**Mapping and Countermapping Shifting Borders**

**Abstract**

Ayelet Shachar’s *The Shifting Border* deploys a powerful map metaphor to support rethinking of borders and their functions. I interrogate this metaphor, developing some of the representational, constructive, and normative functions of maps, along with their connections to legal mechanisms for decoupling migration from territory. I survey three responses to the extra-territorialization of migration: a cynical response that rejects the possibility of migration justice, an abolitionist response connected to open borders, and a revisionist response that advocates for widescale institutional reform. The revisionist response illuminates how Shachar’s essay challenges us to reflect on what sorts of maps and accompanying social and political organizations would best support migrant justice.

It is a pleasure to engage with Ayelet Shachar’s important essay *The Shifting Border*. Political philosophers and legal theorists are beginning to realize that the dominant model of political and territorial organization and sovereignty has little connection to reality. States have made Westphalian conceptions of territory and sovereignty obsolete through a variety of legal fictions and political maneuvers. They employ a variety of techniques such as maritime interceptions and offshore processing to expand, bend, and dissolve jurisdictions to prevent refugees from accessing territorially-based rights. By shifting borders, states not only elude their legal and moral responsibilities; they also promote violence toward mobile people.

*The Shifting Border* is an important step forward in drawing new maps and formulating new conceptions of sovereignty, territory, and legal spatiality. At the core of Shachar’s project is the conviction that states can and should be bound by law. She recommends a two-part strategy. First, when states manipulate borders to extend their control over people, they should simultaneously acquire responsibilities to protect human rights. Second, she advocates providing refugees with forms of protection that do not rely on territorial access. Territory and protection, in her view, should be decoupled to provide a more flexible, effective response to human displacement. In this response, I develop the map metaphor that Shachar proposes. In particular, I consider the constructive and normative functions of maps and explore how these might connect to reforming or transforming borders. I use these reflections to interrogate the examples Shachar gives to bind states and to harness shifting borders so that they can used to serve refugees and sketch some possible ways forward.

Shachar seeks to develop concepts to understand and criticize the shifting border and to suggest legal tools to reconcile state spatial innovations with justice. She writes:

When it comes to today’s shifting border, we are, to borrow a metaphor from Seyla Benhabib, like travelers navigating a new terrain with the help of old maps; while the terrain has radically changed, our maps have not. Thus, we stumble upon streams we did not know existed, and climb hills we have never imagined (Shachar, 2020: 6).

Benhabib’s metaphor emphasizes maps’ representative function and how maps fall short when they do not adequately reflect the aspects of reality that we wish to attend to. This captures one of their functions, but maps do more than represent terrains; they are also tools for intervening in the world. Another way of putting this is that maps have both representation and constructive roles. This is most starkly illustrated with examples such as the European powers dividing Africa during the Berlin conference or France and Britain establishing the Sykes-Picot line, but we can go further than these dramatic examples by observing that the modern conception of territory is only possible because of developments in mapping (Elden 2013). Maps not only represent the nation-state; they actively construct it.

Beyond their representational and constructive function, maps have a normative function. They not only tell us where boundaries are, but also where they should be (in the view of the map makers, which often diverges from the people their maps have ensnared). The history of map making is also a history of colonization. Consider sixteenth century maps of the Americas depicting sea monsters, cannibals, naked indigenous people, and vast stretches of uncharted terrain. In doing so, they played served to justifying conquest (and had a comparatively negligible role in enabling it) (Mignolo 2003: 259-313). In a similar vein, Brian Friel’s *Translations* dramatizes the British mapping and renaming of nineteenth century Ireland (Friel 1993). Owen, who has been translating for the British military, corrects his father Hugh’s statement that the priest lives at Lis na Much:

No he doesn’t. Lis na Muc, the Fort of the Pigs, has become Swinefort. … And to get to Swinefort you pass through Greencastle and Fair head and Strandhill and Gort and Whiteplains. And the new school isn’t at Poll na gCaorach – it’s at Sheepsrock… (*Translations*, Act II, 310-15)

Maps have a central role in nation-building projects which provide much of our conceptual apparatus for thinking about politics today. Methodological nationalism in the social sciences gave rise to a conceptual and normative view of the state, combining notions of territory and sovereignty with nationalist visions of identity and society (Wimmer and Glick Schiller 2002). One of the functions of methodological nationalism has been to erase colonial and imperialist histories and obfuscate ongoing neocolonial and neo-imperialist structures. It blinds us to ongoing transnational relationships and states’ hypocritical extraterritorial exercise of power. One of the ways it does this is through maps.

What makes mapping so powerful is the way that it creates and manipulates borders in tandem with other techniques. Spatial borders interact with conceptual categories that classify people and allocate rights based on a combination of status and location. This is most problematic when it gives rise to the illegalization of groups of people (Dauvergne, 2008). The shifting of territorial borders works hand in hand with shifting categorical borders, altering people’s rights, privileges, and vulnerabilities. This occurs through discourse in examples such as state attempts to shift blame for migrant deaths to smugglers by conflating them with human traffickers. Mapping contributes to enabling the larger conceptual and emotional discourse that enables the securitization of human mobility (Albahari, 2015).

 An alarming recent development is the revolution in big data which amplifies state surveillance, expanding their capacity and permitting highly individualized, invasive scrutiny. This creates borders around individual bodies, determining whether people pass unmolested through checkpoints after providing a retinal scan or whether they are singled out, detained or turned back.[[1]](#footnote-1) Powerful and problematic algorithms incorporate and legitimize their creators’ biases, pioneering newly opaque ways of exercising control and evading moral and legal responsibilities.

One way of reading *The Shifting Border* is to see it as part of an effort to move beyond methodological nationalism (which has always served more as a vision of what states ought to be than an adequate model of what they are):

I believe this shift in the ‘technology’ of governance and spatiality of migration regulation must be matched by a reconceptualization of the relationship between law and territory, stratification and (im)mobility, space and political will, so as to facilitate rights protections and access options that begin to match the restless agility of the shifting border (Shachar, 2020: 56).

How should we reconceptualize “the relationship between law and territory, stratification and (im)mobility, space and political will”?

Our response to this question will depend in large part on our diagnosis of what we are up against. One of the pleasures of *The Shifting Borders* is the menagerie of monsters that Shachar and her interlocutors – especially Sarah Fine and Steffan Mau – offer us. Fine suggests the biblical sea monster Leviathan who doubles as Thomas Hobbes’ mortal God and the troll of the *Three Billy Goats Gruff* (Fine, 2020: 99-101; 113-4). Shachar connects Mau’s reference to metamorphosis (Mau, 2020: 146) to Gregor Samsa’s transformation in the monstrous vermin of Kafka’s novella (Shachar 2020: 243). We might add the *Odyssey’s* shapeshifter Proteus and the Heuristically Programmed Algorithmic Computer (HAL) of *Space Odyssey*.

Perhaps the monster we are facing is neither the mortal god Leviathan, the ravenous troll or zombie, or even the rogue AI. Many of the monsters are more banally human. They are the border guards who turn asylum seekers back to Mexico or Libya and detention workers who wrench the arms of children from their parents’ legs. They include politicians who demonize immigrants for votes and reporters who sell papers with dehumanizing images of black and brown people. They are judges who uphold and legitimatize a rotten system. They are humanitarian workers, exercising their authority over people under their care with smug paternalism. They are academics who wield power over the people they research and, in too many cases, reinforce rather than challenge the status quo.

We should not minimize individual responsibility – the daily harms to migrants depend on the actions of tens of thousands of people necessary to surveil and punish them, as well as the inaction of millions more. Nonetheless, the solution is not solely a matter of individual resistance, but systemic change. Bureaucrats are embedded in institutions that enable and normalize violence against migrants.

What possibilities are there of transforming the current system? Shachar hopes to bind Leviathan with law and provides a number of useful cases and models to show how this might be possible. In *Hirsi Jamaa and Others v. Italy*, the Italian Revenue Police and Coastguard intercepted boats carrying Somalian and Eritrean asylum seekers, transferred them to Italian military ships, and handed them over to the Libyan authorities known to frequently detain and torture migrants. This effectively denied them an opportunity to receive protection, let alone claim asylum. Libya does not respect the obligation of *non*-*refoulement*, frequently collectively expelling Somali or Eritrean asylum seekers back to states where they face imprisonment and torture.

*Hirsi Jamaa* contrasts with the notorious *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993) in which the U.S. Supreme Court denied that the US Coast Guard violated the obligation of *non-refoulment* by intercepting boats of Haitian asylum seekers on the grounds that the obligation did not apply extraterritorially. The European Court of Human Rights ruled in *Hirsi* *Jamaa* that the applicants were under the jurisdiction of Italy since human rights obligations can extend outside of traditional Westphalian borders when state officials “exercise ‘continuous and exclusive *de jure* and *de facto* control.” (77, quoting *Hirsi v Italy* (n 25), sec. 81).

A similar verdict was reached in *N.D. and N.T. v. Spain*.[[2]](#footnote-2) The two applicants had reached the top of the third fence that separates Spain from Morocco when the Spanish *Guardia Civil* apprehended them and returned them to Morocco. Rather than ruling on whether the applicants were on Spanish territory, the court ruled that what was relevant was the Spanish authorities’ functional control.

Shachar’s other examples include Canadian resettlement of Syrian refugees in 2015 which involved Canadian officials travelling to camps in Jordan, Turkey, and Lebanon for pre-screening interviews and identity verification (Shachar, 2020: 82-4). She takes this to be an exemplar of “deploying the shifting border ‘machinery’ in the service of *enhancing* rights and securing mobility, rather than inhibiting both.” (Shachar, 2020: 83). Another example is the UNHCR coordinated Orderly Departure Program after the end of the Vietnam War. Shachar observes that the program successfully combined “international cooperation and the *severance* of the linkage between territorial arrival and the granting of protection status.” (Shachar, 2020: 87)

Another intriguing example is the Nansen passport, in which the League of Nations issued international travel documents to stateless people to enable safe passage and lawful mobility (Shachar, 2020: 91). Perhaps this could serve as the basis for moving migration beyond the exclusive purview of states, especially if it could be expanded to cover a broader range of refugees (not just *de jure* stateless people) and to include rights of settlement and return.

 What should we make of these cases and models? The first response is a cynical one. States shift borders because they want to deflect responsibility and repel migrants. As Shachar acknowledges, Italy’s response to *Hirsi Jamaa and Others* was to create a partnership with Libya that allowed it to escape its legal obligations by using the Libyan coast guard to sustain the fiction that it was no longer intercepting migrants (Shachar, 2020: 77). On this reading, what we need is not diagnosis and conceptual and legal innovation – states understand how to manipulate borders at least as well as theorists and will bend the law to their will. The problem does not lie in the structure or nature of our legal and political institutions, but rather in interests and power. The solution is to compel states to live up to their responsibilities or to hope that state interests align with a less brutal immigration policy.[[3]](#footnote-3)

 A second type of response is an abolitionist one. In her response to Shachar, Sarah Fine advocates abolishing states’ right to exclude non-members. She points out that the shifting border is not an aberration, but “part of migration control’s business-as-usual – albeit business that states often like to conduct behind closed doors.” (Fine, 2020: 114) Fine counters Shachar’s hope of “taming” states’ manipulation of borders (Fine, 2020: 109) by quoting Audre Lorde: “the master’s tools will never dismantle the master’s house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change.” (Fine, 2020: 111)

 I want to explore a third revisionist response by asking *what sort of legal or political organization could support migration justice?* Shachar’s proposal largely works within the state-system. *Hirsi Jamaa and Others v. Italy* and *N.D. and N.T. v. Spain* suggest aligning control with responsibility; the Canadian resettlement of Syrian refugees and the Orderly Departure Program harness states’ extraterritorial reach in the interest of refugees. Nonetheless, she is open to more ambitious re-imaginings of space and, perhaps, of political authority. What could this look like? What sorts of maps could we draw and how these maps can be used to remake the world?

 Is there anything attractive about alternatives to states such as a world government, a revival of empire, or neo-medieval, overlapping jurisdictions (Sassen, 2008)? Should we seek to devolve power to local jurisdictions or to urban centers (making immigration a local rather that national issue) (de Shalit, 2018)? Should we countenance proposals to give private actors more authority over migration (perhaps in special economic zones) (Betts and Collier, 2017) or to allow refugees to create transnational or cross-national territories (Cohen and Van Hear, 2019)? In work that complements *The Shifting Border*, Matthew Longo has recently put forward the provocative claims that borders are turning into frontiers and states are starting to resemble empires, extending their reach into other states’ territories (Longo, 2018). Frontiers do not have clear boundaries, but rather extend indefinitely – a frontier can always be expanded. While frontiers are not clearly marked, they’re constantly maintained by surveillance and often military force.

 We need to transform how we think about migration and to reconstruct institutions, including borders, so that they serve migration justice. We live in a mobile, diverse world. But instead of facilitating mobility and the complexity of human life, migration policy has been captured by a vision and language that construes migrants as threats. This pathological view of human mobility has been institutionalized and, as Shachar shows, is extending its tentacles around the world. How should we respond? Cynicism risks either resignation or fostering a self-fulfilling prophecy. Abolitionism may be part of the solution, but it tells us largely what we should not do and is an insufficient response to the millions of people immobilized by conflict, repression, and scant resources. *The Shifting Border* promises something potentially more transformative: it challenges us to construct institutions which treat mobility as an ordinary part of life.

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1. See also Fine’s remarks on iBorder Ctrl (Fine, 2020: 105) and Steffan Mau’s comments about “smart borders” (Mau, 2020: 152-4). [↑](#footnote-ref-1)
2. *N.D. and N.T. v. Spain*, App. Nos 8675/15 and 8697/15, Eur. Ct. H.R. (2017) http://eumigrationlawblog.eu/a-hole-of-unclear-dimensions-reading-nd-and-nt-v-spain/ [↑](#footnote-ref-2)
3. Chimène I. Keitner (2020) defends this view in her response to Shachar, contending that it is not so much visions of new legal definitions and channels for mobility that are lacking; rather what is needed are political strategies to reduce incentives that lead states to circumvent legal obligations or to interpret them narrowly and to refuse to take on new commitments. [↑](#footnote-ref-3)