorial borders and the prerogative of states to exclude newcomers. This dissertation has explored in depth the reasons why a sovereign prerogative, when combined with an unequal balance of power internationally, results in abuses of power and excessive coercion toward immigrants. These regimes do not necessarily operate solely within territorial borders, as the European Union’s initiatives to establish offshore refugee processing camps to preempt arrival show.³

More broadly, as globalization connects the world ever more tightly, social and economic decisions in dominant countries have significant effects over societies in peripheral countries. Regardless of this, sovereignty acts as a barrier that claims to enclose political responsibility as well as territory. As such, it is a dangerous representation that disavows the consequences of polities’ decisions and converts all obligations towards the outside into *assistance* or *humanitarianism*. In this context, the

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significant material and symbolic resources countries invest in defending sovereignty can be seen in a Kantian light as “veils of injustice” that attempt to justify power.⁴

In other words, I see many reasons to question the legitimacy of the institution of sovereignty. However, the conceptions of democratic politics and rights that I have defended in this dissertation are attuned to the way in which rights and principles get deployed by particular actors in particular historical instances and in opposition to particular structures of power. As a consequence, to prescribe an end to sovereign borders would be to enact a definition of rights that would replace the process of contestation over their meaning. Instead, I suggest that illuminating the actions and vocabularies of political actors working at the limits of power is a necessary first step. This examination should feed into the rethinking of the institution of sovereignty in directions that are more welcoming of these actors and their demands for transformation.

⁴ Kant, The Metaphysics of Morals, 6:266. This is not to diminish the importance of “material” investment. In 2009, the EU received 250,000 applications for asylum, a number that is only half as big as the number of border guards employed by the union. Bjarte Bandvik, "The Eu's Dubious Refugee Deal," The Guardian, October 20 2010.
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