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Commentary on “Bordering by Law,” by Judith Resnik
For NOMOS volume on *Immigration, Emigration and Migration.*, edited by Jack Knight
Jennifer L. Hochschild
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Two thirds of the way through her fascinating chapter, Judith Resnik lays her normative cards on the table:

Another possibility – at the core of my discussion – is that migration ought not to be seen as wrong in either sense [as a “crime, constituted by the willful failure to respect the sovereignty of a polity” or as a “civil tort of trespass”], even if it can be subjected to regulation based on the concerns for the wellbeing of migrants and of the receiving community. ‘Legalization’ is typically used in reference to changing the status of those present in the country, but its deeper purchase would be to override the idea that border-crossing without permission is illicit. (p. 29 of my version).

Resnik is, in short, a proponent of almost open borders and almost complete “amnesty” for unauthorized immigrants, as am I. That puts us in the company of a handful of excellent scholars who take the idea of open borders seriously [(Carens 2013); (Shachar 2009); (Wellman and Cole 2011)], a few advocacy groups or websites (for example, <http://openborders.info/blog/welcome-to-open-borders/>), and almost no citizens of developed, western countries. Being in a tiny minority does not make us wrong, of course; at various historical moments, few people thought that the earth traveled around the sun, the earth was round, slavery was unjustifiable, or women were morally and mentally equal to men. But it does tend to put us on the defensive, and make us overemphasize state failures and undervalue state accomplishments. That, at any rate, is what I will argue here.

“Bordering by Law” has three major themes. First, the United States is strongly and increasingly criminalizing immigration and stigmatizing immigrants, to the detriment of everyone. Second, the United States is engaging in more and more harmful surveillance of migrants as well as citizens. Third, the history of the Universal Postal Union provides a model for how to overcome nationalist solipsism, as well as a warning that the virtues of public governance are threatened by privatized services. This commentary focuses mostly on the first theme, which also takes up the bulk of Resnik’s chapter. I disagree to some extent with her characterization of the trajectory of policies surrounding immigration and immigrants, and I aim to substitute a more complicated and multifaceted characterization. I engage only briefly with her second theme, with which I mostly agree. Her final theme provokes several larger questions, which I explore but do not try to answer. My overall message, perhaps not surprising from a political scientist, is that we need more political analysis to fully understand the United States’ ambivalent treatment of migration and migrants.

“Legalizing, Illegalizing, and Criminalizing Migration”

Resnik argues that the United States has fallen off from its high point of recognizing non-citizen migrants’ civil rights, which came in the 1941 Supreme Court decision of *Hines v. Davidowitz*, (312 U.S. 52, 71). She refers to the case at many points in the article and devotes several pages to its exposition. *Hines* is indeed inspiring, holding that Pennsylvania’s system of registration

for migrants who had not declared the intention of becoming American citizens was “a departure from our traditional policy of not treating aliens as a thing apart.” *Hines* also held that Congress was the appropriate forum for “protect[ing] the personal liberties of law-abiding aliens” while leaving them “free from the possibility of inquisitorial practices and police surveillance that might not only affect our international relations but might also generate the very disloyalty which the law was intended to guard against.” (these three quotations are from the decision, as quoted by Resnik). In short, as Resnik puts it, “the United States Supreme Court spoke about protecting human liberty in general terms. . . [and] rejected making public stigmatization a facet of the government-alien relationship.” (p. 15 of my version).

Since 1941, in Resnik’s telling, there has been a slow but steady downhill slide in the protection of immigrants’ rights and a corresponding increase in the “criminalization of migration” (p. 5). She describes and criticizes the recent hardening of the United States-Mexico border, the expansion of locations that count as legal borders and thus permit heightened control of individuals’ movement, the rise of state laws hostile to migrants, the Court’s retreat from concern about immigrants’ rights to the more bloodless assertion of federal preemption in migration law, the use of local law enforcement agencies to oversee and harass migrants, increasing deportation of non-citizen migrants, laws requiring employer sanctions for hiring unauthorized workers, and other ways of stigmatizing and criminalizing immigrants. It is a daunting and depressing litany.

And yet this litany seems to me incomplete--and even misleading in the sense that it leaves out the other side of the picture. One can make a plausible case that the United States is among the most liberal polities with regard to immigration and naturalization, that its policies and practices have improved over the past century, and that our recent history shows substantial efforts to incorporate undocumented migrants. That case by itself would also be exaggerated – as much in the flattering or optimistic direction as Resnik’s case is exaggerated in the critical or pessimistic direction. The real question is how and why the United States and its various elements engage in such a contradictory mix of policies and practices that include, permit, stigmatize, and exclude people who make extraordinary efforts to live within our borders.

Birthright Citizenship: Resnik does not discuss this rule, perhaps because it has not changed over the twentieth and twenty-first centuries, but it seems a crucial starting point for any analysis of policies with regard to migration and migrants. The United States is one of only two large wealthy polities (the other is Canada) to offer birthright citizenship. Unlike in Canada, American birthright citizenship is constitutionally protected: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside” (U.S. Const. amend. XIV). Constitutional inertia matters, since other large western states, including Australia, Ireland, India, New Zealand, and the United Kingdom, have rescinded laws or birthright citizenship in recent decades.¹

¹ According to MIPEx (see text in next section), the United States is eighth out of thirty-one western nations with regard to immigrants’ access to nationality. Portugal and Sweden have the highest scores, 82 and 79 respectively; the United States is scored 61; and the lowest-

Birthright citizenship is highly consequential for unauthorized immigrants and their families. As of 2010, about 10.2 million adult unauthorized immigrants lived in the United States, along with roughly another million younger than 18. About 4.5 million children were born in the United States into families with least one unauthorized immigrant parent (Taylor et al. 2011). Thus at least nine million people live in mixed-status families in the United States. Their situations are complex and can be difficult (Zimmerman and Fix 2014). But the fact of birthright citizenship protects our country from the severe political, economic, social, and cultural problems attendant on having second and third generation “foreigners” as in many European states.

More generally, 15.2 million American citizen children have at least one foreign-born parent, some but not all of whom are naturalized citizens (Nwosu et al. 2014). Although too many remain subject to the sorts of harassment that Resnik describes, those children at least have the full legal standing of American citizens. This again contrasts favorably with children in many European countries (Hochschild and Brown 2014).

Relatively Open Immigration Laws: Given the vituperation involved in recent immigration debates, it seems perverse to describe the United States’ immigration policies as open in any way. But they are, relative to those of many comparable countries and to our own history for much of the twentieth century. I address that history below; consider here some international comparisons. The United States is tied for tenth among thirty-one countries with regard to family reunification policies, according to the well-respected Migrant Integration Policy Index (MIPEX).² That is hardly stellar, but it is not disgraceful. Well-off western states with less favorable family reunification policies include the Netherlands, the United Kingdom, Germany, and France; Canada, Spain, and Sweden are more generous with regard to family reunion.

The United States is also relatively generous in permitting poor and poorly-educated people to enter the country legally. There is no complete or fully compelling database that compares immigration policies across nations,³ but the extensive literature comparing particular subsets of countries usually depicts the United States as among the more open to newcomers from around the world [(Joppke 2005); (Hochschild and Mollenkopf 2009)]. The most recent and systematic comparison of immigration policies includes eleven major European Union immigration destinations, although not the United States. It shows that nine of the eleven states have selective policies and/or point based systems that give preferential admission for those with considerable education and professional skills (European Parliament 2011): table 20). So do Canada and Japan. The United States’ looser criteria for legal entry may well be an economic mistake, but they do have the effect of enabling low-skill and poorly educated individuals to enter the United States with comparative ease.

scoring nations are Estonia and Latvia at 16 and 15 (<http://www.mipex.eu/access-to-nationality>).

² <http://www.mipex.eu/family-reunion>. The US scores 67; the highest ranking nation is again Portugal at 91 and the lowest is Ireland at 34.

³ One is coming; see (Gest et al. 2014).

Exclusion: Birthright citizenship and relatively easy entry, of course, are of little benefit to migrants if they are forced to leave the United States against their will or may not enter it. Resnik is eloquent and persuasive on the subject of the increase in deportations over the past decade; I neither can nor have any desire to provide counterarguments to her critique of the rising number of “removals” during the Obama administration. Some deportations are justified on the grounds that their objects are criminals whose behavior is genuinely dangerous, but the evidence suggests that these are only a portion of those “removed.” The best that can be said, in my view, is that (in the words of an opponent of this policy), “immigration enforcement in the interior has slowed significantly in the last few years. ICE is arresting and removing noticeably fewer illegal aliens from the interior now than was the case five years ago, and even two years ago. Its focus has shifted away from interior enforcement in favor of processing aliens who are apprehended by the Border Patrol” (Vaughan 2013).

If this critic is correct, deportations may be slowing from their peak of a few years ago; whether that is a genuine trend away from criminalizing migration or a short term deviation remains to be seen. Nonetheless, given her thesis of increasing criminalization of migrants, it is noteworthy that Resnik does not mention the massive deportations in the mid-1930s of hundreds of thousands of, maybe several million, Mexicans and Mexican Americans. Some estimates suggest that three-fifths of those “repatriated” were United States citizens, and none received due process. It seems to me unlikely that such a massive forced exclusion coordinated by federal, state, and local authorities could take place today; if that conviction is not merely wishful thinking, it suggests some doubts about Resnik’s claim that criminalization of migration has done nothing but grow during the last century.

Given her focus on the 1941 *Hines* case as a high point of legal protection of migrants’ rights, it is even more surprising that Resnik gives short shrift to the internment of perhaps 120,000 Japanese and Japanese American citizens very soon thereafter. She notes its occurrence and the fact that three years after *Hines* the Court “infamously” upheld the 1942 military order in *Korematsu v. the United States*. Resnik also observes that like segregation, *Korematsu* “made plain [that] the category of citizen did not provide a safe harbor for all persons who fell within that definition” (p. 29). Thus, while the eloquent language in *Hines* indeed warrants strong praise from those seeking to promote immigrants’ rights, it does not seem to have been very effective. As a result, I am not fully persuaded by the claim that the criminalization of immigration and the stigmatization of migrants has increased in the United States since the mid-twentieth century.

Inclusion: The trajectory of policies and practices with regard to inclusion are no more unidirectional than those of exclusion. Resnik’s portrayals of the invention of the “illegal alien” during the twentieth century, and of the impact of that new category on individuals and polity alike, are compelling and depressing for those of us who share her values. But once again, she does not discuss the contrasting moves during the same decades to open the United States’ borders and citizenship rights to those formerly excluded.

That trajectory begins, of course, with a period of extensive exclusion. Resnik describes the 1924 immigration act as “imposing literacy tests for migrants, numerical restrictions, and limits on Asian immigration. The 1924 quota system was aimed, as a member of Congress

commented in 1929, ‘principally at two peoples, the Italians and the Jews’.” (p. 22 her version). That seems a surprisingly mild description of a law that prohibited any immigration from all of Pacific and Southern Asia, including Japan, China, Korea, India and a dozen other countries. The law’s quotas cut Italian immigration by 90 percent from its peak in 1890, permitted only 1,100 immigrants annually from all of Africa (not including Egypt), and slowed Arab immigration to a trickle. Even setting aside nationality restrictions, in 1933, President Roosevelt’s State Department admitted only 23,000 migrants, one tenth of the number admitted annually just before the Great Depression. The law had its intended impact; immigration declined from about 14 million residents of the United States in the first few decades of the twentieth century to under 10 million by 1970 –or from almost fifteen percent of the population to under five percent.

Bars to citizenship paralleled bars to entry, though they began earlier with the 1870s denial of naturalization rights to Chinese. The Supreme Court declared subcontinental Indians to be non-white in 1923 (*United States v. Bhagat Singh Thind*), thus stripping citizenship from Indians. Citizenship mattered; California and eight other states passed laws restricting land ownership among “aliens ineligible for citizenship.” For good measure, California added a bar on commercial fishing licenses for aliens ineligible for citizenship in 1945. [The Supreme Court upheld California’s property laws in 1923, but overturned its fishing law in 1948 (*Torao Takahashi v. Fish And Game Commission et al.*).]

Over the rest of the twentieth century, these and further exclusions and restrictions were repealed, while others took their place. Chinese were permitted to immigrate in 1943 – but only 105 annually. Refugees were admitted in 1948 –with provisions that discriminated against Catholics and Jews. The 1952 Immigration and Nationality Act eliminated race as a bar to immigration or citizenship-- but gave each Asian nation an annual quota of 100. The California Supreme Court finally invalidated the state’s Alien Land Laws in the same year. The 1965 Hart-Celler Act ended national origin quotas and increased annual ceilings for immigration to several hundred thousand – as well as setting quotas on western hemispheric immigration for the first time, thus inventing “illegal aliens.” The Immigration Reform and Control Act of 1986 provided a route to legalization for unauthorized residents of the United States – but also created employer sanctions for hiring the unauthorized. And so on. Neither Resnik’s narrative of constriction and criminalization since the high point of *Hines* nor an equal but opposite narrative of steady liberalization and enlightenment is accurate.

Surveillance and Sanctions: A central feature of Resnik’s argument about the increasing criminalization of migration is the stream of laws and policies that oversee, constrain, and sometimes punish migrants because of their actual or presumed status as “illegal aliens.” Again, the list is long and the descriptions chilling to those of Resnik’s and my moral persuasion: state laws criminalizing undocumented status, “border” inspections many miles from any border, 287(g) training of local police, Secure Communities’ electronic links to local police, more training of local police through SAR, employer sanctions against hiring unauthorized workers, and on and on. But again, this list is a bit misleading.

To begin with, both the 287(g) program and its successor, Secure Communities, have been shut down. Neither was popular with police or elected officials (Varsanyi et al. 2012) and neither was widely adopted. For example, the International Association of Chiefs of Police did

not explicitly oppose 287(g) but it did publish a report exploring all of the ways in which taking on immigration enforcement could inhibit local policing. The report set its tone early on: “At the outset, it is important to note that state, tribal and local police are ***not required to enforce federal immigration laws***. The federal government and its agencies are the authorities responsible for enforcement of immigration law.” It observed that the IACP would be “greatly concerned” if deportable aliens were brought into local enforcement systems; it pointed out that “many executives do not have the resources to tackle this additional federal issue;” and it acutely concluded that “when local police have waded into immigration enforcement, it has often come with disastrous and expensive consequences” [(International Association of Chiefs of Police n.d.) *Italics and bold face in original*]. The Major Cities Chiefs Association, from the sixty-four largest police departments in the United States and Canada, issued a similar policy statement. It was

based upon five key concerns with local police enforcing federal immigration law. These concerns are:

1. It undermines the trust and cooperation with immigrant communities which are essential elements of community oriented policing.
2. Local agencies do not possess adequate resources to enforce these laws in addition to the added responsibility of homeland security.
3. Immigration laws are very complex and the training required to understand them significantly detracts from the core mission of local police to create safe communities.
4. Local police do not possess clear authority to enforce the civil aspects of these laws. If given the authority, the federal government does not have the capacity to handle the volume of immigration violations that currently exist.
5. The lack of clear authority increases the risk of civil liability for local police and government (Major Cities Chiefs Association n.d. (perhaps 2013))

These are not government actors eager to criminalize migrants or migration. And after the Government Accountability Office and the Department of Homeland Security’s Office of the Inspector General piled on with scathing reports about the implementation of 287(g), the Immigration and Customs Enforcement agency (ICE) put the program out of its misery in 2012.

Secure Communities was intended to replace 287(g), on the grounds that its “screening process is more consistent, efficient and cost-effective in identifying and removing criminal and other priority aliens,” according to the Department of Homeland Security’s 2012 budget request. But it proved no more popular among law enforcement officers and elected officials. New York’s governor Andrew Cuomo, Massachusetts’ governor Deval Patrick, and Illinois’ governor Pat Quinn refused their state’s participation; the California state legislature passed a law limiting its reach. Large city mayors also resisted the program. ICE officials notified New York and Massachusetts leaders that the program would nonetheless be activated “in all remaining jurisdictions” in 2012 (Preston 2012)--but in November 2014, the Secretary of Homeland Security announced that “the Secure Communities program, as we know it, will be discontinued.” It too does not provide strong evidence of increasing criminalization of migrants and migration.

What remains, as Resnik points out, is the federal Nationwide Suspicious Activity Reporting Initiative (SAR). In existence since the mid-2000s, it focuses not on immigrants per se, but on terrorism-related criminal activity. The American Civil Liberties Union and others have

criticized the growth of “fusion centers” that collect information on “Muslim civil liberties groups, lobbying organizations, peace activists, hip hop bands, a former congresswoman and even the U.S. Treasury Department” (ACLU 2009). The Initiative is murky—even its acronym varies on different websites—and it may warrant deep concern as part of Resnik’s attention to increasing surveillance of Americans. But it is not specific to immigrants, so it is better analyzed in terms of governmental monitoring of all American residents than in terms of the criminalization of migration.

A more serious threat to immigrants than SAR is, after three decades of futility, employer sanctions. The 1986 Immigration Reform and Control Act (IRCA) not only provided a path to legal permanent residence for almost all undocumented immigrants at the time (close to three million), but also it also included a provision mandating government sanctions against employers hiring unauthorized immigrants. Those provisions were carefully balanced in order to induce both liberal and conservative members of Congress to support the bill; the sponsors’ political skill is evidenced by passage of the law.

But the provisions’ implementation was not so well balanced. The amnesty program was so successful that conservatives have sworn never to be tricked into such a provision again. The employer sanction program, in contrast, “has proven to be highly unreliable.” as the nonpartisan Migration Policy Institute put it,

primarily because IRCA's passage sparked a large market for fraudulent green cards and other fake forms of identification. While the law requires employers to check workers' documents, it also undermines their ability to do so. In an effort to prevent discrimination and facilitate the process for legal workers, IRCA established a long list of documents acceptable for proving work authorization. It also prohibited employers from questioning the authenticity of documents that "appear to be genuine" and seem "to relate to the employee." As a result, even good-faith employers seeking to comply with the law are often fooled by fake documents. And bad-faith employers who may know or suspect the prospective employee is in the United States illegally take advantage of the situation. Such employers go through the motions of reviewing workers' documents to shield themselves from possible prosecution (Rosenblum and Hoyt 2011).

For about a decade the federal government did sanction or fine some employers, as the two panels of figure 1 demonstrate. At the peak of activity, fewer than 10,000 employers were investigated and roughly 1000 fined—a small fraction of the roughly 5 million American firms counted by the census bureau in 1990.

Figures 1: Employer sanctions and fines from employer sanctions, as a result of IRCA

Employer sanctions from IRCA, 1988-2003

Source: (Brownell 2005)

These data are out of date, and in any case this sort of information does not reflect the anguish and disruption of families and communities attendant on even a few dramatic raids such as those in Swift meat packing plants in 2006, and New Bedford, Massachusetts in 2007. But even if new analyses were to show a rise in employer sanctions after 2004, the pattern would be a zig zag – up in 1990, down in 2000, arguably up in 2010—rather than a steadily increasing criminalization of migration.

The federal government has developed a new technology of surveillance in response to IRCA's employer sanction failure. E-Verify enables employers to check on the immigration status of new employees by seeking to match their identity data on mandatory I-9 forms with information in federal databases. According to the U.S. Citizenship and Immigration Services website, about 500,000 employers subscribe to the service and the system has verified that almost 99 percent of the 24 million cases submitted to it are people who are authorized to work. Roughly 20 percent of the "initial system mismatches" are false positives, requiring an appeal and reanalysis to determine that the employee is authorized. Twenty-one states, many with small numbers of undocumented migrants, require the use of E-Verify; mandated coverage ranges from all employees to only state contractors. Conversely, California and Illinois—in which about three-tenths of immigrants to the United States live—place restrictions on the mandating or use of E-Verify (I-9 Verification and E-Verify Frequently Asked Questions 2013).

E-Verify's eventual reach is hard to predict; given that the census bureau reports roughly 5,700,000 firms in the United States, it has not yet reached a critical mass. And since roughly twenty million of the United States' 113 million employees work for small businesses that are often exempted even in states with E-Verify mandates, it is unlikely ever to cover all employees. Furthermore, political actors ranging from President Obama through the ACLU,

some members of Congress in both parties, Tea Party groups, and business and agricultural interests oppose expansion or mandating of E-Verify as it now stands.

But the system can probably be modified to satisfy some concerns, and unless California and a few other states with large immigrant populations continue to restrict the use of E-Verify, employment of unauthorized immigrants may become much more difficult in the foreseeable future. E-Verify might develop into a powerful and ubiquitous system of surveillance and oversight in the workplace.

“Various, and sometimes conflicting, agendas crisscross the states:” The growth of E-Verify is a leading indicator of the crucial issue of day-to-day treatment and opportunities of undocumented migrants. As Resnik makes clear, living in the United States, or any country, without legal status can be devastating economically, socially, emotionally, and physically, as well as providing a person no right to participate in governance. It is a sobering statement about deprivation in the rest of the world that so many people have striven so hard to place themselves and their families in this unpalatable situation.⁴

Government at various levels can affect the circumstances and prospects of the undocumented. Progressives tend to look to the federal government for protection of rights and mitigation of ills; those of us who imprinted on the 1960s civil rights movement and its successors find it hard to see states and localities as other than impediments to rights and social benefits. And indeed, as Resnik points out, much state action is harmful to migrants or non-Anglo citizens. California’s Proposition 187, Arizona’s SB 1070, and similar state laws authorized punitive—perhaps even hysterical—actions against migrants and people who look like migrants, whereas the federal executive and judicial branches rolled back most of their worst provisions. One can join Resnik in wishing that the Court had relied on migrants’ rights rather than federal preemption in rejecting most of SB 1070, but in this politically volatile arena, I’ll cheerfully take a win regardless of its official justification.

States and localities have taken other punitive or simply mean actions against migrants, people who look like migrants, or unauthorized migrants. Five states copied SB 1070. Cities and states have promulgated laws or ordinances to prohibit renting to the undocumented or giving them in-state tuition rates for higher education, to curtail their employment, and to otherwise make their lives even more difficult than they already are [for examples beyond those that Resnik describes, see (High & Hazel Darling Law Library 2014)]. *Mother Jones* magazine counted 164 new laws restricting immigrants or immigration in some way emerging from 2010-11 state legislative sessions, out of a total of 226 immigration-related laws that year (Mother Jones State Immigration Law Database n.d.).

But as the difference between 226 and 164 implies, states and localities have also passed laws to help migrants and the undocumented. The raw number of laws on either side may be uninformative; some supportive state laws are more important and far-reaching than the often symbolic hostile measures beloved of state legislators. Twenty, including states with a disproportionate share of undocumented immigrants such as California, Florida, Illinois, New

⁴ According to the Gallup Organization, about 630 million adults around the world would like to migrate to another country. About a quarter—145 million--would like to move to the United States (Gallup Organization 2012).

York, and Texas, have state DREAM Acts or university system rules that allow undocumented students to qualify for in-state tuition rates. Five offer state financial assistance to university students. Ten, again including heavily immigrant-receiving states such as California, New Mexico, and Illinois (but not Texas or New York), give all immigrants access to drivers' licenses. Although federal laws exclude undocumented immigrants from federally funded public health programs such as Medicare or Medicaid, a few states or localities (Illinois, New York state, San Francisco) cover some or all uninsured children. In about half of the states, pregnant women and children who have been granted deferred action on their immigration status are eligible for publicly supported health care.⁵ Some municipalities (Wikipedia identifies 31 in the United States) call themselves sanctuary cities, on the grounds that they take active steps to incorporate the undocumented or prohibit the use of municipal resources to enforce punitive federal immigration laws. They include some of the largest cities or cities with large populations of undocumented migrants – New York, Los Angeles, Chicago, Houston, Washington D.C., San Francisco, San Diego, Minneapolis, and Denver, among others.⁶

Researchers have struggled to explain the pattern—or indeed, to determine whether there is a pattern—of state and local exclusion and incorporation [(Varsanyi 2010); (Walker and Leitner 2011)]. Many laws and ordinances in both directions cannot be explained systematically, in that they result from the successful activity of a more or less randomly located policy entrepreneur or advocacy group. Idiosyncratic innovation is a common pattern in state and local policy making, and in that way immigration law is politics as usual.

Nonetheless, immigration law does have a distinctive feature, best described as the intersection of demographic change, ideology, and partisan incentives. Examining repeated Field Poll surveys, Shaun Bowler and his colleagues found that “racially charged ballot propositions sponsored by the Republican party during the 1990s in California reversed the trend among Latinos and Anglos toward identifying as Republican, *ceteris paribus*, by shifting party attachments toward the Democratic party” (Bowler et al. 2006): 146). That is, although Proposition 187 passed in 1994, as did Proposition 209 (prohibiting affirmative action) in 1996 and Proposition 227 (limiting bilingual education programs) in 1998, a liberal backlash then ensued. Both Anglo and Latino voters became more Democratic after 1998.⁷ At the same time, Latino immigrants became naturalized citizens at higher rates, and more Latino citizens registered and voted. Republicans have won almost no statewide elections in California since 2000. As Bowler et al. conclude, “the use of these three ballot propositions by the California GOP to improve their electoral fortunes was unsuccessful in the long run and, in fact,

⁵ A patchwork of other laws and policies provides emergency health care, but the system is clearly inadequate (Gusmano 2012).

⁶ The concept is hopelessly vague; as of September 2014, a website opposing sanctuary cities listed 175 municipalities and three states, some of which contested inclusion on the list (<http://www.ojjpac.org/sanctuary.asp>).

⁷ Black voters became statistically significantly more Republican in these analyses, perhaps, the authors suggest, because of small and unrepresentative sample sizes in each survey.

constituted a significant political error. . . . Our results raise serious questions about the long-term efficacy of racially divisive strategies for electoral gain” (Bowler et al 2006: 156, 146).

Although California is unusual in its share of immigrants in general and the undocumented in particular, the phenomenon of an anti-immigrant backlash is not unique to that state. Arizona state senator Russell Pearce, the sponsor of SB 1070, lost in a recall election in 2011, partly though not only because of his leadership on that law. He lost to a conservative Republican, but Democrats interpreted the decision as a victory for “mainstream over extremism” (Weiner 2011). Obviously, not all Republicans fear a liberal or Democratic counterattack, since states and localities continue to pass anti-immigrant laws and ordinances. But it may be reassuring to people who share Resnik’s and my values that “partisanship, not Spanish, explain[s] municipal ordinances affecting undocumented immigrants” (Ramakrishnan and Wong 2010).

DACA and DAPA: As in the arenas of minimum wage and climate change, states and localities have partly filled the vacuum of federal inaction on immigration and migrants—for better and for worse. But although no legislation has passed Congress since the harsh 2002 Enhanced Border Security Act and the 2005 Real ID Act, the federal government has not been totally silent on migration and migrants. Apart from the largely successful legal challenges to SB 1070 and its replicas, the most consequential actions have been President Obama’s two executive orders, the 2012 Deferred Action for Childhood Arrivals (DACA) and the 2014 Deferred Action for Parental Accountability (DAPA).

DACA provides administrative relief from deportation for three years (originally two years), renewable, for young undocumented adults who meet various criteria. If an applicant is approved, he or she may obtain a work permit and social security number, and travel outside the United States; the successful applicant is also, by definition, a low priority for deportation should DACA not be renewed. The successful applicant may be able to get a driver’s license in every state and in-state tuition benefits, but not federally-funded health benefits [for a useful FAQ, see (DAPA and Expanded DACA 2014)]. As of July 2014, 55 percent of the 1.2 million young adults who met the criteria for DACA had applied for deportation relief for two years.⁸ The Citizenship and Immigration Services agency had approved 86 percent of the applications; the Migration Policy Institute describes DACA’s design and implementation as “a mixed picture” (Batalova et al. 2014).

DAPA is the parallel program for undocumented parents of United States citizens or lawful permanent residents. It has many of the same eligibility criteria as DACA, and will presumably provide the same benefits. Up to 4 million may be eligible for DAPA, but if DACA is a good indicator, the number of applicants will be considerably lower at least in the first few years.

DACA and DAPA, while infuriating some of Obama’s opponents, disappointed a few of his supporters by not reaching far enough [e.g. (Oleaga 2014)]. And its strongest proponents

⁸ About 425,000 more young adults are potentially eligible, but were not in school or lacked a high school diploma at the time of the study; another 473,000 will be eligible once they reach age 15. DACA was expanded to three years in November 2014, but the new rules have not yet been implemented.

worry that the new policies are not secure. Since executive orders lack the force of law, both could be overturned by legislation or by a president issuing a new executive order. Presumably if the next president is a Democrat, DACA and DAPA will remain in effect; I make no prediction if the next president is a Republican. In the latter case, much will depend on whether the new presence of several million semi-legal college students and adult employees has become a routine feature of the social and economic landscape or is an attractive political target. The Republicans' political calculations, in turn, depend partly on public opinion and partly on other incentives – which opens up several larger questions inspired by “Bordering by Law.”

Some Larger Issues

Up to this point, I have focused on Resnik's analysis of laws and policies regarding immigration and migrants because of the sweep and importance of her argument. Her thesis of the increasing criminalization of migration and stigmatization of migrants since the nation's high point of *Hines v. Davidowitz* captures a large part of the migration landscape. E-Verify might become an effective surveillance method for the undocumented, or migrants, or people who look like migrants, or eventually all employees. The militarization of the border in the American southwest is ludicrous, expensive, and offensive. Tom Tancredo is no longer a member of Congress and “America's Toughest Sheriff” Joe Arpaio has been largely defanged – but they will probably be replaced. People can still be stopped along the border (broadly defined) because they look Mexican. Immigrants, especially the undocumented, are often thought to be criminals and many “are becoming the targets of criminal and antiterrorist policies” (Simes and Waters 2013): 458; see also other chapters in that volume). “Removal” has reached unprecedented levels.

But as I have shown, criminalization and stigmatization are only part of the migration landscape. The rest is more encouraging to supporters of expanded migration and immigrants' rights. Birthright citizenship conveys a powerful Constitutional right almost unique among nations, and as undocumented migration declines and Latino birthrates remain high, the proportion of non-Anglo families with citizen members is increasing. Massive programs of race-based deportation and internment of American citizens are, in my view, no longer politically possible. A quarter century after *Hines*, would-be migrants from all countries attained the legal right to move to and become citizens of the United States. Most policies for drawing local governments or employers into surveillance and sanctioning have failed and been abandoned, whereas the 1986 amnesty program was a clear success. Advocacy groups are well developed, and in many states and localities with large numbers or proportions of migrants, voters support pro-immigrant measures. MIPEX rates the United States as the best of its thirty-one countries (tied with Canada) on anti-discrimination policy.⁹

In short, the United States' laws, policies, and practices with regard to immigration and migrants are dramatically inconsistent over time, across space, through levels of government, and by types of actors. Some policies and practices contradict others; some states, localities, and federal actions go in opposite directions from others; trend lines for quotas, sanctions, and other policies show sharp inflections, even zig-zags. In my view, no single thesis is justified—

⁹ The United States and Canada are both scored at 89 (out of a possible 100); Latvia and Turkey are at the opposite end of the scale with scores of 25 and 24 respectively (<http://www.mipex.eu/anti-discrimination>).

whether of criminalization and stigmatization or of validation and incorporation. If that summary is correct, it opens three large questions, to which I have no answers.

Public Opinion on Immigration and Immigrants: Resnik does not address the nature or role of public opinion in criminalizing migration and stigmatizing migrants. That is not surprising in a chapter focusing on judicial decisions and laws or regulations. But as a political scientist, I find public opinion to be potentially important politically and normatively. It points to a puzzle: Americans have consistently and strongly opposed increasing immigration since they were first asked in 1965, while levels of immigration have risen steadily since then. Why?

Figure 2 shows all national public opinion polls asking if immigration to the United States should be increased, decreased, or kept at the same level. Responses bounce around a little, but show four things clearly. First, the proportion of Americans who want to keep immigration levels the same has largely remained between 30 and 40 percent since 1965, regardless of the actual rate of increase at the point when the question was asked. That probably reflects ignorance of immigration levels more than a considered judgment. Second, with a few exceptions, more Americans want levels of immigration to decrease than to remain the same. In fifteen of the thirty-nine items, furthermore, a majority of respondents said “decrease” despite having four answer options (that proportion is higher if one looks only at respondents who give a substantive answer). Third, over most of the period, considerably fewer than twenty percent want immigration to increase. That is hardly a ringing public endorsement of federal law and actual practice. Finally, the proportion saying “increase” has risen since the mid-1990s; one would need a more complete analysis to determine if that reflects changing views among white and black Americans, or a larger share of survey respondents who are themselves immigrants or the children of immigrants, or both.

Immigration is not the only policy in which public opinion is consistently out of line with federal legislation; gun control and free trade are other examples. But the discrepancy does require us to ask why a policy with such clear potential electoral costs persists.¹⁰ Scholars have examined this issue; answers generally revolve around the impact of groups ranging from business and agricultural interests to ethnic and racial advocacy organizations.¹¹

¹⁰ Figure 2 also invites an analysis of why Americans, who are mostly descended from either voluntary or involuntary immigrants, are so skeptical of or hostile to immigration. There are, of course, many answers, the best of which was articulated by Stephen Colbert in his Congressional testimony: “But this is America, I don't want a tomato picked by a Mexican. I want it picked by an American, then sliced by a Guatemalan and served by a Venezuelan in a spa where a Chilean gives me a Brazilian. Because my great grandfather did not travel across four thousand miles of the Atlantic Ocean to see this country overrun by immigrants” (“Stephen Colbert's congress routine fell flat” 2010).

¹¹ See Hochschild and Brown 2014 for a brief literature review of the “liberal paradox” in the European context. (Fetzer 2000) and (Freeman et al. 2012) examine the American case, among others.

Figure 2: American public opinion on desirable levels of immigration.

Source: all questions in the Roper Center for Public Opinion’s iPoll asking, “In your view, should immigration be kept at its present level, increased, or decreased?” (or very similar wording). 29 items are from Gallup polls; 6 are from CBS News, the *New York Times*, or CBS News/*New York Times*, and the remaining 4 are from other sources. Almost all are telephone polls of a national U. S. adult sample; a few are of registered voters but the responses do not differ materially. The most recent polls (included in the graph but not indicated on the X axis) are from February and June 2014.

Americans are totally inconsistent in their views of immigrants themselves. When asked, they associate migrants, especially the undocumented, with criminality (Simes and Waters 2013), higher taxes, and unemployment of American workers. But in other surveys, “by a margin of 57% to 35%, more say immigrants today strengthen rather than burden the country; by a similar 59% to 35% margin, most believe that the growing number of newcomers strengthens society rather than threatens traditions” (Pew Research Center 2014). Americans oppose unauthorized entry—but in the most recent poll, 63 percent of registered voters endorsed “allow[ing] illegal immigrants to remain in the country and eventually qualify for US citizenship. . . if they meet certain requirements like paying back taxes, learning English, and passing a background check.”¹² Anywhere from 43 percent (Fox News, Dec. 7-9, 2014) to 72 percent (Public Religion Research Institute, Nov. 25-30, 2014) support the DACA and DAPA executive orders, depending on how the question is worded.

How to understand Americans’ thoroughly mixed views of migrants, and how to understand the disconnect between consistent opposition to increasing immigration and actual immigration policies and practices, are both worth further study. One set of issues is empirical. Citizens’ views do not directly create systems of criminalization and stigmatization, or of validation and incorporation, but they arguably matter to politicians’ calculations. How, when, and to what effect? Does public opinion help to explain the zig-zag in some policies and practices, and the mixed pattern of success and failure in others? Do members of the public even have views that are clear and consistent enough to call an opinion (Zaller 1992)? Is public opinion a consequence rather than a cause of policy development?

A second set of issues stemming from the liberal paradox is normative. Most scholars start from the premise that in a democratic state, policy ought roughly but genuinely to follow the contours of public opinion, especially when that opinion is consistent over a long period of time. But in this case [and some others—see (Hochschild 1984)], liberal sentiments about democratic control conflict with liberal sentiments about the right to migrate and the rights of migrants. Under what conditions should illiberal public opinion take priority over liberal rights – and if the answer is never, what justifies the claim that the more liberal of the two forces should predominate? “Bordering the Law” does not explicitly ask such questions, but its rich evidence and argumentation invite them.

Tipping Points: One way to analyze politicians’ calculations about migration policy is through the concept of trajectory or tipping points. Politicians must balance three demographic phenomena. First, an increase in hate crimes or hostility to immigrants is more closely associated with a rising share of the disfavored group in the salient population than with absolute numbers or the proportion of the population [(Hopkins 2010); (Green et al. 1998); Walker and Leitner 2011]. That is, flows matter more politically than stocks, to use the demographers’ terms. Second, however, an older research tradition shows that an in-group is

¹² The other options were “send all illegal immigrants back to their home country,” with 17 percent support, and “have a guest worker program that allows immigrants to remain in the United States to work, but only for a limited amount of time,” with 16 percent support (Fox News, Dec. 7-9, 2014). The fact that this was a Fox News poll suggests that support for legalization was not exaggerated by any house effect.

especially threatened when the outgroup's share of the population is high. As V.O. Key put it, "the hard core of the political South—and the backbone of southern political unity—is made up of those counties and sections of the southern states in which Negroes constitute a substantial proportion of the population. In these areas a real problem of politics, broadly considered, is the maintenance of control by a white minority" (Key 1984 [1949]). Third and finally, if the outgroup has an increasing set of political resources, such as votes and organizational capacity, a formerly hostile political party may decide at some point that its competitive electoral advantage lies in bringing the outgroup into the party rather than fighting to keep them out of politics. That is the tipping point.

We see all three phenomena at work in the recent politics around Arizona's SB 1070, as revealed in one very astute newspaper article. First, flows more than stocks explained its passage:

The biggest reason of all is that the illegal flow of people across the border is seen as a more acute problem, and a more dangerous one, in Arizona [compared to the other border states]. In the 1990s, the U.S. government added fences, stadium lights and more agents to the border in Southern California and Texas, forcing a shift in the flow of illegal immigrants that has turned Arizona into the single biggest gateway for people sneaking into the country from Mexico. . . . Arizona's population of illegal immigrants has increased fivefold since 1990, to around 500,000.

Second, high proportions of immigrants can generate a politics of hostility: "California and Texas were forced to deal with illegal immigration decades ago. Both states saw surges in the 1980s because of Mexico's shaky economy and the civil wars that wracked Central America." The result in California was the three propositions in the 1990s—187, 209, and 227—widely perceived to be hostile to nonwhites and newcomers. They all passed with strong Anglo support and non-Anglo opposition. The result in Texas has been disproportionately Republican control of the state government since the mid-1990s.

Third, although some states followed Arizona's lead, the new law found little support in border states. They had passed the political tipping point by 2010:

California, New Mexico and Texas have long-established, politically powerful Hispanic communities. . . . Many who entered illegally became voters under a 1986 federal law that granted amnesty to 2.7 million people. That political clout is evident today Los Angeles became the nation's largest city to boycott Arizona over the law, when the City Council voted 13-1 for sanctions that could include canceling \$8 million in contracts. The New Mexico Legislature is 44 percent Hispanic, followed by California at 23 percent, Texas at 20 percent and Arizona at 16 percent.

As a result, even a former aide to Texas's Republican governor Rick Perry claimed that "Hispanics and people of Spanish or Hispanic descent have lived among us since the beginning of time. We've all sort of shared this state together and the dream of what it means to be a Texan." Governor Perry himself, a Tea Party conservative, agreed that such a law "would not be the right direction for Texas," as did California's Republican governor Arnold Schwarzenegger: a law like SB 1070 is "not something that we will do here in California" [all quotations in this section are from (Spagat 2010)].

Obviously, neither the United States as a whole nor many of its governmental units have reached this political tipping point. Perhaps many never will; a lot of Republicans can plausibly

calculate that the constituents relevant to their election will continue to be driven by fear of rising numbers or overall proportions rather than by the judgment that it is time to bring the camel inside the tent. But Resnik's attention to the change over time in treatment of migrants usefully points us to the fascinating analytic question of when, how, and why changing demography generates a changed political destiny, in one or another direction.

Political and Normative Lessons from the UPU: My final large issue builds from Resnik's fable of the Universal Postal Union. As someone who wrote a long report on the United States post office in grade school (which my teacher said was one of the best reports she ever read!), I was primed to concur that it provided an illuminating comparison to immigration policy. As Resnik says, the creation of an open borders policy and program for the mail from a previously closed and incompatible set of state-specific rules shows that an apparently fixed national and international regime can be changed. One could extend the analogy through parallel analyses of the creation of international monetary and transportation systems, the multinational corporate structure, international drug control and policing programs, the Internet, and other elements of what we glibly call globalization. All of these open international channels provoke two questions.

First, what were the political incentives that led state leaders to work hard enough to overcome the inevitable psychological, organizational, and legal impediments to opening their borders to mail, money, police, corporate executives, information, or trains and planes? Each case saw opposition, within as well as outside the ruling political party or coalition. As Resnik points out, the "political and bureaucratic systems of Europe and North America" were "initially mistrustful" — after all, some of them went to war with one another within a few years or decades of creating the UPU. They must have had compelling motives to overcome their mistrust and maintain their connections, beyond the fact that it made substantive sense to do so. After all, it makes at least as much sense to permit workers who want jobs to move to countries that have jobs available (Pritchett 2006), but to my knowledge no state has a policy of open borders regardless of its ominously growing dependency ratio. Further attention to the strategies and tactics for establishing and maintaining the UPU might deepen the analogy and make it even more useful.

Second and finally, how are we to understand and respond to the deep normative differences between the movement of people and the movement of things or ideas? All states seek to protect their borders against "too many" or the "wrong kind" of migrants, and all states are at least initially mistrustful of those they let in even if they want them. It is not clear to me whether weakening state power, for example by giving migrants the same political and social rights as citizens, would in the long run encourage or discourage the free movement of individuals and families to where they think they will best flourish. That is a question to which I hope Resnik next turns her formidable passion, intellect, and knowledge. In the meantime, we can be grateful for what she has already given us to ponder.

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