ARTICLE

The Methodology of Immigration Law

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The development of immigration law as a legal branch of its own allows for a deeper investigation into the underlying methodologies of this field. For the most part, immigration law is methodologically individualistic, emphasizing measures taken with respect to individuals, and neglecting the social institutions in which these individuals are embedded, namely families, communities and markets. This methodology assumes that immigration can be understood, controlled and regulated by acquiring a deeper understanding of the micro-level actions, traits and decision-making processes of individual migrants. At other times, immigration law takes an opposite methodological approach, referring to migrants through methodological holism, "in-bulk," regulating migration at the macro-level. This Article explores an alternative methodology of relational autonomy, which seeks to refer to migrants in their context, acknowledging both their personal relationships, and the broader relational context of their immigration.

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I. INTRODUCTION

In many First World jurisdictions, immigration law and policy has evolved into a legal branch of its own. Drawing from international, criminal, constitutional and administrative law, immigration law regulates what migrants are permitted and eligible for and delineates the authority of states to limit migration. Though originally embedded in many different disciplines, immigration law and policy has matured into a field in its own right. It is now taught as a standalone course in most law schools,[1] and is considered to be a specialization of many lawyers, tribunals, legal clinics and human rights organizations.[2] Like other fields, as immigration law develops as a distinct legal discipline, it generates its own methodologies, which are then used to direct its application in practice. Exploring these methodologies allows us to better understand the field's self-conception and reasoning of its doctrinal endeavors.

Upon close examination of the methodology of immigration law to date, a curious dichotomy unfolds.[3] For the most part, immigration law has been methodologically individualistic: it assumes that immigration can be understood, controlled and regulated by understanding the actions and circumstances of individual migrants.[4] It thus emphasizes measures taken with respect to individuals, which seek to address their actions and motivations, while purposely ignoring the social institutions in which these individuals are embedded—namely families, communities and markets. At the same time, in some specific contexts, immigration law refers to migrants "in-bulk," through the contradicting methodology of methodological holism. It refers to migrants as a collective that has unifying characteristics, interdependence and strong interconnections that render the individualistic study of the particular migrant inherently flawed or redundant.[5]

This Article seeks to explore and propose an alternative methodology of relational autonomy, which is situated between methodological individualism and holism.[6] Relational autonomy[7] views migrants as autonomous subjects with intrinsic value, yet acknowledges that they are

1. *List of the Best Immigration Law Schools and Colleges in the U.S.*, STUDY.COM, https://tinyurl.com/yc6cmahh (last visited July 21, 2019).

2. Lawrence Baum, *Judicial Specialization and the Adjudication of Immigration Cases*, 59 DUKE L.J. 1501 (2010). On specialization in the legal profession see David Fromson, *Let's Be Realistic About Specialization*, 63 A.B.A. J. 74 (1977).

3. I use the term immigration law in reference to the domestic legislation, international migrants' rights instruments, "soft law" and adjudication regulating international cross-border migration. I will elaborate on the multi-faceted nature of immigration law below.

4. *See infra* Section I.

5. *See infra* Section II.

6. *See infra* Section III.

7. JENNIFER NEDELSKY, LAW'S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW (2012).

embedded in personal relationships of various kinds and incorporates the broader social and political relational context of their immigration into the legal analysis of immigration law's various components. This Article suggests operating in a different modus, one which considers the relational context in the formation, interpretation, and application of immigration law and policy, in lieu of the current methodological approaches. These relational considerations may not be "trump cards" for immigrants, and states may very well still make legitimate, sound and morally justifiable decisions to exclude them even when they have relational-type arguments to make. The use of this methodology does not undermine the ability of states to exclude, but rather increases the accuracy, consistency, reasonableness and social value of immigration law and policy.

The relational autonomy methodology this Article outlines can be used across the different realms of immigration law. It can be used in the creation, application and interpretation of domestic immigration law. This Article illustrates the current methodologies and proposes a different methodology by looking at a rich set of diverse examples of domestic legislation and case law. It then provides examples from different domestic legal systems, such as the United States, France, Switzerland, Israel, Australia, etc., whose immigration regimes differ significantly in the inner-logic, but nevertheless have shared methodological commonalities. At the same time, the suggestion to apply a relational autonomy approach applies to international migration law, which is often applied and interpreted in domestic courts in parallel to domestic law, used as reference for the determination of domestic law or policy, or created, interpreted or applied by international migration agencies and international tribunals. The suggestion is to apply a relational autonomy methodology throughout the various forms and loci of application of immigration law. It is addressed to the various participants in the realm of immigration law: administrators of the immigration bureaucracy, lawyers representing migrants or states, legislatures and governments creating immigration law and policy, international migration agencies, and domestic and international courts. All of them contribute to the telos of immigration law in their ongoing negotiations, which shape not only the substantive protections of immigration law but also its methodological approach.

This proposed relational autonomy model for immigration law is consistent with and builds on sociological and geographical research of immigration. In recent decades, the sociology of migration has drifted away from micro-level studies of migration, which largely understand migration as a rational choice deriving from individual economic calculations. Sociology of migration has evolved into the study of migration as a multi-faceted phenomenon—macro-level and meso-level—which, alongside

emphasizing the agency and subjectivity of the migrant,[8] understands migration as deeply connected to the strategic choices of social units larger than individuals, such as families,[9] correlative to networks of migrants,[10] and influenced by local and global markets.[11] Similarly, relational geography of migration currently avoids treating destination states and cities as closed containers in which migrants arrive and need to assimilate. Instead, it analyzes the multiple and hybrid interconnections among migrants, states and cities, and how those interconnections are either supported or blocked.[12]

Admittedly, immigration law's commitment to individualism is not unique or surprising, especially in liberal traditions that tend to focus on the rights of individuals, more than those of communities or other groups.[13] More often than not, law is methodologically individualistic. At the same time, this simultaneous application of two seemingly-contradicting methodologies such as methodological individualism and methodological holism suggests that the methodology of immigration law can benefit from additional conceptualization.

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8. Liisa H. Malkki, *Speechless Emissaries: Refugees, Humanitarianism, and Dehistoricization*, 11 CULTURAL ANTHROPOLOGY 377, 398 (1996).

9. ANNE WHITE, POLISH FAMILIES AND MIGRATION SINCE EU ACCESSION (2017); Douglas S. Massey et al., *Theories of International Migration: A Review and Appraisal*, 19 POPULATION & DEV. REV. 431, 436-40 (1993).

10. For a glimpse of the extensive research on migration networks and their assistance in mobility, knowledge, assimilation, increasing economic gains, etc., see, e.g., Ivan Light, Parminder Bhachu & Stavros Karageorgis, *Migration Networks and Immigrant Entrepreneurship*, *in* IMMIGRATION & ENTREPRENEURSHIP: CULTURE, CAPITAL, & ETHNIC NETWORKS 25 (Ivan Light & Parminder Bhachu eds., 1993); Sara R. Curran & Abigail C. Saguy, *Migration and Cultural Change: A Role for Gender and Social Networks?*, 2 J. INT'L WOMEN'S STUD. 54 (2001); Sarah Dolfin & Garance Genicot, *What Do Networks Do? The Role of Networks on Migration and "Coyote" Use*, 14 REV. DEV. ECON. 343 (2010); Sonja Haug, *Migration Networks and Migration Decision-Making*, 34 J. ETHNIC & RACIAL STUD. 585 (2008); David McKenzie & Hillel Rapoport, *Self-Selection Patterns in Mexico-U.S. Migration: The Role of Migration Networks*, 92 REV. ECON. & STAT. 811 (2010); Bernice A. Pescosolido, *Migration, Medical Care Preferences and the Lay Referral System: A Network Theory of Role Assimilation*, 51 AM. SOC. REV. 523 (1986); Yaohui Zhao, *The Role of Migrant Networks in Labor Migration: The Case of China*, 21 CONTEMP. ECON. POL'Y 500 (2003). For other studies, arguing that the explanatory force of the network theory is limited see also Fred Krissman, *Sin Coyote Ni Patrón: Why the "Migrant Network" Fails to Explain International Migration*, 39 INT'L MIGRATION REV. 4 (2005).

11. *See, e.g.*, MICHAEL PIORE, BIRDS OF PASSAGE: MIGRANT LABOR AND INDUSTRIAL SOCIETIES (1979); Janice Fine et al., *Celebrating the Enduring Contribution of Birds of Passage: Migrant Labor and Industrial Societies*, 69 INDUS. & LAB. REL. REV. 774 (2016); Roberto Patricio Korzeniewicz & Scott Albrecht, *Income Differentials and Global Migration in the Contemporary World-Economy*, 64 CURRENT SOC. 259 (2016); Massey et al., *supra* note 9, at 433-34, 440-48; Natasha C. Parkins, *Push and Pull Factors of Migration*, 8 AM. REV. POL. ECON. 6 (2010); Nicholas Van Hear, Oliver Bakewell & Katy Long, *Push-Pull Plus: Reconsidering the Drivers of Migration*, 44 J. ETHNIC & MIGRATION STUD. 927 (2018).

12. *See, e.g.*, ARRIVAL INFRASTRUCTURES: MIGRATION AND URBAN SOCIAL MOBILITIES 14 (Bruno Meeus, Karel Arnaut & Bas Van Heur eds., 2019).

13. On the connection between liberalism and methodological individualism see, e.g., LARS UDEHN, METHODOLOGICAL INDIVIDUALISM: BACKGROUND, HISTORY AND MEANING 337-39 (2002).

This Paper not only suggests abandoning methodological holism for the sake of better methodological consistency, but also explores alternatives to the prevailing methodological individualism. It can be read as a suggestion to explore the justification of methodological individualism in other legal branches. In fact, in property law, criminal law, and family law, for example, relational autonomy has already been proposed as a preferable framework for analyzing legal categories.[14] To the extent that this is a suitable framework for those legal branches, it is at least as justified to explore the relevance of this methodology in the field of immigration law for two main reasons. The *first* has to do with the failure, to date, of universal individualism to justify the protection of rights of migrants, and in particular the rights of undocumented migrants.[15] Migrants cannot, as a practical matter, receive protections of most of their rights in many cases, including many of their political, social and economic rights, from their country of nationality as long as they are outside its territory and in the territory of a host country. At the same time, they often do not receive adequate protection of many of these same rights in the receiving countries, which frequently display a preference to protecting and promoting the rights of their nationals. In fact, in many cases the mere notion that migrants have rights claims in receiving states remains highly contested, despite the rather clear stance of international human rights on this matter. Thus, it is often the case that migrants are unable to turn to the state of nationality or the receiving state to pursue a rights argument, and there is no state which bears the duty which corresponds to their right. Since the correlation between rights (of individuals) and duties (of states) is more complex than usual when it comes to migrants, and their rights are imperfectly construed, it seems odd to adhere to the individualistic methodology when there lacks a serious liberal commitment to the protection of those individuals' rights.[16] The *second* reason has to do with the politicization of the rights of migrants, which has taken such an extreme dimension and is so internationally wide spread, in comparison to the politicization of other rights debates. In light of this politicization, it seems odd to continue to ground immigration law in

14. JONATHAN HERRING, RELATIONAL AUTONOMY AND FAMILY LAW (2014); ALAN NORRIE, PUNISHMENT, RESPONSIBILITY, AND JUSTICE: A RELATIONAL CRITIQUE (2000); Jennifer Nedelsky, *Property in Potential Life? A Relational Approach to Choosing Legal Categories*, 4 CAN. J. L. & JURIS. 343 (1993). There is even some analysis of nationality in the terms of relational autonomy in the literature. *See* Karen Knop, *Relational Nationality: On Gender and Nationality in International Law*, *in* CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES 89 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2001).

15. Jaya Ramji-Nogales, *Undocumented Migrants and the Failures of Universal Individualis*m, 47 VAND. J. TRANSNAT'L L. 699, 704 (2014).

16. Tally Kritzman-Amir & Kayla Rothman-Zecher, *Mainstreaming Refugee Women's Rights Advocacy*, 372 HARV. J.L. & GENDER 371 (2019) (analyzing the lack of serious commitment to protecting the rights of migrants as such).

methodological individualism as if it transcends the social and political context in which it is entrenched.[17]

Part I will explain the prevailing methodology of immigration law—a methodologically individualistic approach, looking at migrants as exposed, detached persons lacking any profound interpersonal connections worthy of the law's protection. Even when immigration law recognizes the existence of personal connections, it often reverts back to an individualistic approach, ignoring those connections or failing to consider them in a deep manner. In addition, this methodological approach renders immigration law incapable of taking into account the socio-political context of migration. Part II looks at the less common methodology of immigration law, holism. More specifically, I will demonstrate how methodological holism occurs in the context of "large scale migration," and blanket categories of migration, such as temporary protection, on the one hand, and immigration bans, safe third countries of origin presumptions, and safe third country agreements. I will illustrate the methodological holism of law by looking at examples of how different countries deploy immigration law. Part III introduces the alternative of a relational approach to immigration law. Part IV examines some examples of decisions which could be read as at least somewhat compatible with the relational autonomy approach, as well as some cases which should not be confused for applications of relational autonomy. The Article concludes by highlighting some of the benefits of a relational autonomy approach to immigration law.

II. METHODOLOGICAL INDIVIDUALISM – THE MIGRANT AS A STRANGER

Immigration law in many First World countries is highly methodologically individualistic. Methodological individualism, which received the support of several social contract theorists and sociologists such as Max Weber,[18] is founded on the notion that "without knowing *why* people do what they do, we do not really understand why any of the more large-scale phenomena with which they are embroiled occur."[19] Methodological individualism stems from the fact that in various contexts, "[t]he self-governing individual constitutes the ultimate unit of the social sciences, and that all social phenomena resolve themselves into decisions and actions of individuals that need not or cannot be further analyzed in

17. Ramji-Nogales, *supra* note 15, at 704.

18. Steven Lukes, *Methodological Individualism Reconsidered*, 19 BRIT. J. SOC. 119 (1968); Joseph Heath, *Methodological Individualism*, STAN. ENCYCLOPEDIA PHIL. (Feb. 3, 2005), https://tinyurl.com/y8jrf2wp.

19. Heath, *supra* note 18.

terms of superindividual factors."[20] The logic of methodological individualism is founded on a strong liberal conception of the self, and an individual rights theory.[21] According to that conception, the self is "an autonomous, rational agent that exercises its capacity for self-determination by choosing its relationships and obligations".[22] This also follows from an assumption that "all actions are performed by individuals,"[23] that social phenomena "should always be understood as resulting from the decisions, actions, attitudes, etc. of human individuals, and that we should never be satisfied by an explanation in terms of the so-called 'collective,'" including in the context of immigration.[24] Explanations of large-scale phenomena (immigration, for example) by other large-scale phenomena (colonialism, or globalization of the structure of labor markets, for example) are, under the methodological individualist analysis, only partial explanations at best.[25]

From this perception of individual agency stems a belief that society's laws should have a strong basis in individual psychology.[26] In the context of immigration law, the working assumption is that in order for sovereigns to regulate and control migration, immigration law needs to regulate the motivations and actions of the individual migrant. The protagonist of immigration law is the alien, immigrant, or refugee, since understanding and controlling her as an individual is the key to the enterprise of understanding and controlling migration.[27] Migration occurs as a rational choice of the

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20. JOSEPH SCHUMPETER, HISTORY OF ECONOMIC ANALYSIS 888 (Elizabeth Schumpeter ed., 1954).

21. Kit Johnson, *Theories of Immigration Law*, 46 ARIZ. ST. L.J. 1211, 1218-22 (2015).

22. Jennifer Nedelsky, *Citizenship and Relational Feminism*, *in* CANADIAN POLITICAL PHILOSOPHY: CONTEMPORARY REFLECTIONS 131, 132 (Ronald Beiner & Wayne Norman eds., 2001).

23. GEORGE H. SMITH, THE SYSTEM OF LIBERTY: THEMES IN THE HISTORY OF CLASSICAL LIBERALISM 198 (2013) (quoting LUDWIG VON MISES, HUMAN ACTION: A TREATISE OF ECONOMICS 42 (3d rev. ed. 1966)).

24. SMITH, *supra* note 23, at 198 (quoting KARL POPPER, THE OPEN SOCIETY AND ITS ENEMIES 98 (5th rev. ed. 1966)); J.W.N. Watkins, *The Principle of Methodological Individualism*, 3 BRIT. J. PHIL. SCI. 186, 186-89 (1952).

25. Christian List & Kai Spiekermann, *Methodological Individualism and Holism in Political Science: A Reconciliation*, 107 AM. POL. SCI. REV. 629, 630 (2013).

26. *Id.* at 630 (quoting Mill's claim).

27. *See, e.g.*, Immigration and Nationality Act, 8 U.S.C. § 1101 (a)(1), (15), (42) (1952) (amended 1965). The differentiation between the different categories of migrants is a highly contested one, and the different suggestions on how the lines between categories of migrants (e.g. refugees and migrants) should be drawn fall outside the scope of this Article. It is sufficient to say that as a matter of current law, a refugee is defined as a person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country." Convention Relating to the Status of Refugees art. 1(A)(2), July 28, 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention]. For critical reflections on this distinction see Rebecca Hamlin, The Migrant/Refugee Binary and State Responses to Asylum Seekers 1 (2018) (unpublished manuscript) (on file with author); Tally Kritzman-Amir, Socio-Economic Refugees (2009) (unpublished Ph.D. dissertation, Tel-Aviv University) (on file with author).

individual,[28] wherein migrants decide to migrate after conducting a (conscious or unconscious) cost-benefit analysis in which they weigh economy of risk and economy of labor considerations, attempting to foresee their expected costs and gains from the migration.[29]

Law can therefore influence this rational decision-making process in various ways. Just as the cost-benefit analysis that individuals conduct takes into account their individual characteristics,[30] law can correlatively make an inclusion and exclusion determination on a "merit based" individual basis.[31] Individuals are the ultimate object of the law. They are those who, under immigration law, obtain access to benefits, rights and status—their right to have rights.[32] Those rights, benefits and status stem from their individuality and support their ability to act as rational, autonomous agents.[33] Furthermore, under this methodology migrants are perceived to integrate into the host society as individuals. They should therefore be subjected to immigration enforcement sanctions, in connection with their own actions which are allegedly induced by their rational choice[34]. This enforcement of "illegality" renders them individually vulnerable.[35]

One example of the methodological individualism of immigration law has to do with the manner by which refugees receive protection in many First World countries. When Refugee Status Determination (RSD) is conducted, it is often conducted in a methodologically individualistic manner.[36] In many cases, states process refugees' requests for protection through individual interviews.[37] In those interviews, economy of risk consideration are weighed and the individual's case is examined against the legal definition of refugee.[38] The situation in the country of origin is only

28. List & Spiekermann, *supra* note 25, at 637-38 (discussing the rational choice foundations of methodological individualism).

29. Massey et al., *supra* note 9, at 434-35.

30. *Id.* at 435.

31. On the rise in merit-based migration norms, and the connection between those and socio-economic status, see Sarah Ganty, Merizenship: The Emergence of a De Facto Citizenship Based on Socioeconomic Status (unpublished manuscript) (on file with author).

32. HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 267-306 (rev. ed. 1973).

33. *Id.*

34. List & Spiekermann, *supra* note 25, at 637-38 (discussing the rational choice foundations of methodological individualism).

35. Nicholas De Genova, *The Legal Production of Mexican/Migrant "Illegality,"* 2 LATINO STUD. 160, 161 (2004); Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 8-15 (2008).

36. In many cases, RSD is not actually carried out and refugees are offered protection based on processes of Prima Facie Recognition of Refugee Status (PFRRS), which are methodologically holistic in nature. *See* U.N. High Commissioner for Refugees, *Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status*, U.N. Doc. HCR/GIP/15/11 (June 4, 2015) [hereinafter UNHCR Guidelines].

37. U.N. High Commissioner for Refugees, *RLD4 - Interviewing Applicants for Refugee Status*, RLD4 (1995).

38. U.N. High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating*

considered for the sake of evaluating the risk of being persecuted, but not in a broader manner, which takes into account as relevant—but not necessarily determinative—considerations of those different elements in the socio-political and economic context (which often includes colonial history or neo-colonial praxis) in which their immigration is rooted.

A. Methodological Individualism, Immigration Law and Personal Relationships

Methodological individualism is not to be confused with atomism. It does not reduce all sociology to psychology, and does not see the individual as completely detached and devoid of social interactions.[39] However, the social embeddedness of individuals is not perceived to be explanatory of their behaviors.

This is also true for immigration law. Immigration law captures migrants as persons with relationships with different people, including nationals. Yet, in many instances immigration law focuses on incentivizing and controlling individuals' migration decisions to such a great extent, that it operates without much thought as to the "ways in which immigration-related decisions profoundly affect those individuals who are already citizen-members."[40] The relationships migrants are embedded in are not perceived to be determinative to their immigration.

1. Relationships with Employers

One example is that immigration law in the United States, and several other countries, allows employers to invite workers to immigrate under expectation of future employment.[41] But even when immigration law recognizes the existence of an employment relationship, its focus is not to uphold, support or promote that relationship. Instead, the focal point of immigration law is the utility of the migrant, the expected contribution of

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to the Status of Refugees, at 189-219, U.N. Doc. HCR/1P/4/ENG/REV.4 (Apr. 2019) [hereinafter UNHCR Handbook].

39. *See* T.R. Quigley, *Social Atomism and the Old World Order* (1999) (archived from the original on Mar. 8, 2012), https://tinyurl.com/y96g4slc (explaining social atomism). On the difference between atomism and methodological individualism, see Heath, *supra* note 18; Lukes, *supra* note 18, at 121-22. For a critique of social atomism, see ELIZABETH WOLGAST, A WORLD OF SOCIAL ATOMS (1994).

40. Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1390-91 (1999).

41. Immigration and Nationality Act § 203, 8 U.S.C. § 1153(b) (1952) (amended 1965); *see also* STEM Jobs Act, H.R. 6429, 112th Cong. (2012); Annie Karni, *Trump's Immigration Plan Gets a Rose Garden Rollout and a Cool Reception*, N.Y. TIMES (May 16, 2019), https://tinyurl.com/y9emmmqd (discussing Trump's plan to decrease family-based migration and increase "merit"-based migration). For information on the ability of employers to invite immigrants and employ them in various capacities in Canada, see *Temporary Foreign Worker Program*, EMP. & SOC. DEV. CAN., https://tinyurl.com/yappmrlp (last visited July 21, 2019). For Australia's policy, see *Learn About Sponsoring*, AUSTL. GOV'T: DEP'T HOME AFFAIRS, https://tinyurl.com/yavxy3tm (last visited July 21, 2019).

the migrant to the economy, and the utilitarian perception of the self-interest of the receiving state, to which the relationship is incidental.[42] The motivation to support the employment relationship is not connected to the relationship itself, but rather to the "employability" of the migrant, and her potential utility to the market economy of the receiving country. Therefore, once the employment is terminated for whatever reason, a person might lose her immigration status, despite the fact that she might have had genuine connections with her employers and co-workers, or might have formed additional relationships during her stay in the receiving country. The relationship is perceived as static, monolithic, one dimensional, without recognition of the changes in purpose it might endure (from employer or co-worker to friend, for example). In light of this superficial perception of relationships, typical of methodological individualism, receiving states fail to take into account in their immigration law and policy the fact that people form new relationships exogenous to those on the basis of which they were admitted, and seek to remain in the receiving states for the sake of those relationships.

2. Familial Relationships

Perhaps a better example has to do with the fact that immigration law in the United States, and other countries, supports migrants' family relations. Many countries offer nationals the ability sponsor, invite or petition for the entry of their non-national family members.[43] In the United States, as well as in other countries, the existence of family members may also be grounds for granting discretionary forms of relief from removal.[44] This support does not necessarily derive from a rights-based approach, upholding the sacredness of the right to family life, but rather from a self-interest approach, viewing families as units important for integration, labor and social engineering. In other words, rather than being perceived as a location of

42. *Cf.* Johnson, *supra* note 21, at 1218-22 (discussing the domestic interest theory of migration law).

43. For an overview of the different types of petitions available to support the immigration of different family members in the United States see, e.g., IMMIGRANT LEGAL RES. CTR., QUALIFYING FAMILY RELATIONSHIPS AND ELIGIBILITY FOR VISAS (2017), https://tinyurl.com/y6ueod9x. Note that only the petitions for immediate family members are handled without delay, whereas petitions for others outside the "traditional" nuclear family are subject to an annual cap and thus subject to prolonged waiting periods. *See* Immigration and Nationality Act § 203, 8 U.S.C. § 1153(a) (2020). For examples outside the United States see, e.g., Israeli Nationality Law, 5712-1952, SH No. 146 art. 7-8 (compare with Nationality and Entry into Israel (Temporary Order) Law, 5763-2003, SH No. 544 art. 2). For various family sponsorship plans in Australia, see *Explore Visa Options for Joining Family in Australia*, AUSTL. GOV'T: DEP'T HOME AFFAIRS, https://tinyurl.com/y9j5f32b (last updated Mar. 17, 2020).

44. Hiroshi Motomura, *We Asked for Workers, but Families Came: Time, Law, and the Family in Immigration and Citizenship*, 14 VA. J. SOC. POL'Y & L. 103, 107-11 (2006).

deep relational bonds, the *family* is ultimately seen as instrumental for *individuals* in promoting the interests of the *receiving country*.[45]

At the same time, not all familial relationships are regarded equally. Historically, family reunification categories are limited to a preset and rigid group of relatives,[46] namely spouses and minor children,[47] which are constantly being limited and re-examined, [48] according, among other things, to traditional role perceptions of family members.[49] In addition, on many occasions immigration law maintains its individualistic inclination even in those contexts. It does so by stripping away the status of persons, in some cases, once those familial relationships end, due to death, divorce, annulment, separation, or abandonment.[50] Past familial relationships are rendered meaningless for immigration purposes in certain contexts,[51] even though in the familial context the end of one familial relationship rarely means the end of *all* relationships. For example, even after a divorce a person is likely to still have a connection with extended family, which is rarely a basis for acquiring status. Additionally, familial relationships are not consistently protected since, for example, immigration law does not offer

45. Kerry Abrams, *What Makes the Family Special?*, 80 U. CHI. L. REV. 7, 9 (2013); Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 853-56 (2007).

46. Donald Kerwin & Robert Warren, *Fixing What's Most Broken in the US Immigration System: A Profile of the Family Members of US Citizens and Lawful Permanent Residents Mired in Multiyear Backlogs*, 7 J. ON MIGRATION & HUM. SECURITY 36 (2019).

47. Ramji-Nogales, *supra* note 15, at 734; *see, e.g.*, Jeunesse v. Netherlands, App. No. 12738/10, Eur. Ct. H.R. (2014), https://tinyurl.com/ycca98mn; da Silva v. Netherlands, 2006-I Eur. Ct. H.R. 223; Useinov v. Netherlands, App. No. 61292/00, Eur. Ct. H.R. (2006), https://tinyurl.com/y8ngn5qr; Mitchell v. United Kingdom, App. No. 40447/98, Eur. Ct. H.R. (1998), https://tinyurl.com/ybxkjkqx (highlighting the limited scope of such family-based applications); *see also* Rhuppiah v. Secretary of State for the Home Department [2018] UKSC 58 (UK).

48. On the recent plan of the Trump administration to prioritize high-skilled migration over family-based migration through an institution of a point system for migration, see, e.g., Muzaffar Chishti & Jessica Bolter, *"Merit-Based" Immigration: Trump Proposal Would Dramatically Revamp Immigrant Selection Criteria, but with Modest Effects on Numbers*, MIGRATION POL'Y INST. (May 30, 2019), https://tinyurl.com/ybja9nbd. *See also* Lisa Hahn, Address at the Law and Society Association Conference: Graduated Dignity? Mobilizing for Family Reunification in Germany (May 30, 2019) (transcript on file with author) (discussing the recent changes limiting the right to family reunification in Germany).

49. Abrams, *supra* note 45, at 9.

50. Immigration and Nationality Act § 216, 8 U.S.C. § 1186a(b) (2020).

51. One context in which past relationships do matter is the U visa, a visa granted to victims of domestic violence, to stop the dependence between the abused and the abuser. However, the recognition of past relationship is incidental to the purpose of the visa: providing assistance to the law enforcement agencies. *See* Natalie Nanasi, *The U Visa's Failed Promise for Survivors of Domestic Violence*, 29 YALE J.L. & FEMINISM 273 (2018). Similarly, T Visas for Trafficking victims and S visas for informants share the same purpose. The option of VAWA self-petition is limited by various requirements, making it relatively inaccessible to victims of domestic violence. *See Violence Against Women Act (VAWA) Provides Protections for Immigrant Women and Victims of Crime*, AM. IMMIGR. COUNCIL (May 7, 2012), https://tinyurl.com/y8paeoey; *see also* Mariela Olivares, *A Final Obstacle: Barriers to Divorce for Immigrant Victims of Domestic Violence in the United States*, 34 HAMLINE L. REV. 149, 174-82 (2011).

formal inclusion for undocumented parents of citizen children.[52] Part of the difficulty with recognizing migrants' familial relationships as functional, intentional and genuine stems from an ongoing and constant effort to examine the authenticity of migrants' familial relationships, which are inevitably suspected for being fraudulent, motivated by the sought-after immigration benefit.[53] In other words, not all familial relationships are protected, but only those who are perceived as living up to an imaginary "bona fide" standard. Furthermore, relationships are only protected to the extent that the individuals in question are not of the kind that immigration law seeks to exclude, such as persons with certain criminal convictions.[54] Methodological individualism has also been used to justify the placement of migrants in immigration detention in the United States, either at the expense of separating them from their children or for the purpose of keeping families together by placing children in detention with their parents.[55] Thus,

52. In the United States, citizen children can only petition for their parents when they turn twenty-one. *See* 8 U.S.C. § 1151(b) (1982); LUIS H. ZAYAS, FORGOTTEN CITIZENS: DEPORTATION, CHILDREN, AND THE MAKING OF AMERICAN EXILES AND ORPHANS (2015); Tally Kritzman-Amir, *Iterations of the Family: Parents, Children and Mixed-Status Families*, 24 MINN. J. INT'L L. 245 (2015). In the United States, protection from deportation is afforded through DAPA – Deferred Action for Parents of Americans, to those who: "(1) as of November 20, 2014, be the parent of a U.S. Citizen or lawful permanent resident; (2) have continuously resided here since before January 1, 2010; (3) have been physically present here on November 20, 2014, and when applying for relief; (4) have no lawful immigration status on that date; (5) not fall within the Secretary's enforcement priorities; and (6) present no other factors that, in the exercise of discretion make . . . the grant of deferred action inappropriate." *See* Memorandum from the Dept. of Homeland Security on Rescission of November 20, 2014 Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents (June 15, 2017), https://tinyurl.com/ybvxmduo (rescinding the memorandum providing Deferred Action for Parents of Americans and Lawful Permanent Residents). Notably, this protection mechanism is both limited in scope and in the rights it guarantees to the parents. In addition, DAPA was challenged in court, and the court issued a preliminary injunction, Texas v. United States, 86 F. Supp. 3d 591 (S.D. Tex. 2015), the stay of which was denied, Texas v. United States, 787 F.3d 733 (5th Cir. 2015). The preliminary injunction was later affirmed in the 5th Circuit. *See* Texas v. United States, 809 F.3d 134 (5th Cir. 2015) *cert. granted*, United States v. Texas, 136 S. Ct. 906 (2016). The Supreme Court was divided on this matter (4-4), and therefore the matter was left undecided, with the preliminary injunction still in place. United States v. Texas, 136 S. Ct. 2271 (2016) (per curiam) In other countries, parents are only allowed to acquire status based on their citizen children's petition in some conditions. In Australia, for example, parents may receive status only if half or more of their children are based in Australia, and are subjected to extremely long wait periods. *See Subclass 103: Parent Visa*, AUSTL. GOV'T: DEP'T HOME AFFAIRS, https://tinyurl.com/yct5xdmf (last updated Apr. 29, 2020). In Israel, only certain parents, such as parents of soldiers and dependent elderly parents may be eligible for status. *See* Tally Kritzman-Amir, *Parents and Children: Family Reunification in Israel*, 44 MISHPATIM 361, 362 (2014).

53. Kerry Abrams & R. Kent Piacenti, *Immigration's Family Values*, 100 VA. L. REV. 629, 688-89 (2014).

54. *See also* Jaya Ramji-Nogales, *"The Right to Have Rights": Undocumented Migrants and State Protection*, 63 U. KAN. L. REV. 1045, 1056 n.57 (2015). *Compare* Fernandes v. Netherlands, U.N. Hum. Rts. Comm., No. 1513/2006, U.N. Doc. CCPR/C/93/D/1513/2006 (Aug. 6, 2008), *with* Madafferi v. Australia, U.N. Hum. Rts. Comm., No. 1011/2001, U.N. Doc. CCPR/C/81/D/1011/2001 (Aug. 26, 2004) (reaching the opposite result).

55. It is, however, possible to make a compelling argument that the family separation actually reflects an awareness of the family ties, and instrumentally uses them to deter migrants from coming

immigration law demonstrates a lack of consideration for the fact that migrants, like all individuals, continuously form new relationships, as well as the fact that often it is immigration law itself that impacts the sustainability of these relationships.[56] Familial relationships are thus inferior to the interests of maintaining sovereign control over immigration and its "orderly," individualistic regulation. While this Article does not seek to suggest that familial relationships should always trump national self-interest, I would argue that families are typically protected to the extent that their protection coincides with the national self-interest in including an individual. Relationships are not trump cards (and perhaps should not be), but the national self-interest in an individual is.

Efforts to anchor the protection of migrants in their familial context in international law have largely been unsuccessful.[57] Only a few dozen states—and no significant Western migration-receiving state—have ratified the United Nations' International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.[58] Furthermore, the protection of the family in this instrument was somewhat limited to begin with,[59] even if we ignore the fact that this instrument cannot currently be used to introduce a more relational approach to the rights of migrants.

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to the United States. *See, e.g.*, PENN. ST. LAW CTR. FOR IMMIGRANTS' RIGHTS CLINIC, FAMILY SEPARATION POLICY: WHAT YOU NEED TO KNOW (2018), https://tinyurl.com/y6uqvt33. In 1995, children were separated from their parents during a period of six weeks. Many of them were detained in harsh conditions. Julie Hirschfeld Davis, *Separated at the Border from Their Parents: In Six Weeks, 1,995 Children*, N.Y. TIMES (June 15, 2018), https://tinyurl.com/yctxwqks. The family separation policy was challenged in Federal District Court of Southern California. The court thus found that the family separation policy violated Due Process because it was likely to be "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience, . . . and is so brutal and offensive that it does not comport with traditional ideas of fair play and decency." *See* L. v. U.S. Immigration & Customs Enf't, 310 F. Supp. 3d 1133 (S.D. Cal. 2018). In light of this lawsuit, the family separation policy was replaced with a "Temporary Detention Policy for Families Entering this Country Illegally," by Executive Order. Exec. Order No. 13841, 3 C.F.R. 841 (2019). On July 9, 2018, this was found by the Federal District Court of Central California to violate the *Flores* Settlement Agreement, a court settlement that has been in effect since 1997, and set limits on the length of time and conditions under which children can be incarcerated in immigration detention. Flores v. Sessions, No. 2:85-4544-DMG-AGR, 2018 U.S. Dist. LEXIS 115488 (C.D. Cal. July 9, 2018) (denying defendants' "ex parte application for limited relief from settlement agreement"). For a brief history of the *Flores* Settlement Agreement, see HUMAN RIGHTS FIRST, THE FLORES SETTLEMENT AND FAMILY INCARCERATION: A BRIEF HISTORY AND NEXT STEPS (2018), https://tinyurl.com/ycr9ox2m.

56. Kritzman-Amir, *supra* note 52 (comparing the United States and Israel on this matter).

57. David B. Thronson, *Thinking Globally, Acting Locally: The Problematically Peripheral Role of Immigration Law in the Globalization of Family Law*, 22 TRANSNAT'L L. & CONTEMP. PROBS. 655 (2013).

58. Antoine Pécoud, *The Politics of the UN Convention on Migrant Workers' Rights*, 5 GRONINGEN J. INT'L L. 57 (2017).

59. Shirley Hune, *Migrant Women in the Context of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, 25 INT'L MIGRATION REV. 800, 811-12 (1991).

3. Other Relationships

Other relationships such as those with colleagues, friends, neighbors, local communities, religious congregations and others are often largely overlooked in immigration law. They are sometimes considered, but not as being intrinsically significant. They are rather weighed as proxies on the basis of which one's integration (or the potential to integrate) is evaluated in naturalization proceedings[60] or sponsorship proceedings. In addition, those relationships are sometimes brought up in immigration bond hearing, as indicative of the fact that a migrant does not pose a flight risk. However, research findings are at best mixed with respect to the weight attributed to those relationships, and it is not possible to determine that these relationships are taken seriously enough to change pretrial custody outcomes.[61]

A different example of a relationship that is not seen as meaningful is that between migrant and smuggler. While very different from the above-mentioned relationships, this relationship is also one of great significance and much dependence. It is assumed that any contact between smuggler and migrant is purely instrumental. The smuggler is assumed to be both a business entrepreneur who immorally capitalizes off the human suffering and dependency, and a criminal who is disrespectful of national sovereignty.[62] As such, the smuggler's actions are criminalized.[63] In the United States, for example, constant negotiation over the scope of the prohibition on "harboring,"[64] allowed for the prosecution of humanitarian activists. However, there is a rather wide array of relationships with smugglers, and some of those are relationships of great trust, benevolence, and kindness.[65] The different forms of relationships between smugglers and

60. *See, e.g.*, Switzerland's naturalization requirement states that a person must be socially and culturally integrated in Switzerland. Under the recently changed law, which has been in force since January 1, 2018, in order to naturalize one has to prove maintaining contact with Switzerland. *Fragen zum neuen Recht (Gesuchseinreichung ab 1.1.2018)*, STAATSSEKRETARIAT FÜR MIGRATION SEM, https://tinyurl.com/y7nyp3ra (last updated Feb. 16, 2018).

61. Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, 50 LAW & SOC. REV. 117, 124-25 (2016).

62. Ilse van Liempt & Stephanie Sersli, *State Responses and Migrant Experiences with Human Smuggling: A Reality Check*, 45 ANTIPODE 1029, 1033-35 (2013); Danilo Mandić, *Trafficking and Syrian Refugee Smuggling: Evidence from the Balkan Route*, 5 SOC. INCLUSION 28 (2017).

63. *See, e.g.*, Bob Ortega, *Trial Begins for No More Deaths Volunteer Who Aided Migrants*, CNN (June 3, 2019), https://tinyurl.com/yyzt5h3x; Claire Provost et al., *Europeans Criminalized for Helping Migrants as Far Right Aims to Win Elections*, TRUTHOUT (May 21, 2019), https://tinyurl.com/y7dd7mdl.

64. JULIE YIHONG MAO & JAN COLLATZ, UNDERSTANDING THE FEDERAL OFFENSES OF HARBORING, TRANSPORTING, SMUGGLING, AND ENCOURAGING UNDER 8 U.S.C. § 1324(A) 1, 5 (Dan Kesselbrenner & Paromiter Shah eds., 2017), https://tinyurl.com/y8a8z3gy (discussing United States v. Moreno, 561 F.2d 1321 (9th Cir. 1977)).

65. GABRIELLA SANCHEZ, HUMAN SMUGGLING AND BORDER CROSSINGS 47-69 (2014) (describing the collaborative relationship between friends, family, and smuggling facilitators).

migrants,[66] the purpose of the actions of the smuggler, and the circumstances of the smuggling and immigration (including conditions in the country of origin of the migrant, the lack of alternatives to smuggling, and increased securitization of migration options which render smuggling the only option for some) are too often overlooked.[67] This has often led to increased risk for migrants, as they are forced to cross borders and navigate unfamiliar territories of a new country on their own.

To conclude, immigration law considers only some of the personal relationships of migrants, and even then, fails to treat the ones it does consider as deep and meaningful, often rendering them subordinate to certain interests of the sovereign. Law's individualistic approach to personal relationships stands in sharp contrast to the migrant experience. For many migrants, it is precisely those connections within their communities and families that drive their immigration, help them integrate, and encourage them to stay in a host country, even in periods during which they are subjected to anti-immigrants policies.[68] This lack of consideration of relationships has a dehumanizing effect on migrants, since relationality is often equated with humanism.[69]

B. Methodological Individualism and the Broader Relational Context

Methodological individualism is less-than-compelling for reasons that have to do with the humanity and personal relationships of individuals, but also for the lack of reference to any broader historical and international relational context.

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66. For evidence that such differences between types of smugglers exist, see Liempt & Sersli, *supra* note 62, at 1040-42. For the importance of tailoring efforts to combat smuggling more carefully, see Danilo Mandić & Charles M. Simpson, *Refugees and Shifted Risk: An International Study of Syrian Forced Migration and Smuggling*, 55 INT'L MIGRATION 73 (2017); Shalini Bhargava Ray, *The Law of Rescue*, 108 CAL. L. REV. (forthcoming 2020).

67. Some factors such as the question whether a person was making a profit from smuggling might only be considered for the calculation of the imprisonment period. Shalini Bhargaya Ray argues that courts actually impose harsher sentences on people who provide free housing for undocumented migrants, and that people who charge migrants for those amenities per their usual course of business avoid liability. Ray, *supra* note 66. The only real exception to the prohibition to bring in and harbor migrants is a narrowly applied religious exception. *See id.*; Immigration and Nationality Act § 274, 8 U.S.C. § 1324 (2020). *Cf.* Entry to Israel Law, 5712-1952, art. 12b1-12d, SH No. 111 p. 354, as amended; Prevention of Infiltration (Offences and Jurisdiction) Law, 5714-1954, art. 6-7, 8 LSI 133 (1953-54) (Isr.) (which do not include any exceptions).

68. Carmen R. Valdez et al., *"Why We Stay": Immigrants' Motivations for Remaining in Communities Impacted by Anti-Immigration Policy*, 19 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 279 (2013).

69. John Christman, *Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves*, 117 PHIL. STUD. 143, 144-45 (2004); NEDELSKY, *supra* note 7, at 32-33.

1. Social Contextualization

Due to the focus on state sovereignty, immigration law rarely takes into account how social processes of "othering"[70] and illegalization,[71] which are endemic to immigration law, impact migrants. By applying and developing immigration law, and through other means, states invest on-going, tireless efforts in these processes. Through various exhibitions of moral panic, migrants are portrayed as those "threatening the existence of democratic societies, potentially harming the social and cultural fabric of society and leading to economic catastrophe."[72] These processes render migrants as susceptible to various forms of exploitation by a broad range of people including service providers, employers, smugglers, and even family members. Those harms and exploitations spread over a wide range of examples, ranging from heightened exposure to risks during perilous journeys to the country of destination, increased likelihood of enduring labor rights violations by employers, growing probability of domestic abuse and the potential of being taken advantage of by smugglers, traffickers and others.[73] Yet more often than not, immigration law does not include internal protections to "othered" immigrants, and in most cases protections are either not found, or found outside immigration law and only incidentally applied to migrants.

Another example of lack of reference to social context is the vulnerability assessment which is carried out during the status determination process,[74] conducted for the sake of accommodating the needs of vulnerable immigrants.[75] In some countries, immigration law includes certain categories of individuals which are assumed to be vulnerable, such as children, women,

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70. ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1956) (discussing the concept of the "other"); YASEMIN N. SOYSAL, LIMITS OF CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE (1994) (discussing social "othering"); Mimi Ajzenstadt & Assaf Shapira, *The Socio-Legal Construction of Otherness Under a Neo-Liberal Regime: The Case of Foreign Workers in the Israeli Criminal Courts*, 52 BRIT. J. CRIMINOLOGY 685, 686 (2012) (discussing the role of courts in the construction of migrants as social others).

71. Harald Bauder, *Why We Should Use the Term 'Illegalized' Refugee or Immigrant: A Commentary*, 26 INT'L J. REFUGEE L. 327 (2014).

72. Ajzenstadt & Shapira, *supra* note 70, at 686. See, more broadly, LIAV ORGAD, THE CULTURAL DEFENSE OF NATIONS: A LIBERAL THEORY OF MAJORITY RIGHTS (2015) (arguing that in light of changes in migration patterns, Western democracies, and the world more broadly, nation states are no longer able to control migration and preserve their culture).

73. Ramji-Nogales, *supra* note 15, at 718.

74. *See* UNHCR Handbook, *supra* note 38 (referencing vulnerability, especially with regard to women and children, but also in regard to other populations).

75. *See, e.g.*, Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 Laying Down Standards for the Reception of Applicants for International Protection (Recast), ch. IV, 2013 O.J. (L 180) 96, 106-08 (listing a long list of vulnerable persons, who should receive accommodations during their reception); Petra Sussner, Presentation at the Law and Society Association Annual Conference: Vulnerability and Border Crossings in the Case-Law of the European Court of Human Rights (May 30, 2019) (on file with author).

LGBTQ, people with disabilities, etc.[76] This categorization suggests that these individuals are in themselves "problematic," "weak" or even a "burden." The fact that their vulnerability is a social construct is in no way apparent.[77]

A third example of the manner by which immigration law fails to refer to context has to do with the contribution—or lack thereof—to the prevention of migration crises due to natural disasters and climate migration. Migrants whose migration was triggered by natural disasters or climate change are not considered as eligible to protection under international law.[78] Contextualizing their treatment would allow the opportunity to think about the fact that the categories of those who receive protection are not natural or neutral, and reflect a choice rather than a fact. Context would also allow us to remember that we play a role in these crises, in allowing them to occur by refraining to prevent climate change, and by refraining to make sure that the vulnerable countries are ready for the crises.

2. International Relations Context: Sovereignty, Power and Mobility

Immigration law is generally reluctant to directly address the role of sovereignty and power in the construction of international migration. Immigration law is essentially presented as the law according to which a sovereign may exercise its inherent power to make decisions of inclusion and exclusion.[79] The assumption is that all sovereigns, as independent nation states, have this power and may exercise it according to their national priorities,[80] despite the fact that sovereign states are not equally capable of exercising this power.[81] Another assumption that operates in immigration law is one of global mobility, despite the fact that access to global mobility infrastructure is unequally distributed and operates in a discriminatory manner, along gender, age, race and nationality lines.[82]

The internal order of immigration law assumes that non-nationals to whom inclusion/exclusion decisions apply are "political strangers," external

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76. *Supra* notes 64-65.

77. Sussner, *supra* note 75; *see also* Fineman, *supra* note 35 (discussing the social construction of vulnerability).

78. *See generally* CLIMATE CHANGE AND DISPLACEMENT: MULTIDISCIPLINARY PERSPECTIVE (Jane McAdam ed., 2010) (discussing climate migration, which is likely to be the destiny of millions of migrants).

79. Nicholas De Genova, *Spectacles of Migrant 'Illegality': The Scene of Exclusion, the Obscene of Inclusion*, 36 ETHNIC & RACIAL STUD. 1180 (2013) (addressing the law as a visible actor of inclusion and exclusion).

80. DAVID MILLER, STRANGERS IN OUR MIDST: THE POLITICAL PHILOSOPHY OF IMMIGRATION 3-5 (2016); E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1513 (2019).

81. Achiume, *supra* note 80, at 1524.

82. Thomas Spijkerboer, *The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control*, 20 EUR. J. MIGRATION & L. 452, 463, 466-69 (2018).

to the political community of the nation state they wish to join.[83] They are not perceived as a part of the political community, or even as persons with whom the political community has a meaningful relationship. As non-members, most are not able to invoke rights-based arguments to support their request for inclusion.[84] The fact that the non-national is a political stranger is often taken as an unchallenged fact of nature. However, this is not a natural or neutral fact. "Political strangeness" is actively constituted for political, economic and social reasons, in an effort to reinforce "the normativity of national territorial borders, which also double as political borders firmly closed to the economic migrant".[85]

The fundamentals of this conceptualization need to be challenged, and immigration law should engage "more broadly with global structural injustice."[86] Because states are "interconnected in messy, complex ways determined significantly by historical imperial projects and their legacies, and this interconnection has implications for the law of international migration" the paradigm of sovereign states excluding individuals on the grounds that they are political strangers does not hold up.[87] As Tendayi Achiume suggests, when considering migration from Third World to First World, the moral legitimacy of First World nation states to exclude non-nationals should be evaluated in light of colonial legacies.[88] Colonialism constituted migration routes in ways that benefitted colonizers at the expense of the colonized, but at the same time brought together colonial peoples into transnational communities.[89] Those legacies render non-nationals from Third-World countries political *insiders*, and deems the working assumption about their being political *strangers* a false one.[90] Likewise, in the age of neo-colonialism exploitative power relations are sustained to ascertain that "Third World sovereignty remains only quasi-sovereignty."[91] Migration is thus an act of "asserting individual agency over political horizons,"[92] or an act of de-colonization. It is the result of those ties between First and Third World peoples who are a part of the same

83. This is evident from the title of the book on immigration policy and its philosophical foundations. *See* MILLER, *supra* note 80, at 3-5; *see also* Achiume, *supra* note 80, at 1515-16.

84. Only a small percentage are able to make a rights-based claim for inclusion (as opposed to a claim for eligibility to certain rights as long as they are in the territory of a certain state or subject to its jurisdiction)—namely refugees and persons in refugee-like situations, on the basis of the Refugee Convention and International Human Rights Law. Those sources carve out an exception to the broad ability to exclude non-nationals, requiring states to include and protect those migrants. However, they are included as political strangers. Achiume, *supra* note 80, at 1516.

85. *Id.* at 1523.

86. Ramji-Nogales, *supra* note 15, at 704.

87. Achiume, *supra* note 80, at 1528.

88. *Id.* at 1513.

89. *Id.* at 1534-35.

90. *Id.* at 1513.

91. *Id.* at 1541.

92. *Id.* at 1516.

informal empire.[93] This does not suggest that First World states should not be able to exclude Third World migrants, but it does propose considering the colonial and neo-colonial legacies and power relations in the process of making inclusion and exclusion decisions.

The analysis of Third to First World migration along colonial and neo-colonial lines coincides with sociological literature explaining migration patterns along the lines of changes in national[94] and international labor markets.[95] According to this analysis, while states include or exclude migrants, changing labor markets actively recruit them. Thus states have a multifaceted role, supporting national markets and participating in international markets by bringing in migrants, while simultaneously seeking to exclude and actively "other" them, so as to render them more susceptible to exploitation.

In the burgeoning field of immigration law, this relational context of colonialism and neo-colonialism, power gaps between sovereigns and changes in national and international labor markets are largely disregarded, due to immigration law's methodological individualism. Within its methodological individualism, immigration law only sporadically recognizes the connection between colonialism and migratory patterns, by substantively including persons from former colonies.[96] Immigration law should deviate from this methodology in acknowledgement of the fact that migrants do not operate with full autonomy, and are heavily influenced by "the global distribution of wealth, power, opportunity, and social goods that render the playing field uneven."[97] This deviation would be normatively desirable and would allow immigration law to operate more effectively as a social instrument.

III. METHODOLOGICAL HOLISM – MIGRANTS "IN-BULK"

While methodological individualism dominates immigration law, there are a few cases in which immigration is referred to on a more macro-level. In some exceptional circumstances, immigration law refers to migrants through methodological holism, "in-bulk." This methodology follows the assumption that macro-level social explanations of social phenomena, such as immigration, are indispensable. Under methodological holism,

93. *Id.* at 1542.

94. PIORE, *supra* note 11; Fine et al., *supra* note 11; Massey et al., *supra* note 9, at 440-44.

95. Korzeniewics & Albrecht, *supra* note 11; Massey et al., *supra* note 9, at 444-48.

96. *See, e.g.*, Simona Vezzoli & Marie-Laurence Flahaux, *How Do Post-Colonial Ties and Migration Regimes Shape Travel Visa Requirements? The Case of Caribbean Nationals*, 43 J. ETHNIC & MIGRATION STUD. 1141 (2017); *Types of British Nationality*, GOV.UK, https://www.gov.uk/types-of-british-nationality (last visited July 21, 2019) (describing the British mechanisms of inclusion offered to persons from former colonies).

97. Ramji-Nogales, *supra* note 15, at 704.

explanations may not necessarily require an individual-level micro-foundation.[98] Certain elements of immigration are perceived in immigration law as *sui generis*,[99] and as such inexplicable by looking at individuals. Immigration phenomena are perceived as "social facts," rather than individual acts or manifestations.[100] They are understood to be of systemic nature with such a high level of complexity that they cannot be understood, explained or addressed by looking at micro-level individuals.[101]

A. Large Scale Migration

One such example is "large-scale migration" (often referred to through the derogatory term of "mass influx"), a term that does not have a generally agreed upon definition,[102] suggesting that the very scale of migration is a reason to prevent it. "Large-scale migration" almost seems an entity of its own, as opposed to an aggregation of individuals, wherein the large number of migrants has transformed them into a collective. It is not merely a quantitative difference in the scope migration, but also a qualitative one that transforms the migration into something fundamentally different. This

98. Julie Zahle, *Methodological Holism in the Social Sciences*, STAN. ENCYCLOPEDIA PHIL. (Mar. 21, 2016), https://plato.stanford.edu/entries/holism-social/.

99. *Id.*

100. EMILE DURKHEIM, THE RULES OF SOCIOLOGICAL METHOD AND SELECTED TEXTS ON SOCIOLOGY AND ITS METHODS 27 (W.D. Halls trans., Steven Lukes ed., Palgrave Macmillan 2d ed. 2013) (1895) ("A social fact is any way of acting, whether fixed or not, capable of exerting over the individual an external constraint; or: which is general over the whole of a given society whilst having an existence of its own, independent of its individual manifestations.").

101. List & Speikermann, *supra* note 25, at 631.

102. There is no unified, quantitative, formal definition of large-scale migration. Some domestic or regional definitions of the term do exist, but they are not universally applicable. According to a European Union directive, "'mass influx' means arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided, for example through an evacuation programme . . . ." Council Directive 2001/55/EC, art. 2(d), 2001 O.J. (L 212) 12, 14. In United States, an "immigration emergency" is defined as "an actual or imminent influx of aliens which either is of such magnitude or exhibits such other characteristics that effective administration of the immigration laws of the United States is beyond the existing capabilities of the Immigration and Naturalization Service (INS) in the affected area or areas. Characteristics of an influx of aliens, other than magnitude, which may be considered in determining whether an immigration emergency exists include: the likelihood of continued growth in the magnitude of the influx; an apparent connection between the influx and increases in criminal activity; the actual or imminent imposition of unusual and overwhelming demands on law enforcement agencies; and other similar characteristics." 28 C.F.R. § 65.81 (2020). The term, which is not mentioned in the Refugee Convention, was interpreted by the United Nations High Commissioner for Refugees to mean a combination of the following: "considerable numbers of people arriving over an international border; a rapid rate of arrival; inadequate absorption or response capacity in host States, particularly during the emergency phase; and individual asylum procedures, where they exist, that are unable to deal with assessment of such large numbers." Exec. Comm. of the High Comm'r's Programme, Ensuring International Protection and Enhancing International Cooperation in Mass Influx Situations: Advance Summary Findings of the Study Commissioned by UNHCR, U.N. Doc. EC/54/SC/CRP.11 (June 7, 2004). It is also included, though not defined, in the G.A. Res. 2312 (XXII), ¶ 3 (Dec. 14, 1967).

reference to migrants "in-bulk" is sometimes driven by moral panic,[103] which casts large-scale migration as an evil that threatens the well-being of society.[104] In this debate, arguments include declining quality (in terms of cultural and financial capital) via an alleged increasing quantity of migration flows (arrival of unskilled or low-skilled migrants in large numbers, who presumably rely on welfare),[105] an alleged involvement of migrants in crime and security issues,[106] an alleged impact of migrants on cultural decay,[107] and an alleged inability of administrative agencies to contain the migration.[108] It is also perceived as a situation ill-suited to the application of methodological individualism, due to the scope of the phenomenon.[109]

The reference to migrants "in-bulk" occurs despite the fact that persons who migrate in a "large-scale migration" do not exhibit a "performance of relations among component parts which constitutes the individuality of a whole as distinguished from the individualities of its part."[110] Reference to large-scale migration does not distinguish whether or not migrants who come in the same "wave" of large-scale migration have any sort of connection with one another or with the nationals of the destination country. In fact, people whose immigration occurs at the same time, as a part of "large-scale migration" may have no substantial relationship with each other, other than the shared fate of needing or opting to migrate simultaneously. They may or may not know each other, arrive from the same regions or aim to reach the same destinations. Their migration decisions are not mutually dependent.

At the same time, the broader relational framework is not considered. "Large scale migration" is not seen for what it is, a part of a broader

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103. *Moral Panic*, *in* A DICTIONARY OF SOCIOLOGY 492 (John Scott ed., 4th ed. 2014).

104. Philip Kretsedemas, *Reconsidering Immigrant Welfare Restrictions: A Critical Review of Post-Keynesian Welfare Policy*, 16 STAN. L. & POL'Y REV. 463, 464 (2005).

105. *Id.* at 465; *see also* Alan Gomez, *How Trump Administration Plans to Screen Green Card Applicants' Use of Government Welfare Benefits*, USA TODAY (Oct. 9, 2018), https://tinyurl.com/y945lagq. "Quality" is often evaluated in racist terms. *See* Josh Dawsey, *Trump Derides Protections for Immigrants from 'Shithole' Countries*, WASH. POST (Jan. 12, 2018), https://tinyurl.com/ybspu5qa.

106. Tally Kritzman-Amir & Jaya Ramji-Nogales, *Nationality Bans*, 2019 U. ILL. L. REV. 563 (2019); Bart Jansen & Alan Gomez, *President Trump Calls Caravan Immigrants 'Stone Cold Criminals.' Here's What We Know*, USA TODAY (Nov. 26, 2018), https://tinyurl.com/y7jqmkm7.

107. Katelyn Caralle, *Trump: 'Not One' European Country Has Been Improved by Mass Immigration*, WASH. EXAMINER (July 17, 2018), https://tinyurl.com/y853sks4.

108. Massoud Hayoun, *Is Trump Solving the Immigration Court Backlog or Is He Funding It?*, PAC. STANDARD (Jan. 11, 2018), https://tinyurl.com/y9n2jhyp.

109. When individual status determination is not a realistic option due to the number of people immigrating, prima-facie recognition, which relies on broad, group categories is preferred as more suitable. *See* UNHCR Guidelines, *supra* note 36, at 2-3.

110. SMITH, *supra* note 23, at 199 (quoting Herbert Spencer, *The Principles of Sociology*, *in* STRUCTURE, FUNCTION, AND EVOLUTION (Stanislav Andreski ed., 1971)) ("The relationship between society and individual human beings is like the relationship between a house and the individual stones that make it up. A house is more than a mere heap of stones randomly arranged; it consists of stones that are 'connected in fixed ways.'").

context—the "foreseeable responses to cycles and structures of violence as well as cyclical labor migration flows. In the former case, the migration stream grows steadily over time with ample warning, but at some point is transformed into a 'crisis' that grabs public attention. In the latter case, these migration cycles have often occurred for many years and meet predictable labor needs within destination countries."[111] Large-scale migration crises are handled as secluded historic events, as though unconnected to a colonial past or neo-colonial present.

The drift away from methodological individualism leads to two conceptual paradoxes. The first is the divide between rights and duties.[112] It is clear that even in large-scale migration situations, every individual deserves the same set of rights she would have been offered had she been the only person to seek asylum. Yet, often states behave as though they do not have any duty whatsoever towards asylum seekers in large-scale migration situations, and reframe them as economic migrants and infiltrators.[113] This makes these rights empty and unattainable, for they have little or no meaning without an attached correlative duty.[114] To some extent, though, this paradox exists broadly in refugee law, in the sense that the right to seek asylum is not coupled by a duty to grant asylum and the responsibility is not allocated to any particular state(s). Large-scale migration situations are unique in that they are often characterized by a certain urgency that make it impossible to obtain access to rights and status through a detailed and individualized RSD process. Paradoxically, in large-scale migration situations, those First World states that can realistically offer protection often respond by a massive denial of a duty, and thus impose on the Third World Countries, who are unable to evade the duty as effectively.

This takes us to the second paradox, concerning the treatment of migrants in large-scale migration. States counter-intuitively use the term "mass influx" to explain why they back away from their obligations (as per their mutual agreements) to refugees (as per refugee and human rights law). While in most human-rights contexts, states extend *more* resources and efforts when there are *more people in need of protection of their rights*, in the context of immigration, states essentially argue that *because many more persons are in*

111. Jaya Ramji-Nogales, *Migration Emergencies*, 68 HASTINGS L.J. 609, 612-13 (2017).

112. ANN VIBEKE EGGLI, MASS REFUGEE INFLUX AND THE LIMITS OF PUBLIC INTERNATIONAL LAW (2002) ("The content of the rights attributed to the individual may be generally agreed, the same does not, in critical respects, apply to the responsibilities of states.").

113. This reframing occurs either in the public discourse or in the application of immigration law and policy. It often results in countries foregoing individual RSD, or applying blanket policies of exclusion, including a non-entrée policy at their borders.

114. In Hochfeldian terms, rights are claims, enforceable by state actors that others behave in a certain manner in relation to the right holder. One has no right if she has no power to require the aid of the state to tame or control the behavior of others. WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING: AND OTHER LEGAL ESSAYS (Walter Wheeler Cook ed., 1919).

need, they should be exempt from protecting their rights at all. For example, we would think it unfathomable to deny the right to education to all first graders just because in a specific year there has been a dramatic increase in the number of children entering first grade. Rather, we would expect there to be more funding directed to education, more classrooms, more trained teachers, and more supplies in order to meet the increased need. Also, in light of the foreseeability of such a need, we would expect schools to prepare in advance in order to accommodate the right to education of those children. The same is true in the context of immigration and asylum. Likewise, it seems strange to suggest that people should not be afforded status and protection just because too many people need it, or to refrain from planning ahead for large-scale migration, given that it is foreseeable.[115]

Many states have used the catchphrase "large-scale migration" to explain their reluctance to provide protection or rights to migrants—when they refrain from shouldering the burden as per their international, regional and domestic obligations,[116] reject or push back migrants at the borders,[117] hold asylum seekers in immigration detention,[118] refrain from conducting

115. In a recent important paper Jaya Ramji-Nogales doubts whether mass influx migrations are actually crises. She argues that "crisis results not from an outside shock to a preexisting order, but from processes of crisis identification, definition, and construction. As a result, narrative and discourse play important roles in bringing a crisis into existence. These generative processes take place within dominant cultural frames, meaning that crises are defined according to the values of the politically powerful at the expense of the marginalized. The voices of those made most vulnerable by the crisis are often excluded from the conversation. In the migration context, the voices of the migrants themselves are rarely heard in the public debate . . . . Rather than encouraging the creation of permanent institutions that might prevent future crises, the emergency rhetoric focuses attention on temporary solutions. Migration emergencies are no different from other crises in this regard. They are generally portrayed as unexpected and unmoored from structural causes. Yet an interesting paradox arises. At the same time that existing institutions are perceived as inadequate to address the crisis, extreme faith is placed in existing adjudication processes to determine appropriately who should be protected." Ramji-Nogales also clarifies that mass influx migrations can hardly been seen as surprising since they are the "foreseeable responses to cycles and structures of violence as well as cyclical labor migration flows. In the former case, the migration stream grows steadily over time with ample warning, but at some point is transformed into a 'crisis' that grabs public attention. In the latter case, these migration cycles have often occurred for many years and meet predictable labor needs within destination countries." Ramji-Nogales, *supra* note 111, at 612-13.

116. Tally Kritzman-Amir & Yonatan Berman, *Responsibility Sharing and the Rights of Refugees: The Case of Israel*, 41 GEO. WASH. INT'L L. REV. 619 (2011).

117. For a European example, see, for instance, Willa Frej, *Here Are The European Countries That Want to Refuse Refugees*, HUFFINGTON POST (Sept. 9, 2015), https://tinyurl.com/y7qjygz9; Soraya Sarhaddi Nelson, *Hungary Closes Borders to Most Asylum Seekers, Human Rights Advocates Say*, NPR (Feb. 5, 2018), https://tinyurl.com/yd8gbupp; BELGRADE CTR. FOR HUMAN RIGHTS, MACED. YOUNG LAWYERS ASS'N & OXFAM, A DANGEROUS 'GAME': THE PUSHBACK OF MIGRANTS, INCLUDING REFUGEES, AT EUROPE'S BORDERS (2017), https://tinyurl.com/ycjo5vod; Lorne Waldman & Audrey Macklin, *Why We Can't Turn Away the Tamil Ships*, GLOBE & MAIL (Aug. 17, 2010), https://tinyurl.com/y7s6jjvz.

118. *See, e.g.*, Patrick Wintour, *Hungary to Detain All Asylum Seekers in Container Camps*, GUARDIAN (Mar. 7, 2017), https://tinyurl.com/h5dfuyu; *Manus: Timeline of Controversial Australian Detention Centre*, BBC NEWS (Oct. 31, 2017), https://www.bbc.com/news/world-australia-41813219.

individualized status determination,[119] fail to provide migrants their social and economic rights,[120] delay decisions in status determination proceedings,[121] and more. The United States, for example, has recently invoked this to justify various policies aimed at deterring and preventing migrants from coming into the country, including the "zero tolerance" policy of mass detention, family separation, family detention, bars to accessing the asylum system and "turnback policy" which is the denial of undocumented entrants' ability to apply for asylum.[122]

B. Nationality-Based Categories of Exclusion or Inclusion

Another example of the methodological holism of immigration law is the constitution of categories of migrants on the basis of a general characteristic, such as country of origin, and reliance on those categories for exclusion and inclusion decisions, in a manner devoid of individualistic considerations.

Temporary Protection Status (TPS) was developed as such a category of inclusion in the United States and several other countries.[123] It is often deployed in countries during large-scale migration events, when governments feel compelled to trade off quality of rights protection for casting a broad net.[124] The United States created the mechanism of TPS in

119. *See, e.g.*, MARINA SHARPE, THE REGIONAL LAW OF REFUGEE PROTECTION IN AFRICA 68 (2018).

120. *See, e.g.*, Camila Domonoske, *Hungary Intentionally Denying Food to Asylum-Seekers, Watchdog Groups Say*, NPR (Aug. 22, 2018), https://tinyurl.com/ya2pmu8a.

121. *See, e.g.*, Nicholas Maple, *The Right to Freedom of Movement for Forced Migrants in South Africa: A Slow Retreat?*, REFUGEE L. INITIATIVE: RLI BLOG ON L. & FORCED MIGRATION (Oct. 24, 2017), https://tinyurl.com/yamj6reu; S. AFR. DEP'T OF HOME AFFAIRS, WHITE PAPER ON INTERNATIONAL MIGRATION FOR SOUTH AFRICA 5 (2017), https://tinyurl.com/yd8rj4af.

122. Tally Kritzman-Amir, *The Shifting Categorization of Immigration Law*, 58 COLUM. J. TRANSNAT'L L. 279.

123. Joan Fitzpatrick, *Temporary Protection of Refugees: Elements of a Formalized Regime*, 94 AM. J. INT'L L. 279, 282, 297-99 (2000). For Temporary Protection in Europe, see Khalid Koser & Richard Black, *Limits to Harmonization: The "Temporary Protection" of Refugees in the European Union*, 37 INT'L MIGRATION 521 (1999); Kim Rygiel, Feyzi Baban & Suzan Ilcan, *The Syrian Refugee Crisis: The EU-Turkey 'Deal' and Temporary Protection*, 16 GLOBAL SOC. POL'Y 315 (2016).

124. Alexander Betts, *Survival Migration: A New Protection Framework*, 16 GLOBAL GOVERNANCE 361 (2010).

1990,[125] as one form of protection[126] extended to nationals of designated countries[127] who met a set of criteria. Typical situations that result in TPS designation of a country include the existence of an ongoing armed conflict,[128] the occurrence of an environmental disaster,[129] or other

125. Susan Martin et al., *Temporary Protection: Towards a New Regional and Domestic Framework*, 12 GEO. IMMIGR. L.J. 543, 544 (1998).

126. A similar mechanism activated even before TPS was created is Deferred Enforced Departure (DED), which allows for the designation of a country by the President. Bill Frelick & Barbara Kohnen, *Filling the Gap: Temporary Protected Status*, 8 J. REFUGEE STUD. 339 (1995); U.S. Citizenship and Immigration Services, *Adjudicator's Field Manual - Redacted Public Version* ¶ 38.2, https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-16606/0-0-0-16764.html (last visited Jan. 3, 2019). Currently Liberia is the only designated country. Filing Procedures for Employment Authorization and Automatic Extension of Existing Employment Authorization Documents for Eligible Liberians Before Period of Deferred Enforced Departure Ends, 83 Fed. Reg. 13767 (Mar. 30, 2018). Essentially Liberians have received discretionary and complementary forms of protection since the late 1980s, due to the ongoing armed conflict in their country and the economic difficulties and other struggles of their country to re-stabilize afterwards.

127. Ten countries are currently designated under TPS: El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, South Sudan, Sudan, Syria, and Yemen. In 2017, the designation of two more countries, the nationals of which were receiving temporary protection, was terminated: Guinea, Sierra Leone. For information about these two countries, and for statistics on TPS beneficiaries see Robert Warren & Donald Kerwin, *A Statistical and Demographic Profile of the US Temporary Protected Status Populations from El Salvador, Honduras, and Haiti*, 5 J. ON MIGRATION & HUM. SEC. 577, 591 (2017). Out of the ten countries currently designated, the designation of El Salvador, Haiti, Honduras, Nepal, Nicaragua, Liberia and Sudan was recently announced to be ending shortly, though this is currently being challenged in Court. El Salvador (January 2018, designated in 1999) (Termination of the Designation of El Salvador for Temporary Protected Status, 83 Fed. Reg. 2654 (Jan. 18, 2018)); Haiti (November 2017, designated in 2010) (Termination of the Designation of Haiti for Temporary Protected Status, 83 Fed. Reg. 2648 (Jan. 18, 2018)); Honduras (June 2018, designated in 1999) (Termination of the Designation of Honduras for Temporary Protected Status, 83 Fed. Reg. 26074 (June 5, 2018)); Nepal (May 2018, designated in 2015) (Termination of the Designation of Nepal for Temporary Protected Status, 83 Fed. Reg. 23705 (May 22, 2018)); Nicaragua (November 2017, designated in 1999) (Termination of the Designation of Nicaragua for Temporary Protected Status, 82 Fed. Reg. 59636 (Dec. 15, 2017)); Liberia (March 2018, designated in 1991) (Filing Procedures for Employment Authorization and Automatic Extension of Existing Employment Authorization Documents for Eligible Liberians Before Period of Deferred Enforced Departure Ends, 83 Fed. Reg. 13767 (Mar. 30, 2018)); and Sudan (September 2017, designated in 1997) (Termination of the Designation of Sudan for Temporary Protected Status, 82 Fed. Reg. 47228 (Oct. 11, 2017)). *See, e.g.*, Complaint, NAACP v. U.S. Dep't of Homeland Sec., No. 1:18-cv-00239-MJG (D. Md. Jan. 24, 2018). An amended complaint was filed on April 17, 2018. First Amended Complaint, NAACP v. U.S. Dep't of Homeland Sec., No. 1:18-cv-00239-MJG (D. Md. Apr. 16, 2018); Complaint, Centro Presente v. Trump, No. 1:18-cv-10340 (D. Mass. Feb. 22, 2018). The complaint was amended in May 2018 to challenge also the decision to terminate TPS for Hondurans. First Amended Complaint, Centro Presente v. Trump, No. 1:18-cv-10340 (D. Mass. May 9, 2018); Complaint, Saget v. Trump, 351 F. Supp. 3d 251 (E.D.N.Y. 2019) (No. 18-CV-1599). On July 23, 2018, the court denied the government's request to dismiss the lawsuit and to dismiss President Trump as a defendant. The court determined that the government had not proven that its decision to terminate TPS will survive review under the APA "arbitrary and capricious" standard, as well as that the policy change was not motivated by discriminatory purposes. Centro Presente v. U.S. Dep't of Homeland Sec., 332 F. Supp. 3d 393 (D. Mass. 2018); *see* Ramos v. Nielsen, 336 F. Supp. 3d 1075 (N.D. Cal. 2018).

128. For example, Syria was designated due to the ongoing armed conflict in its territory. *See* Designation of Syrian Arab Republic for Temporary Protected Status, 77 Fed. Reg. 19026 (Mar. 29, 2012).

129. For example, El Salvador was designated after a series of earthquakes. *See* Designation of El Salvador Under Temporary Protected Status Program, 66 Fed. Reg. 14214 (Mar. 9, 2001).

"extraordinary and temporary conditions."[130] It is a form of group-based protection offered to those who fall outside the scope of the Convention Relating to the Status of Refugees, and is legally grounded in international human rights obligations, including the principle of non-refoulement.[131] In the United States, as well as in other countries,[132] in order to become a beneficiary of this form of protection persons simply need to establish their nationality rather than prove that they fled danger.[133] Under TPS, individual reasons for leaving their country of origin or inability to return to it are irrelevant. Rather, protection is granted on the mere basis of nationality. Thus, this category groups a pattern of migration from a certain country of origin, rather than migrants who share any substantive common denominator. In the absence of individual claims of rights, the protection afforded to beneficiaries is rather minimal. Protection is focused on the short-term and immediate physical safety of those in need of protection and their ability to support themselves until they are able to return to their country of nationality,[134] yet, critically, it renders the protected persons' lives liminal.[135]

If TPS is a category defined by the protection offered to nationals of a set of designated countries, then the mirror image of TPS is the exclusion of persons with specific nationalities. Just like TPS, this category of migration bulks together different individuals who have little in common, whose personal circumstances of migration are virtually immaterial to their categorization. These bans take different forms. One form which is quite controversial is reliance on a Safe Country of Origin doctrine,[136] creating a presumption that a person from a designated country may not qualify as a refugee, or on Safe Third Country Agreements/Country of First Asylum, allowing exclusion of persons arriving from such a country.[137] Additional

130. Immigration and Nationality Act, 8 U.S.C. § 1254a(b)(1)(A)-(C) (2020). Haiti, for example, was designated due to "extraordinary and temporary conditions" after the 2010 earthquake devastated the country. *See* Designation of Haiti for Temporary Protected Status, 75 Fed. Reg. 3476 (Jan. 21, 2010).

131. The principle prohibits returning persons to a place where their lives and liberty would be in danger. Martin et al., *supra* note 125, at 544-45.

132. Fitzpatrick, *supra* note 123.

133. 8 U.S.C. § 1254a(c)(1)(A)(i) (2018). In addition, it is necessary to establish presence in the United States during the time period covered, the fact that they are admissible in the United States, and that they were not convicted of certain categories of criminal offenses. 8 U.S.C. § 1254a(c)(1)(A)(iii), (c)(2) (2019); 8 U.S.C. § 1182(a)(6), (9) (2020).

134. Fitzpatrick, *supra* note 123, at 280.

135. Miranda Cady Hallett, *Temporary Protection, Enduring Contradiction: The Contested and Contradictory Meanings of Temporary Immigration Status*, 39 LAW & SOC. INQUIRY 621, 623 (2014).

136. *See, e.g.*, Cathryn Costello, *Safe Country? Says Who?*, 28 INT'L J. REFUGEE L. 601 (2016); María-Teresa Gil-Bazo, *The Safe Third County Concept in International Agreements on Refugee Protection: Assessing State Practice*, 33 NETH. Q. HUM. RTS. 42 (2015).

137. *See, e.g.*, REINHARD MARX, PRO ASYL, LEGAL OPINION ON THE ADMISSIBILITY UNDER UNION LAW OF THE EUROPEAN COUNCIL'S PLAN TO TREAT TURKEY LIKE A "SAFE THIRD STATE" (2016); Efrat Arbel, *Shifting Borders and the Boundaries of Rights: Examining the Safe Third Country Agreement*

bans of persons from specific nationalities were recently instated in the United States, and are typically referred to as "travel bans,"[138] but also exist

between Canada and the United States, 25 INT'L J. REFUGEE L. 65 (2013) (discussing the Canada-U.S. agreement).

138. On January 27, 2017, shortly after his inauguration, the Trump administration issued the first Executive Order (EO1), which included a general ban on all entries of nationals from seven countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen, allegedly for security reasons. Exec. Order No. 13769, Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. 8977, § 3(c) (Jan. 27, 2017). The ban contained a case-by-case exception for nationals whose admission would be "in the national interest." *Id.* § 5(c). The ban was followed on March 6, 2017, by a second Executive Order (EO2). Exec. Order No. 13780, Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. 13209 (Mar. 6, 2017). EO2 prohibited entry for nationals of only six out of the seven above-mentioned countries (Iraq was removed from the list), for ninety days, subject to some exceptions. Exec. Order No. 13780, 82 Fed. Reg. §§ 2-3. Exceptions covered individuals with visas valid on both January 7 and March 16, permanent residents, parolees, nationals of the six countries travelling on a passport of a country not on the list or a diplomatic visa, etc. This waiver has proven nearly impossible to obtain in practice. Trump v. Hawaii, 138 S. Ct. 2392 (2018) (Breyer, J., dissenting). The State Department website indicates that as of July 15, 2018, 996 applicants had been cleared for waivers. U.S. Department of State: Bureau of Consular Affairs, *Presidential Proclamation 9645 and Presidential Proclamation 9983*, TRAVEL.STATE.GOV, https://tinyurl.com/ve3bpzo (last visited July 31, 2018). The State Department website does not provide numbers of applicants, but according to a recently filed complaint, a letter from the State Department to a U.S. Senator indicated that 27,129 applicants from banned countries had been considered for waivers and 579 had been "cleared" as of April 30, a rate of two percent. First Amended Complaint at 24, Emami v. Nielsen, 365 F. Supp. 3d 1009 (N.D. Cal. 2018) (No. 3:18-cv01587) (citing Letter from Mary K. Waters, Assistant Sec'y of Legislative Affairs, U.S. Dep't of State, to Chris Van Hollen, Senator (June 22, 2018)). These bans were quickly challenged in courts. EO2 was enjoined in the Hawaii District Court. Hawai'i v. Trump, 241 F. Supp. 3d 1119, 1140 (D. Haw. 2017) (order granting motion for temporary restraining order). The TRO was converted into a preliminary injunction on March 29. Hawai'i v. Trump, 245 F. Supp. 3d 1227 (D. Haw. 2017). Also enjoined section 6, the 120-day suspension of the US Refugee Admissions Program. The Ninth Circuit affirmed the core holding in June 2017. Hawai'i v. Trump, 859 F.3d 741 (9th Cir. 2017) (per curiam). A similar decision was given in the Maryland Federal District Court, which issued a nationwide injunction against the entry ban provision of the second order. Int'l Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539 (D. Md. 2017). This was affirmed by the Fourth Circuit Court of Appeals two months after. Int'l Refugee Assistance Project v. Trump, 857 F.3d 554 (4th Cir. 2017). These cases before the Fourth and Ninth Circuits were consolidated at the Supreme Court, which narrowed the injunctions, but never heard the challenge on its merits, as the second nationality ban expired before it could do so. The Court decided that EO2 was not to be used to exclude "foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States" seeking visas to visit family, to attend a university at which they were admitted, to accept an offer of employment, or to address an American audience. Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2088 (2017). On September 24, 2017, a new presidential proclamation followed (EO3) placing entry restrictions for nationals of eight countries: Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen, subject to minimal exemptions, and a case-by-case waiver for a variety of foreign nationals. Proclamation 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats, 82 Fed. Reg. 45161 (Sept. 24, 2017). On October 17, 2017, the federal district court in Hawaii enjoined the proclamation, its decision affirmed two months later by the Ninth Circuit. The Ninth Circuit upheld the narrower version of the preliminary injunction ascribed by the Supreme Court in the context of EO2. On October 17, 2017, the Maryland federal district court also enjoined the third nationality ban, a decision affirmed four months later by the Fourth Circuit Court of Appeals. However, in its two orders on December 4, 2017, the Supreme Court stayed the preliminary injunctions in both cases, meaning that the third nationality ban went into effect. Eventually, on June 26, 2018, the Supreme Court upheld the third nationality ban, accepting the security reasoning of the ban.

in other countries.[139] Those bans are based on flimsy proffered justifications of national security,[140] the need to diminish administrative costs, or the need to prevent "asylum shopping." Because of their categorical nature, exclusions of different nationals create irrefutable or hard-to-refute[141] presumptions of un-deservingness, shifting the (nearly impossible) burden to the immigrant to establish her innocence.[142] Rather than assessing individuals, as is commonly done in immigration law, and as is required by international law,[143] these laws designate all individuals from a certain country as unworthy of protection or as suspect on national security grounds. Instead of looking to actions as a basis for exclusion, this excessively broad legal category relies on identity to prohibit entry. The social implications of stigmatizing, marginalizing and increasing vulnerability of entire groups of migrants are hardly considered in this process.

To recap, some elements of immigration law are characterized by methodological holism. They leave little to no room for individualistic consideration, ignoring the fact that the migratory phenomena, which they define, regulate, and explain, transcend the individual into a collective, social fact realm. These elements are based on categories of risk management: large-scale migration and persons arriving from designated "Safe Countries of Origin," which runs the risk of overburdening and dramatically impacting the host society; TPS, which derives from an assumption of a shared risk for every individual in a certain region of origin; "Safe Third Countries Agreements" which deal with those who allegedly opportunistically seek to take advantage of international mobility to select their preferred country of asylum; and banned nationalities, which is a population-wide generalization based on a handful of cases in which nationals from those countries were involved in terrorism. The shift to holism is also accompanied by a sense of (real or imagined) emergency or urgency—because of rising numbers of incoming migrants in large-scale migration incidents; because of alleged security emergencies used to justify blanket bans on nationals of certain countries; and because of a particular crisis in the country of origin—which justifies providing protection to nationals of designated countries.

As presented above, there is significant methodological inconsistency within immigration law—at times relying on methodological individualism and at others on methodological holism—which is in itself a reason for

139. Kritzman-Amir & Ramji-Nogales, *supra* note 106 (comparing the "travel bans" in the United States and similar bans in Israel).

140. *Id.*

141. On the waivers under the nationality bans system, see, e.g., Kritzman-Amir & Ramji-Nogales, *supra* note 106, at 593.

142. *Id.*

143. *Id.*

reconsidering the need for a methodological shift. At the same time, both methodological approaches to immigration law seem flawed. The methodological individualistic approach looks mostly at individuals and does little contextualization of their migration, thus failing to capture a broad understanding of the migration experience and then failing to tailor the regulation of migration according to that understanding. Methodological holism deems the individual insignificant, and does so in the contexts in which migrants are most vulnerable and most susceptible to the untamed power of sovereigns. The lack of focus on individuals results in lesser access to rights and increased susceptibility to exclusion (such as being grouped under the labels of large-scale migration or being subjected to nationality bans).

IV. RELATIONAL AUTONOMY

An alternative to the methodological individualism and holism of immigration law is the methodology of "relational autonomy."[144] In this Section, the Article explains the logic of the relational autonomy approach. It begins by explaining the constitutive attributes of social context, and its importance for understanding individuals. Social context is also crucial for understanding and regulating migration. Then, this Section explains that part of our being socially embedded has to do with the interconnectedness of harm—the fact that harm inflicted on someone influences others. This is also highly relevant in the immigration law context, even when certain categories of individuals, such as nationals, are less susceptible to certain harms experienced by some migrants. The Sections proceed to examine dependence as an acknowledged feature of relational autonomy, which in the immigration context is embodied in the dependence of migrants on the receiving state and on specific and non-specific individuals. Next, this Section analyzes the concept of autonomy, which is key to this methodology, as a value which is always crucial to uphold and protect—including in the migration context. Lastly, the Article discusses the role of the law, including immigration law, for the creation and sustainment of relationships and for fostering autonomy.

A. Relationality and the Constitutive Social Context

Relational autonomy assumes that persons are socially embedded, and that their identity, choices and actions are formed and limited within their social context.[145] It is an approach that looks at the individual as a "self-

144. Neil Stammer, *Human Rights and Power*, 41 POL. STUD. 70, 72-73 (1993).
145. Christman, *supra* note 69, at 147.

governing agent who is also socially constituted and who possibly defines her basic value commitments in terms of inter-personal relations and mutual dependencies."[146] This approach "underscore[s] the social components of our self-concepts as well as emphasize[s] the role that background social dynamics and power structures play in the enjoyment and development of autonomy."[147] It also criticizes the hyper-individualism and reduction of persons to autonomous agents,[148] suggesting that autonomy itself is relational.[149] This approach emphasizes the fact that social interactions are constitutive, and thus are more than a convergence of individual interests.[150] While taking autonomy seriously, it also acknowledges that autonomy is impaired by various oppressive social powers.[151] In order to understand the autonomous self, it is necessary to take into account one's traits and interests, and at the same time situate the self in the rich, complex, social, historical, political and economic context in which one is embedded.[152] That context operates on persons in non-deterministic manners, and thus different persons' autonomy may react differently to their context.[153] Importantly, the relational autonomy approach understands that persons are affected by their relational context and, conversely, that persons affect their relational context.[154]

The relations that this approach refers to include both personal relations with family, friends, colleagues and other people we directly interact with, as well as wider relational patterns, ranging from institutional norms, cultural habits, gender and class relations, interaction with global markets etc.[155] Socio-political historical context is also understood to be part of the relational context in which we are embedded.[156] All of these distinct relations are the context in which one exercises and constitutes her autonomy. Those relationships can foster conditions necessary for our autonomy to develop and grow, or could impede our autonomy and limit

146. *Id.* at 143.

147. *Id.*

148. *Id.* at 144.

149. *Id.* at 150.

150. NEDELSKY, *supra* note 7, at 19 ("People's interactions with one another matter not simply because their interests may collide. In my view, each individual is in basic ways constituted by networks of relationships of which they are a part—networks that range from intimate relations with parents, friends, or lovers to relations between student and teacher, welfare recipient and caseworker, citizen and state, to being participants in a global economy, migrants in a world of gross economic inequality, inhabitants of a world shaped by global warming.").

151. CATRIONA MACKENZIE & NATALIE STOLJAR, RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF 21 (2000).

152. *Id.*

153. NEDELSKY, *supra* note 7, at 31-32.

154. *Id.* at 23.

155. *Id.* at 20-22, 30-31.

156. *Id.* at 37.

it.[157] While not all relationships should be promoted or protected, all should be acknowledged.

This approach thus seems particularly suitable to the methodological operation of immigration and immigration law. Historically, sociology of migration has focused on individual micro-level autonomous decision making,[158] but there is much evidence to support the fact that migration is, in fact, relational. Some of the research connects decisions to immigrate with forces in the markets and governments of countries of origin and countries of destination[159] with family and household risk evaluation patterns.[160] Other theories of international migration suggest that migration should be understood not as stemming from an individual decision, but rather from structural elements of labor markets, including national labor market stratification[161] or the neo-colonial structure of world market economy.[162] It is hard to deny that migration is facilitated by networks, within which interpersonal ties play both a social and economic role, diminishing risks and increasing gains.[163] At the same time, these distinct social forces operate differently on various individuals, as migrants are attributed agency and subjectivity in their migration.[164] If immigration law seeks to regulate migration, it needs to conceptualize migrants as embedded in a variety of relationships (with nationals, non-nationals, family members, neighbors, employers, smugglers) and other relational contexts (such as gender, class and race power relations, colonialism and neo-colonialism).

B. Relational Autonomy and the Interconnectedness of Harm

Part of the relational approach has to do with the interconnectedness of harm.[165] We are influenced by harm inflicted on someone else, even when this harm is unlikely to be directed towards us. This is an indication of our relational being. Jennifer Nedelsky illustrated this by pointing to research on how children are harmed when witnessing violence even if not inflicted on them, since exposure to violence and suffering impedes their sense of security and trust.[166] Similarly, women are harmed when violence against

157. *Id.* at 20-22, 32.

158. Massey et al., *supra* note 9, at 434-35.

159. *See, e.g.*, *id.* at 433-34; Parkins, *supra* note 11; Van Hear et al., *supra* note 11.

160. Massey et al., *supra* note 9, at 436-40; White, *supra* note 9.

161. PIORE, *supra* note 11; Fine et al., *supra* note 11; Massey et al., *supra* note 9, at 440-44.

162. Korzeniewicz & Albrecht, *supra* note 11; Massey et al., *supra* note 9, at 444-48.

163. For a glimpse of the extensive research on migration networks and their assistance in mobility, knowledge, assimilation, increasing economic gains, etc., see, for example, Curran & Saguy, *supra* note 10; Dolfin & Genicot, *supra* note 10; Haug, *supra* note 10; Light et al., *supra* note 10; McKenzie & Rapoport, *supra* note 10; Pescosolido, *supra* note 10; Zhao, *supra* note 10.

164. Malkki, *supra* note 8, at 337-404.

165. NEDELSKY, *supra* note 7, at 22-23.

166. *Id.*

women is common or tolerated in their society, even if they themselves are not the victims of such violence, because they learn that their society is divided to predators and prey, and because they are constantly forced to stay on guard.[167]

From there, Nedelsky moves on to discussing the interconnectedness of harm in a situation where the harm (violence) is applied to a minority "other" that the majority society has no risk of becoming. Even in such situations, there can be multiple forms of harm, argues Nedelsky: the harm of bearing witness to violence, the harm of knowing one's community permits this violence (even if one will not be vulnerable to that form of violence), the harm of being the "innocent bystander" who does nothing to stop the violence, and the harm of being a perpetrator of the violence or one who reaps its benefits.[168] This harm is intensified if one can imagine that she may be subjected to the same kind of harm, as a theoretical matter.[169]

This, in essence, is a big part of the harm experienced by nationals by the violation of rights of non-nationals and the exclusion of migrants. While nationals are not subjected to the exclusionary practices of immigration law, they are potentially harmed by this form of "bureaucratic violence" which targets migrants: by knowing that migrants are sometimes turned away and excluded on arbitrary grounds, by taking part in a community that is engaged in such exclusion, by exclusion being carried out by a bureaucracy that acts on their behalf and is justified as serving their self-interest in ways which conflict with their senses of justice and morality. This, in essence, is why so many have struggled to come to terms with the consequences of the exclusionary immigration reforms of various First World countries in recent years. This sentiment should be considered.

C. Relationality and Dependence

Part of the conceptualization of relationality has to do with acknowledging and embracing human dependency and interdependency. We are dependent on particular others, for example, in situations of unusual vulnerability like illness or crisis. At the same time, we are also dependent on non-specific others for our ability to engage in various human operations. We depend on others for our ability to love, converse, exchange views, have property, and enjoy safety.[170] Included in those whom we depend on are our social institutions, and in many cases, the state.

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167. *Id.* at 23.
168. *Id.* at 26.
169. *Id.*
170. NEDELSKY, *supra* note 7, at 28-30.

This dependency is foundational to understanding immigration, and thus should be acknowledged by immigration law. A foundational principle of immigration law is that non-nationals are dependent on receiving states and societies for access to rights.[171] All migrants are dependent in that way, since their countries of origin are not in the best position to protect many of their rights when they are outside them. This has an even stronger basis when it comes to refugees.[172] The logic of refugee law is based on the notion that refugees require surrogate protection because their own state has failed to provide protection.[173] This dependency is most obvious in the context of the principle of non-refoulement,[174] the principle that prevents states from deporting persons whose lives and liberty would be put at risk if deported, precisely because of the awareness of this dependence. At the same time, a relational autonomy approach highlights the fact that migrants depend on each other, on their communities, and on the community of nationals for their emancipation and identification.[175] Immigration law should therefore embrace this notion of dependence when considering inclusion and rights of non-nationals.

D. Autonomy

Autonomy is a central element of this approach, just as it is significant in legal and political culture.[176] Although one's freedom and choices are shaped by various external forces, it represents an aspiration to adhere as much as possible to the notion of freedom from them—the relational context—which limit an individual's choices and possibilities.[177] This is a concept that takes individuals seriously, much more seriously than methodological holism, but at the same time analyzes them in the relational context in which they are embedded. Autonomy stands for the "core capacity to engage in the ongoing, interactive creation of relational selves, ourselves that are constituted, yet not determined, by the web of nested

171. ARENDT, *supra* note 32, at 267-306.

172. For the distinction between refugees and migrants, see *supra* note 27.

173. GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW (3d ed. 2007).

174. Article 33(1) of the Convention Relating to the Status of Refugees details the non-refoulement principle and provides that: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Refugee Convention, *supra* note 27, art. 33(1); *see also* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, T.I.A.S. No. 94-1120.1, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture]. Many refugee law scholars view this as a principle of customary international law.

175. Ramji-Nogales, *supra* note 15, at 712.

176. NEDELSKY, *supra* note 7, at 43.

177. *Id.* at 43-44.

relations within which we live."[178] What relational autonomy is concerned with is the inequality in "the ability to sustain this illusion of autonomy," that is, the relational context that renders some people less autonomous and less independent.[179]

In the context of migration, the relational autonomy approach would confront the limited range of options and choices migrants are facing, alongside acknowledging the agency and subjectivity of the migrant.[180] It would be particularly well-suited due to the vulnerability of migrants.[181] Especially when thinking about Third to First World migration, factors like colonialism and neo-colonialism, immigration regimes, familial situation and personal circumstances dictate to a large extent one's migratory ability.[182] A relational autonomy approach to immigration understands immigration and immigration law in the context of the gaps in mobility that exist in our world. Though it does not necessary deny states the ability to exclude, it takes into account those who are rendered immobile by immigration law, and places the role of non-entrée policies in their context, thus demonstrating how the access to mobility is limited along gender, age, race, and nationality lines.[183] In some cases, people need to be given the legal venues through which they can escape the maladies of their place of birth and the fate that expects their likes in that place.[184] It is important for immigration law to realize its potential roles in fulfilling relational autonomy.

E. Relational Autonomy and the Law

Law is crucial to the understanding of the relational context since it "very often lies behind, beneath, or around" it. According to Lon Fuller, law intends to solve social problems, and defines moral relationships.[185] The legal process is meant to provide mechanisms for structuring relationships, despite what Fuller terms as "creeping legalism," which is almost

178. *Id.* at 45.

179. *Id.* at 43.

180. Malkki, *supra* note 8, at 337-404.

181. John Christman, *Relational Autonomy and the Social Dynamics of Paternalism*, 17 ETHICAL & MORAL PRAC. 369, 381 (2014).

182. For a discussion on the problematic concept of choice in the context of immigration, and for the problematic distinction between economic migrants and refugees, see Kritzman-Amir, *supra* note 27, at 217-28; NEDELSKY, *supra* note 7, at 49.

183. Spijkerboer, *supra* note 82, at 463, 466-69.

184. NEDELSKY, *supra* note 7, at 51-54; *see also* AYELET SHACHAR, THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY 1-7 (2009) (explaining that the birth-right allocation system should be reformed to account for the many people today who remain trapped by the lottery of their birth).

185. LON L. FULLER, THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER 14-15 (Kenneth I. Winston ed., rev. ed. 2001) (1981).

synonymous to law's methodological individualism.[186] Indeed, law, including immigration law, constitutes a part of the background norms against which relationships are constituted.[187] For example, immigration law can either support a family by including its members, or bring it to the brink of destruction by excluding them. Law has the potential of structuring and intervening in relations, and could play that role in a number of different ways.[188] Rights and other legal instruments structure relations in ways which can undermine or foster the autonomy of the individuals engaged in them.[189] At the same time, law is virtually unavoidable, and people have to continuously engage with it.

V. THE RELATIONAL AUTONOMY APPROACH APPLIED

How can the relational approach to immigration law be applied in actual cases? I would like to suggest that to some extent a relational approach is already visible in a handful of cases, although it has a rather limited scope of application, which can only be inferred from between-the-lines reading of some legal texts, and is applied in an unaware manner. These examples are not exclusive, nor are they examples of "perfect application of relational autonomy," rather they are demonstrations of *some* relationality *angle*, broadly construed, in the subtext of their reasoning. I use these cases as examples of the applied potential of relational autonomy, suggesting that a deeper engagement of immigration law with this methodology could be beneficial. There are also cases that may look like applications of the relational autonomy methodology, but upon closer inspection it becomes clear that they should not be confused with this approach. I will look at concrete examples from various jurisdictions, though the mentioned cases may not necessarily represent the common methodological approach in these jurisdictions.

A. The Case of Cedric Herrou (France) – A Broad Relational Autonomy Approach

The fact that migrants are not complete political strangers and are connected to nationals in various ways is evidenced in a recent case in France. Mr. Cedric Herrou, an olive farmer in France, was helping smuggle

186. *Id.* For the application of Fuller's argument in the context of refugee law, see Galya Ben-Arieh, *Is the US Gaming Refugee Status for Central Americans? A Study of the Screening and Refugee Status Determination Process for Central American Women and Their Children*, *in* THE CRIMINALIZATION OF MIGRATION: CONTEXT AND CONSEQUENCES 226 (Idil Atak & James C. Simeon eds., 2018).

187. Kritzman-Amir, *supra* note 52.

188. NEDELSKY, *supra* note 7, at 70-72.

189. *Id.* at 65-66.

undocumented immigrants from Italy to France. He arranged a network of volunteers who assisted undocumented migrants as they made their journey to southern France.[190] As a result, he faced criminal charges, due to the fact that he aided and facilitated the undocumented entry of individuals in France.[191] As such, he was punishable by imprisonment of five years and a fine of 30,000 euros.[192] According to exceptions outlined in the law, sanctions may not be imposed on those aiding their immediate family members and those providing pro bono legal advice or other forms of assistance, such as housing or food, aiming to assure the dignity and physical integrity of undocumented migrants. The French Constitutional Council (*Conseil Constitutionnel*) analyzed his actions under the principle of *fraternity*, which is part of the motto of the Republic of France, and appears in the constitution.[193] From this principle, the Council determined, it is possible to infer that acts of humanitarian assistance to migrants should be allowed. Mr. Herrou was then acquitted.[194]

In a world where persons assisting migrants in any way are frequently criminalized, the constitutional decision in the case of Mr. Herrou is unique.[195] It is also unique because it presupposes a bond and connectivity between nationals and non-nationals, a bond of brotherhood around their common humanity.[196] This relational approach is non-infantilizing, respectful of the subjectivity of the migrant, and aware of the dependency that is foundational to all human relationships,[197] especially the relationship between an undocumented migrant and the person assisting her.[198] The migrant is also not atomistic. The context of the relationship is important—including the fact that the relationship is not driven by motivation for economic gain and is not exploitative. The focus of the decision is not on the individual migrants or even the individual assisting the migrants, but rather on how the migration law is connected to the telos of the host country, which, in the case of France, includes *fraternity*. The migrant is a part of this telos, and as such not a political stranger.

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190. Elian Peltier & Richard Pérez-Peña, *'Fraternité' Brings Immunity for Migrant Advocate in France*, N.Y. TIMES (July 6, 2018), https://tinyurl.com/ycz6qc8y.

191. Code de l'entrée et du séjour des étrangers et du droit d'asile [Code for the Entry and Stay of Foreigners and the Right to Asylum] art. L622-1 (Fr.).

192. Peltier & Pérez-Peña, *supra* note 190.

193. 1958 CONST. preamble, art. 72-3 (Fr.)

194. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2018-717/718QPC, July 6, 2018 (Fr.).

195. *Cf.* Claire Provost et al., *Hundreds of Europeans "Criminalised" for Helping Migrants – As Far Right Aims to Win Big in European Elections*, OPENDEMOCRACY (May 18, 2019), https://tinyurl.com/y2rwwycv.

196. This bond is almost entirely missing from the narrative of the litigation of the Scott Warren case, who ultimately was acquitted. Miriam Jordan, *An Arizona Teacher Helped Migrants. Jurors Couldn't Decide if It Was a Crime*, N.Y. TIMES (June 11, 2019), https://tinyurl.com/y2gyzwjh.

197. NEDELSKY, *supra* note 7, at 28-30.

198. On the concept of relationality and dependence see *id.* at 26.

Interestingly, this understanding of the immigrant as someone who has an affinity to nationals derives from an analysis which is focused on the national, particularly the implications that the national-migrant relationship have on the national. The implications on the non-nationals are subtle and sub-textual. The decision implies that if the non-national is a person to whom the principle of *fraternity* applies, perhaps the sovereign ability to exclude her is somewhat limited. Yet at the same time, this decision embraces a profound and broad relational approach which is applied with respect to non-specific non-nationals, who did not have a prior relationship with the national at hand. It does not refer to the broader colonial and neocolonial context of migration. The relational approach stems from an acknowledgement of the fact that exclusionary immigration regimes are constituted against the backdrop of their impact on nationals who object to them and feel moral discomfort with them.

B. The Litigation of the Travel Bans (The United States) - A Narrow Relational Approach

Another series of cases exemplifying a partial relational approach is the litigation over the travel bans in the United States, which were instated by the Trump administration, from January 2017, and changed over time in response to the courts' rulings. This is an example of litigation pushing back on a methodological holism by articulating a partial relational approach.

When looking at the briefs challenging the legality of the various Executive Orders and proclamation which instated the "travel bans," we can see the use of a relational narrative in the briefs. The focus of those briefs is not on the harms and rights infringements of those who are banned, but on the effects of the bans on nationals. The plaintiffs in the various suits explained how the Executive Orders had implications for them and their interests. For example, in the litigation of one of the travel bans,[199] the Plaintiff, Dr. Elshikh, a Hawaii-based Imam, argued that the ban put his mother-in-law on hold from applying for a visa, thus preventing her from coming to the United States from Syria, explaining the consequences of the ban in a relational manner:[200]

> Because of my allegiance to America, and my deep belief in the American ideals of democracy and equality, I am deeply saddened

199. Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 9, 2017); Hawai'i v. Trump, 241 F. Supp. 3d 1119 (D. Haw. 2017) (order granting motion for temporary restraining order). The TRO was converted into a preliminary injunction on March 29. Hawai'i v. Trump, 245 F. Supp. 3d 1227 (D. Haw. 2017). Also enjoined section 6, the 120-day suspension of the U.S. Refugee Admissions Program. The Ninth Circuit affirmed the core holding in June 2017. Hawai'i v. Trump, 859 F.3d 741 (9th Cir. 2017) (per curiam).

200. 241 F. Supp. 3d at 1132.

> by the passage of the Executive Order barring nationals from now-six Muslim majority countries from entering the United States . . . . [My children] are deeply affected by the knowledge that the United States—their own country—would discriminate against individuals who are of the same ethnicity as them, including members of their own family, and who hold the same religious beliefs. They do not fully understand why this is happening, but they feel hurt, confused, and sad.

Over the course of the litigation for the different versions of the bans, most of the focus of the different organizations who challenged its legality was the ban's discriminatory nature and its spill-over effect on nationals:[201] their interest in limiting the executive power over immigration issues;[202] their concern about risks associated with undue deference to the executive;[203] the interests of nationals in allowing entry of banned persons;[204] and the insufficient security basis for the bans, implying the interest of nationals in evidence-based policy making.[205] The focus on nationals was required for legal reasons such as the need to establish standing,[206] and for societal reasons such as strengthening legitimacy of such petitions.[207] Nevertheless, folded into this line of reasoning is a relational approach, underscoring the profound connection that exists between the rights of migrants and the interests of nationals. It also relates with the above-mentioned interconnectedness of harm[208]—when people are banned in arbitrary and disruptive manners, this causes an interconnected harm to nationals: they become a part of the political community on behalf of which immigration law is inflicting the harm; they become witnesses or bystanders when the harm is inflicted on those excluded non-nationals; they imagine or

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201. *See, e.g.*, Brief of Amici Curiae Constitutional Law Professors in Support of Appellees and Affirmance, Int'l Refugee Assistance Project v. Trump, 857 F.3d 554 (4th Cir. 2017); Brief of Amici Curiae Immigration Law Professors on Statutory Claims in Support of Plaintiffs-Appellees, Int'l Refugee Assistance Project v. Trump, 857 F.3d 554 (4th Cir. 2017); Brief of New York University as Amicus Curiae in Support of Respondents, Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080 (2017); Class Action Complaint for Declaratory and Injunctive Relief, Jewish Family Serv. of Seattle v. Trump, No. 2:17-cv-01707 (W.D. Wash. Nov. 13, 2017); Complaint for Declaratory and Injunctive Relief, Zakzok v. Trump, No. 1:17-cv-02969-GLR (D. Md. Oct. 6, 2017).

202. *See, e.g.*, Brief of Immigration Law Scholars as Amici Curiae Supporting Respondents, Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080 (2017).

203. Brief of New York University as Amicus Curiae in Support of Respondents at 16-19, Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080 (2017).

204. *Id.*; Class Action Complaint for Declaratory and Injunctive Relief, Jewish Family Serv. of Seattle v. Trump, No. 2:17-cv-01707 (W.D. Wash. Nov. 13 2017).

205. *See, e.g.*, Motion and Memorandum of Points and Authorities of Civil Rights Organizations for Leave to File a Brief as Amici Curiae, Pars Equal. Ctr. v. Trump, 2018 U.S. Dist. LEXIS 70512 (D.D.C. Mar. 2, 2018).

206. Kritzman-Amir, *supra* note 122.

207. *Id.*

208. *Supra* Section III.b.

experience this harm reaching them in various indirect ways; and they run the risk of potentially excluding people in a way that could cost them their lives.[209]

This connection between the interests of nationals and those of the excluded non-nationals was also important for the court decisions made on the legality of U.S. travel bans. The Ninth Circuit Court of Appeals determined that the second travel ban[210] was insufficiently based on national security grounds, overbroad, and in contradiction with Hawaii's resettlement policies and programs.[211] The Supreme Court, when issuing an injunction on this same travel ban,[212] decided that it was not to be used to exclude "foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States" seeking visas to visit family, to attend a university at which they were admitted, to accept an offer of employment, or to address an American audience.[213] When another version of the travel ban was issued[214] and challenged in the Ninth Circuit, this exclusion of "those persons with a credible bona fide relationship with the United States" was sustained. [215] The courts' differentiation between non-nationals with formal, bona fide relationships and those who lack such a relationship became determinative. This expresses a relational approach acknowledging a rather broad range of personal connections, suggesting non-nationals are not all strangers, but rather some have "bona fide" relationships with nationals which exceed the familial context. This contributes to the humanization of non-nationals. At the same time, critically missing from the narrative of the plaintiffs and the court is the broader relational context, which takes into consideration the messy interconnections among the nationals of the banned countries, the United States and its society.

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209. This harm is supposed to be prevented under the non-refoulement principle. *Compare* Refugee Convention, *supra* note 27, art. 33, *with* Convention Against Torture, *supra* note 174, art. 3. *Non-refoulement* is also considered by some to be a customary international legal norm. *See, e.g.*, Inter-Am. Ct. H.R., Advisory Opinion No. OC-25/18 ¶ 179 (May 30, 2018).

210. Exec. Order No. 13780, Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. 13209 (Mar. 6, 2017).

211. Hawaii v. Trump, 859 F.3d 741, 771-75 (9th Cir. 2017) (per curiam). Similar reasoning was delivered by the Maryland Federal District Court, which issued a nationwide injunction against the entry ban provision of the second order in Int'l Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539 (D. Md. 2017), affirmed by the Fourth Circuit Court of Appeals two months later in Int'l Refugee Assistance Project v. Trump, 857 F.3d 554 (4th Cir. 2017).

212. Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2088-89 (2017).

213. *Id*; *see also* Amy Howe, *Court Releases October Calendar*, SCOTUSBLOG (July 19, 2017), http://www.scotusblog.com/2017/07/court-releases-october-calendar/. The Supreme Court never heard the challenge on its merits, as the second nationality ban expired before it could do so.

214. Proclamation 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats, 82 Fed. Reg. 45161 (Sept. 24, 2017).

215. Hawaii v. Trump, 878 F.3d 662, 675 (9th Cir. 2017) (citing Trump v. Int'l Refugee Assistance Project and Trump v. Hawaii, 137 S. Ct. 2080, 2088 (2017)).

This focus on the impact of immigration policies on nationals runs the risk of implying that migrants' rights are questionable or inferior to the rights of nationals. The notion that migrants are bearers of human rights due to their inherent and intrinsic human value cannot be taken for granted.[216] In order to promote the relational approach and sustain the notion of migrants as autonomous rights bearers, the narrative of such briefs and court decisions should be carefully construed.

C. The Cases of Fertility Treatment and Entry Permits to Memorial Services (Israel) – What is not Rational Autonomy: Migrants as Instrumental to the Rights of Others

There is a fine line between acknowledging the personal connections between migrants and nationals, and looking at migrants as instrumental to the fulfillment of the rights of nationals. Though this instrumentalist view of the non-national is rather dominant in immigration law, it should be avoided as it diminishes the autonomy of migrants.[217]

This was the approach taken in some of the cases on immigration in Israel concerning national Israelis and non-national Palestinians. One such case features an Israeli national who was diagnosed with fertility problems and his non-national wife. The Israeli national requested that his healthcare provider cover the costs of In Vitro Fertilization treatments for his wife who was not insured and thus found not eligible for services by that provider.[218] The Court decided the healthcare provider has a duty to cover the fertility treatment in the non-national wife's body (until the embryo was implanted in her womb),[219] for the sake of materializing the national's right to parenthood.

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216. Kritzman-Amir & Rothman-Zecher, *supra* note 16, at 519-22. Domestic constitutional law in the United States, and in other countries, has acknowledged the fact that migrants are eligible for a wide range of rights. International human rights law obliges states to protect the rights of "all individuals within its territory and subject to its jurisdiction" or "everyone." International Covenant on Civil and Political Rights art. 2(1), Dec. 16, 1966, T.I.A.S. No. 92-908, 999 U.N.T.S 171; International Covenant on Economic, Social and Cultural Rights art. 6-9, 11-13, 15, Dec. 16, 1966, 993 U.N.T.S. 3. These norms should apply to everyone—not only within a state's territory, but also along its borders and in other areas where states apply coercive force. *See generally* Colin Harvey, *Time for Reform? Refugees, Asylum-Seekers, and Protection Under International Human Rights Law*, 34 REFUGEE SURV. Q. 43, 47 (2015). On the application of refugee rights obligations in places where states apply coercive force, see generally Tally Kritzman-Amir & Thomas Spijkerboer, *On the Morality and Legality of Borders: Border Policies and Asylum Seekers*, 26 HARV. HUM. RTS. J. 1 (2013).

217. De Genova, *supra* note 79, at 1180-81 (discussing the instrumentality of migrants as a means of their inclusion).

218. File No. 141/07 Labor Court Appeal (National), John Doe v. Clalit Healthcare Services (Nov. 4, 2008), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

219. Interestingly, coverage stops once the embryo is implanted in the mother's womb, even though stopping medical treatments at that point would not help the national materialize his right to parenthood. Other common milestones in pregnancies are the detection of a heartbeat (*see* H.R. 314, 2019 Leg., Reg. Sess (Ala. 2019)), viability (*see* Roe v. Wade, 410 U.S. 113 (1973)), and birth.

Another example is a petition challenging the Minister of Defense to deny the request of Palestinian non-nationals to enter Israel. Their entry was requested for the purpose of participating in a Memorial Day ceremony held by families who lost their loved ones in the Israeli-Palestinian conflict. The Court decided to allow the entry of Palestinians in order to protect the freedom of speech of the Israeli public, which would be compromised if the Palestinians were denied the opportunity to participate in the ceremony and Israelis and Palestinians were barred the opportunity to converse.[220]

In both of these decisions the courts protected the rights of the non-nationals and acknowledged the existence of relationships between them and the nationals. These relationships were acknowledged in challenging circumstances. In the first case, the Court acknowledged a relationship between a national and a non-national Palestinian partner in the political context of the ongoing control of Israel over the West Bank and in the context of an Israeli immigration regime that actively seeks to prevent the migration of Palestinians, especially Palestinian family members.[221] In the second case, the Court acknowledged the relationship between nationals and non-national Palestinians when the relationship was not a personal or familial one, but rather a relationship of political allies, formed in the context of a very contentious ceremony, and in the context of the common grief of Israelis and Palestinians. Yet, at the same time, the reference to the non-nationals as a means rather than an end is dehumanizing and thus problematic. The Palestinians were not constituted as rights bearers in and of themselves. This could have been avoided had the Court slightly tuned its rhetoric: in the first case, mentioning the right of the non-national to be a parent as the additional basis for the fertility treatments in her body; and in the second case, mentioning the right of freedom of speech of Palestinians, which could only be meaningfully implemented if they are allowed to join the grieving Israeli counterparts for this memorial day ceremony. Presumably, the Court did not choose this reasoning in order to avoid the massive political questions such lines of reasoning would entail. As a result, these two decisions reflect a *relational* approach but not a recognition of the *autonomy* of non-nationals, and as such this approach should be avoided.

VI. CONCLUSION

Immigration law is methodologically prone to individualism. Individual immigrants are primarily at the core of its regulatory efforts. This methodology suggests that we look at the migrant as largely detached from

220. HCJ 3052/19 Combatants for Peace v. Minister of Defense (2019) (Isr.).
221. Kritzman-Amir & Ramji-Nogales, *supra* note 106, at 571-74.

her various connections, affiliations and context. Methodological individualism is highly problematic—it is dehumanizing and it inaccurately depicts the migratory experience. The underlying narrative of methodological individualism in immigration law speaks of the sovereign state faced by "the migrant" having to determine whether to include or exclude her. While personal relationships of migrants with nationals are partially acknowledged, they are not consistently and in a deep way part of the methodological approach of immigration law. The broader context of immigration, power, subordination, colonialism and neo-colonialism[222] are even less present in the methodological landscape. It also means that immigration law overlooks the broader context of human mobility, and the gaps in access to the mobility infrastructure.[223] This methodological approach destines states, migrants, and civil society to conduct massive and costly legal, physical and socio-political operations targeted at the individual migrant, ranging from individual inclusion, integration, criminalization to exclusion. Not only is this individual effort tedious and repetitive, as it has to be renewed for every single individual, it is also an effort that leads us to look at the "tree rather than at the forest." The focus on the individual leads us to miss the broader macro-level picture of how immigration law operates on persons, which stands in sharp contrast to our assumptions on the operationalization of immigration law if reached through a micro-level individualistic focus.[224]

Simultaneously, in some instances, particularly emergency-like situations, immigration law abandons methodological individualism and takes on methodological holism. Methodological holism focuses on the immigration and not on the migrants, and their individual circumstances are hardly significant in those contexts. So, while immigration law primarily assumes a certain understanding of the *individual migrant* and the causes of her migration, and pursues its regulation accordingly, other parts of immigration law assume a certain understanding of *migration* and derive regulatory measures from there. Methodological individualism is the norm or the ordinary state of events. Methodological holism is applied during extraordinary or (real or imagined) emergency-like situations. This too is a problematic methodology since it fails to take the subjectivity and agency of

222. Achiume, *supra* note 80, at 1523.

223. Spijkerboer, *supra* note 82, at 267-306.

224. This could be illustrated, for example, by looking at the risk classification assessment (RSA) ICE has deployed to lend objectivity, efficiency and accuracy to determining individual immigration detention. A look at the broader application of RCA, which was influenced by external political changes such as elections, the work load of the applying officers, the edits to the RSA over the course of the years and discretion of the end users rendered this seemingly-"scientific" and quantifiable calculus of risk is actually incredibly subjective and facilitated massive immigration detention. Robert Koulish & Ernesto Calvo, *The Human Factor: Algorithms, Dissenters, and Detention in Immigration Enforcement* (iLCSS Working Paper No. 1, 2019), https://tinyurl.com/y9afyomf.

the migrant seriously and instead treats migrants "in bulk," depriving them of their autonomy.

This Article proposes a third methodology for immigration law: relational autonomy. This methodology is in a sense a middle ground between methodological individualism and the holism, as it takes some of both worlds, and connects them. It is an approach that looks at individuals (migrants) as self-governing agents who are socially constituted and who are embedded in inter-personal relations, mutual dependencies, and socio-political context.[225] This Article should be read as an invitation for further inquiry into the application of this methodology across different elements of immigration regimes, under different international and domestic laws. Further research could, for example, offer guidelines to a relational RSD process; suggest a relational categorization for migrants; re-conceptualize a deportation regime from a relational point of view; or confront the fundamentals of an immigration regime of a particular jurisdiction with the principles of relational autonomy.

The application of relational autonomy in the setting of international migration is different from its application in domestic contexts, such as those of property law, criminal law or family law. It suggests that humans originating from different sides of national borders—migrants and nationals—are embedded in a shared social context characterized by profound commonalities and mutuality. This is indicative of the vast changes the world has gone through, with increased mobility of globalization, and the shifts in domestic and international labor markets due to colonialism and neo-colonialism, all of which created a relational context which spreads across international borders, and transcends markets and political units.

Connecting immigration law and relational autonomy theory is also instrumental for shedding new light on the concept of sovereignty, contributing to the ever-growing body of literature on sovereign responsibility. "Traditional" literature on sovereignty argues that sovereigns are "trustees of their people, they have fiduciary duties to them and only to them," and that "because sovereignty inheres in the people, the primary responsibility of its agents is held to be that of protecting and promoting their citizens' interests rather than that of heeding others' concerns."[226] The more recent "sovereignty as trusteeship of humanity" literature suggests that for various moral reasons, in today's world of interconnectedness, "as agents of humanity, sovereigns are obligated to take other regarding considerations seriously into account in formulating and implementing policies" in order

225. Christman, *supra* note 69, at 147

226. Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT'L L. 295, 296 (2013).

to avoid abuse and exploitation.[227] This Article suggests, that the line between the acts of taking into account the interests of nationals and considering other-regarding interests is blurry to begin with. Migrants of various kinds are embedded in relationships with receiving states and their nationals; they cannot accurately be portrayed as political and social others, despite their formal status (or lack thereof), and even despite the practices of "othering"[228] or illegality they endure.[229] Therefore, this methodology suggests it is neither about sovereigns taking into account the national self-interest *nor* about them considering other-regarding considerations. It is about considering the relational context. Relational autonomy theory can enrich our understanding of sovereignty and its operationalization, and thus the connection between sovereignty and relational autonomy should be further explored in future research too.

It is important to emphasize that relational autonomy arguments are not necessarily winning arguments, and it is not the case that if this methodology were adopted that sovereigns would be legally or even morally obligated to include all persons who have relationships with their nationals, migrants from formerly colonized countries or even persons whose migration is induced by neo-colonialism. Indeed, exclusion can be justified even if we acknowledge the relational context. Nevertheless, the relational context is relevant and should be considered. If anything, not taking important context into account resulted in a massive failure of states to regulate migration and protect the rights of migrants, as exemplified in the recent rise of Third to First World migration. Decontextualizing and depoliticizing migration, achieved through methodological individualism, sometimes resulted in the construction of migration emergencies, which, in turn, became increasingly political or politicized events handled through methodological holism. A relational approach to immigration law will enable law to "anticipate migrant flows and enable a safe and orderly movement of human beings across borders,"[230] where possible, or tailor exclusionary measures in a more adequate manner. "Without these key features, the regime cannot escape the current cycles of crisis and exploitation."[231]

It is important to recognize the shortcomings of the proposed methodology. One potential challenge with its application is that it might require investing extensive administrative efforts and costs in fact-finding relating to the relational context of every immigration-related case. Without detracting from the validity of this argument, it is important to note this concern is not unique to the application of relational autonomy in

227. *Id.* at 300.
228. *Supra* note 70.
229. *Supra* note 35.
230. Ramji-Nogales, *supra* note 111, at 651.
231. *Id.*

immigration law, and the same kind of concern is valid in every legal branch. Additionally, it is not inherently more complicated or costly to consider relational context than the individualistic traits in immigration proceedings. Some of the costs and administrative burdens could be alleviated, by creating some relational-context-driven presumptions.

Another potential challenge with this methodology is that it might induce overemphasis on the nationals and their rights and interests in the relationship with the migrant. This inherent inequality of power is not unique to immigration law. It characterizes other legal branches where relational autonomy was suggested—such as criminal law, where there is extreme inequality between criminal offenders, victims and states, or family law, characterized by inequality along gender lines, as well as between children and adults. The application of this methodology should therefore be a careful and an aware one. Narratives and reasonings should be mindful of the agency, autonomy, intrinsic value and subjectivity of the migrant. They should refrain from rendering the migrant a relational instrument, and instead constantly emphasize that the migrant is not just interconnected to others in various ways, but also that the migrant is an autonomous rights bearer and that the relational context operates on the migrant in non-deterministic manners.

Nevertheless, a relational approach will create a better fit between immigration law and immigration as a social and geographical phenomenon, allowing law to better fulfill its social roles. Immigration is a not just the movement of an individual across political borders. It is a relational social behavior—in which families, communities and markets participate—that both influences migration and is influenced by migration. Regulation of migration with only an individualistic focus fails to take this context seriously, and therefore may prove to be inefficient and counterproductive. A relational approach could contribute to the methodological cohesiveness of immigration law, which is, as mentioned above, split between two contradicting methodologies. This is a methodology well-suited for the "day-to-day" operationalization of immigration law, and for the (arguably imagined or constructed) migration emergencies.[232] A relational autonomy approach to immigration law is also normatively preferable since it is more humanizing to migrants, and more respectful of the historical and contemporary forms of exploitation and injustice that impact immigration.

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232. *Id.* at 612-13.