

ARTICLE

Special Issue: Legal Infrastructures

The Travel Visa as the Ubiquitous Legal Infrastructure of Everyday Global Mobility Arbitrariness

Frédéric Mégret 

McGill University, Montreal, Canada; Columbia University, New York, United States

Email: fmegret@law.columbia.edu

(Received 08 December 2024; accepted 09 December 2024)

Abstract

Much work has been produced on the passport and on exceptional regimes of mobility, notably asylum or permanent immigration. There has, by contrast, been less research on that intermediary, ubiquitous legal device that is the visa, a fundamental manifestation of state discretion, a major source of arbitrariness, and a constant assertion of power over moving bodies. The visa is a manifestation of and is embedded in a deeper infrastructure of limited global mobility. Adopting a global and comparative perspective, this Article seeks to analyze the politics of the visa as the indispensable sesame of international travel but also as the ultimate manifestation of that infrastructure's arbitrariness. The Article highlights an ideal type of the visa especially as it is deployed towards "at risk" categories, emphasizing the sort of performance it requires from applicants in adapting to the system's demands as they are relayed by officials, corporations and, increasingly, algorithms and artificial intelligence. It will highlight the constraints of applying for the visa, its temporal frames, its assorted conditions, and its denial and possibilities of contestation thereof. The Article contends that, globally, the visa is the key legal infrastructure to channel systemic discrimination, frustrate professional and cultural opportunities, and keep families apart in ways that entrench class and racial divides.

Keywords: Travel visa; arbitrariness; mobility; artificial intelligence; systemic discrimination

A. Introduction: The Banality of Arbitrariness

It is a familiar and depressing experience in academic circles. An international conference is organized in a Western country, at considerable cost and effort. A list of attendees is drawn up, budgets are secured, invitations are sent long in advance. Yet invariably some guest(s) from the Global South are unable to attend, having been denied a visa.¹ Such incidents are so common that they have become part of a depressing background that creates frustration but is not always challenged as such. They coexist with the reality that when visas are obtained at all, it is often at considerable personal, temporal, psychological and financial cost. The same is true of family

¹See Jacob Serebrin, *Visa Denials Denounced at Montreal AIDS Conference, Federal Minister Cancels Speech*, CBC NEWS (last visited Sept. 14, 2023), <https://www.cbc.ca/news/canada/montreal/montreal-aids-conference-2022-visa-problems-1.6536449> (detailing a particularly high-profile recent instance, where about 36% of visa applications were rejected for those planning to attend the event). See also Lin Taylor, *Visa Justice: Border Rules Block Poorer Nations from World Summits*, CONTEXT (last visited June 30, 2024), <https://www.context.news/socioeconomic-inclusion/visa-justice-border-rules-block-poorer-nations-from-world-summits>.

travel, particularly between the Global South and the Global North: Routinely denied in ways that often seem to defy reason or justice.

Whilst international lawyers pay considerable attention to the fate of refugees and, to a lesser extent, to questions of migration more generally, the profound inequities of ordinary mobility have tended to fall through the cracks. This is even though it can be speculated that both migration and asylum claims are themselves deeply determined by responses to permanently stunted ordinary mobility. It is because one cannot travel back and forth that one imagines resettling oneself permanently; it is because one's passport requires visas to visit all other countries that one imagines oneself acquiring another citizenship in order to be able to travel; it is because of a life of repeated denials of mobility that one eventually has no choice than to flee in the heat of the night, etcetera.

Such a reality interrogates our understanding of global mobility, particularly everyday mobility—as opposed to “once in a lifetime migration”²—and its parameters. It exacts a huge cost in terms of annulled travel plans, but also forsaken mobility opportunities given the internalized anticipation of the unlikelihood of getting a visa.³ It includes a considerably vexatious element that goes against very fundamental human aspirations and is typically and insidiously discriminatory in its scope. The situation, moreover, has only worsened as a result of the continued legacy of 9/11,⁴ the COVID pandemic, and global populist panic about migration.⁵ The famed “return to normal” after the pandemic is, for many, merely the continuation of longstanding patterns of exclusion. This frames a particular global form of injustice that is deeply woven into the very structure of international law and its policing of the global “color line.”

This Article's hypothesis is that this vast mass of non-immigrant travel is the submerged part of the iceberg of global mobility, an under-the-radar, latent but highly significant reality unfolding constantly and everywhere. To better understand the conditions under which exceptional mobility—refugeehood, immigration—is denied—and it is, certainly, routinely denied—one must understand how this always already proceeds against the background of a system profoundly devoted to hampering, disturbing, and upsetting the aspirations of the “mobility poor,” that is, those to whom the “birth lottery” has not allotted a passport that entitles them to the considerable privilege of virtually unlimited mobility.⁶

This immobility, the Article posits, is uniquely mediated by the technology of the visa. I focus here on non-immigrant visas, to the exclusion of permanent residence or immigration. These include travel, temporary work and education visas. These are of course merely a “category of analysis,” in a context where individuals' own trajectories may be more complicated and oscillate between non migratory and migratory paths.⁷ The denial of the visa, a far from exceptional occurrence especially for some racialized populations, comes at huge social, human and economic costs. Rich, personal and oftentimes harrowing personal narratives exist of the sort of toll it exacts of those subjected to it.⁸

It is of course not the case that no applicant from the Global South obtain visas. Rather, the visa separates those deemed worthy of traveling from those risk populations that must be kept at bay.

²Thomas Faist & Gunnar Malmberg, *Time and Space in International Migration*, in INTERNATIONAL MIGRATION, IMMOBILITY AND DEVELOPMENT: MULTIDISCIPLINARY PERSPECTIVES 26, 29 (Tomas Hammar, Grete Brochmann, & Kristof Tamas eds., 2021).

³Arwa Badran, *Equal Access to International Debate: Visas and Their Implications*, 3 ARCHAEOLOGIES 207, 209 (2007).

⁴Susan Ginsberg, *Visa Problems Continue to Plague Foreign Students*, APS NEWS (last visited Sept. 13, 2023), <http://www.aps.org/publications/apsnews/200308/visa-students.cfm>.

⁵See Examples of Visa Denial, X, https://twitter.com/search?q=visa%20denied&src=typed_query&f=top (search “visa denied”) (illustrating recurring and sometimes tragic stories of visa denial—which often concern African migrants' being denied entry to Europe or the United States).

⁶AYELET SHACHAR, *THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY* 3 (2009).

⁷Anna Triandafyllidou, *Temporary Migration: Category of Analysis or Category of Practice?*, 48 J. ETHNIC & MIGRATION STUD. 3847, 3850 (2022).

⁸Priya Dixit, *Encounters with Borders: A Migrant Academic's Experiences of the Visa Regime in the Global North*, 14 LEARNING & TEACHING 55, 59 (2021).

In that respect, the visa problematizes a simple vision of asymmetric denial of mobility focused on nationality, race or religion for example, by introducing a clear element of class discrimination. The visa favors relatively elite populations, sometimes aptly described as “cosmopolitans from the Global South,”⁹ who can at least envisage traveling back and forth from the West. These include “not rich white folk from Europe and America but Indian software engineers, Central and South Americans able to get six-month tourist visas to the global North, or Koreans and Chinese using U.S. immigration loopholes to get their children educated in the United States and on a fast track to U.S. citizenship.”¹⁰ In short, racialized, ethnic or otherwise “othered” minorities from the Global South but who occupy an intermediary echelon in the global hierarchy of global mobility in that they are *also* skilled workers, students, and those with connections in host countries.

Focusing on such relatively elite (im)mobilities might seem reductive and even politically unproductive. As one author put it candidly, “[a]t a time when children are incarcerated in cages, when asylum seekers are detained, and when family and friends from many parts of the world are disallowed entry into the United States, this issue of Global South academics’ mobilities seems somewhat trivial.”¹¹ Nonetheless, there is much reason to think that a move away from an attention to migration per se to mobility more broadly and from subaltern to relatively privileged mobility is rich with critical potential.

The importance of class as a marker of mobility has only recently begun being more seriously being taken into account,¹² but it unmistakably sheds light on economic, social and cultural capitals as crucial vectors of mobility.¹³ I note here the importance of an intersectional analysis to highlight relative privilege even among the relatively unprivileged, notably as inscribed in professional status, and in ways that tend to reinforce the class status quo.¹⁴ The visa, by holding up the prospect of mobility for the “meritorious” few accentuates class inequalities and tensions on a transnational basis, by creating or reinforcing the sense of a global upper-class “with options.” By the same token, the point is that this relatively privileged group, those who can at least *envisage* applying for expensive visas, is also the one that is most vulnerable to their iniquitous denial.

Moreover, migrant and non-migrant mobilities are much more connected than may seem at first by their constant symbolic opposition to each other, and not simply because every non-migrant may of course turn out eventually to be a migrant. Some requirements applied and tried in relation to long term migrants have been, through gradual slippages, imposed in part to all, even non-migrant travelers. The competition for visas also creates the conditions for a veritable national and global class struggle around issues of mobility, for example as “the less privileged mobile identity of the undocumented migrant becomes attached to the seemingly unrelated, privileged transnational tourist from the Global South.”¹⁵ Each group, then, is impacted by the fate of the other: Subaltern migrants may occasionally benefit from or take advantage of the privileged

⁹Heidy Sarabia, *Global South Cosmopolitans: The Opening and Closing of the USA–Mexico Border for Mexican Tourists*, 38 ETHNIC & RACIAL STUD. 227, 239 (2015).

¹⁰Adrian Favell, Miriam Feldblum & Michael Peter Smith, *The Human Face of Global Mobility: A Research Agenda*, 44 SOC’Y 15, 20 (2007).

¹¹Dixit, *supra* note 8.

¹²See Saskia Bonjour and Sébastien Chauvin, *Social Class, Migration Policy and Migrant Strategies: An Introduction*, 56 INT’L MIGRATION 5, 11 (2018). See also Nicholas Van Hear, *Reconsidering Migration and Class*, 48 INT’L MIGRATION REV. S100, S109 (2014).

¹³See Van Hear, *supra* note 12, at S107.

¹⁴Hugo Bréant, *(Im)mobilité internationale : les inégalités au sein des catégories populaires face à la migration*, 74 LIEN SOCIAL & POLITIQUES 37, 46 (2015).

¹⁵*But see, e.g.*, Jackal Tanelorn & April Anderson, *Worldwide Approval (and Denial): Analysing Nonimmigrant Visa Statistics to the United States from 2000 to 2016*, 14 MOBILITIES 267, 271 (2019); Avitus A. Agbor, *Africans and the Costs of Obtaining Visas for International Migration: A Disquisition on the Trends, Implications and Biases in the Policy Framework*, 7 COGENT SOC. SCIS. (2021); Mark B. Salter, *The Global Visa Regime and the Political Technologies of the International Self: Borders, Bodies, Biopolitics*, 31 ALTS. 167, 178 (2006); Horng-luen Wang, *Regulating Transnational Flows of People: An Institutional Analysis of Passports and Visas as a Regime of Mobility*, 11 IDENTITIES 351, 364 (2004).

mobility of elites in their country—for example, in terms of relatively relaxed visa conditions—just as elite travelers may be negatively affected by their national, racial or ethnic association with subaltern migrants because of their common provenance. In practice, the fate of elite and unprivileged groups from the Global South are intertwined to the extent that the very stake of migration policy for some countries in the North is to ensure that the pathways cleared for the former are not abused by the latter. The arbitrary denial of visas is very much a consequence of the tension between these contradictory goals of mobility policy and the culture of suspicion that it breeds.

At any rate, this “everyday” global immobility mediated by the visa remains remarkably understudied. Visas are relegated to the realm of idiosyncratic domestic laws that are examined in isolation from each other, on which international law has seemingly little to say, and that comparative law has ignored. Statistics are hard to come by, reporting is almost nonexistent and evidence quite anecdotal. There are even hints that the lack of concern with this ordinary but chronically stunted transnational mobility could be a result of the fact that “anxieties about applying for visas are not shared by many colleagues and evaluators in the Global North.”¹⁶ Because the denial of temporary visas is relatively less dramatic than the exclusion of individuals from the prospects of permanent immigration, it also leads to less spectacular mobilization, litigation and contestation. And there is a sense that the administration of visas operates on the outer edges of the law, as a technology that is premised in part on escaping the law’s strictures.

The Article, then, seeks to investigate what it might mean to take seriously exclusionary visa practices as the very substratum of global mobility. The question asked is: What kind of infrastructural technologies does the visa presume and consolidate? On some level the visa is the sesame that opens previously closed doors; but visa denial is also the lock that keeps them closed: One does not go without the other. The visa, in fact, lies at the heart of “unequal access to foreign spaces.”¹⁷ It will be understood here as a modality of the border,¹⁸ specifically as it is articulated through administrative and legal practices that rest on a certain sovereign, consular and institutional prerogative. I focus on how the global visa regime prolongs, amplifies and conditions unequal access to mobility. I do so by paying attention to the broad infrastructure of visa technology and how it always already expresses preferences and priorities that then become embedded in the system of global (im)mobility. The visa is a unique prism to observe how highly differentiated outcomes are produced along both national, racial, and social lines by rewarding a particular type of traveler. Because the visa channels a subset of the global population that is invested in moving legally, that population bears the full weight of the visa infrastructure as it has been set up to separate, as it were, the chaff from the wheat.

Indeed, this is one area where the notion of a legal infrastructure provides genuine analytical purchase because such a massive and amorphous hindrance to transnational mobility is more than the product of rules, institutions or even discrete practices: Rather, it can only be grounded in a horizontal and vertical assemblage of all of the above as well as their underlying material conditions of possibility and specific forms of rationality. The visa has an evident, immediate materiality to it—the visa stamp in the passport—but it is also associated with a broader infrastructure: The paths for applying to one including a host of private relays; the administrative apparatus of consulates networked with the metropolis and enmeshed in various knowledge systems; and the policing of the visa through various forms of multilayered border protection.

By “visa infrastructure,” then, I will understand both the law and practice of visa administration, but also the way these are embedded in material conditions, professional

¹⁶Dixit, *supra* note 8, at 56.

¹⁷Eric Neumayer, *Unequal Access to Foreign Spaces: How States Use Visa Restrictions to Regulate Mobility in a Globalized World*, 31 *TRANSACTIONS INST. BRIT. GEOGRAPHERS* 72, 77 (2006).

¹⁸Mark B. Salter, *Borders, Passports, and the Global Mobility*, in *ROUTLEDGE INT’L HANDBOOK GLOBALIZATION STUDS.* 491, 492 (Bryan Turner ed., 2011).

practices, and geography, whose goal is to, fundamentally, channel mobility and produce immobility. In a sense, the visa *is* the infrastructure, or at least its key component. It is this infrastructural nature that makes it a natural membrane to manage the complex and often contradictory demands of global mobility, rewarding the relatively privileged whilst maintaining all applicants in a state of dependency and uncertainty. It is also the infrastructural nature of the law that heavily contextualizes it beyond the law's rules and explains why, on the basis of the same regime, some candidates to mobility are successful and others not. Finally, an infrastructure approach also explains the particular nature of the power that is being exercised *around* the border: A power that is less that of top-down government than a diffuse rule by obstacles characterized by multiple, overlaying barriers of space, language, discretion, etc.

Unearthing how that infrastructure emerges requires specific methodological investments. It involves, in particular, going beyond the law to explore very concretely how travel visas are administered in the day-to-day of transnational mobility. I suggest that we need to go “into the belly of the beast” to unearth the ways in which expectations about legitimate travel are produced via a stereotype of the—non-migrating—traveler that is validated by the visa infrastructure. On the government side, this includes looking at manuals published by ministries on how to assess visa applications, which provide evidence beyond merely legislative intent of the sort of practices that make up a country's immigration infrastructure. On the applicants' end, it includes scouring YouTube videos, Reddit threads, X—formerly Twitter—to uncover glimpses of the lived experience of ordinary travel and the maximization of mobility strategies. Wading through the thick whiffs of discontent emanating from those on the receiving end of visa arbitrariness can be a way of contributing to the study of the “human face of global mobility.”¹⁹ Finally, one source for this Article will be advice produced by various institutions and law firms about how to successfully apply for travel visas as prolonging the disciplining effect of the global mobility infrastructure. This knowledge production is a constant, unifying dimension of the visa infrastructure and its micro-implications.

There are as many visa technologies as there are countries. On a certain level each country's specific visa infrastructure is irreducible. National academic siloing, moreover, means that whilst some countries' reality may be better known, very little comparative immigration law—let alone of ordinary visas—exists. But on a certain level the visa is also a unifying, shared technology that undergirds the entire infrastructure of global mobility. I posit that there is, in fact, such a thing as a global visa infrastructure that is a product of diplomatic and consular practice, migration policy, geopolitics, technological investments, the civil service, courts, lawyers and, possibly, travelers themselves. In addition to purely public actors, the visa infrastructure has increasingly been the object of outsourcing and privatization that break down chains of jurisdiction and accountability, thus blurring the notion that visa administration is a sovereign prerogative,²⁰ populating the path towards visas with a wealth of intermediaries,²¹ and leading to a “state-market hybridization underpinning the commercialization of migration regulation.”²²

That infrastructure has the specificity that it is often deployed transnationally and extra-territorially to apprehend, intercept and process would-be migrants far from their intended destination. The visa is also often heavily coordinated—Schengen being the obvious example, notably through the Schengen Information System—if only to avoid creating chinks in the armor of sovereign “fortresses.” Ideas about visa infrastructures circulate, notably from the North to the South. The corporations that are increasingly taking over its administration are themselves global

¹⁹Favell et al., *supra* note 10.

²⁰FEDERICA INFANTINO, *OUTSOURCING BORDER CONTROL: POLITICS AND PRACTICE OF CONTRACTED VISA POLICY IN MOROCCO* 6 (2017).

²¹Federica Infantino, *The Interdependency of Border Bureaucracies and Mobility Intermediaries: A Street-Level View of Migration Infrastructuring*, 11 *COMPAR. MIGRATION STUDS.* 1, 2 (2023).

²²Daniel Nehring & Yang Hu, *From Public to Commercial Service: State-Market Hybridization in the UK Visa and Immigration Permit Infrastructure, 1997–2021*, 72 *BRIT. J. SOCIO.* 1325, 1330 (2021).

(VFSGlobal and TLSContact). And visa administration is further prolonged in countless ways, including through software, artificial intelligence, training, etcetera.²³ The Article will thus seek to highlight a sort of monstrous “ideal type” of the visa globally which is an assemblage of the various technologies that have been put in place over time and across space to develop the visa as central to the infrastructure of mobility. The Article will sample generously from the practices of various, notably Western countries, when they are seen as particularly emblematic of the global visa infrastructure.

Of course, it is whether a visa is required at all which acts as the major obstacle in the global mobility infrastructure. In that respect and on the whole, whilst global visa requirements may have diminished, this has been felt very differently in rich and poor countries.²⁴ Yet what matters is not merely whether a visa is required but the availability of the process, the conditions imposed, and the likelihood of obtaining one, as mediated by the visa infrastructure. This Article, in focusing on the visa application and determination, will thus distinguish three fundamental interlocking dimensions in the infrastructure of global mobility as mediated by the visa: First, the process one has to undertake to obtain one, which is heavily influenced by material, symbolic and technological considerations; second, the actual conditions in law to obtain a visa, which themselves prolong and are based on the above considerations; third, the nature of the administrative decision process understood as itself a specific obstacle to securing a visa. For reasons of space and analytical specificity, the Article will not discuss the subsequent enforcement of the visa, but evidently the infrastructural ramifications of that enforcement go deep, notably through the enlisting of a range of private actors.

At its most basic, the Article will provide a simple contribution to understanding how the visa operates globally, as a sort of infrastructural contraption that has extended its reach to many jurisdictions. Although the Article focuses on obstacles to South-North mobility, it takes note of the concern that this framework can be reductive of complexity,²⁵ and will also hint at the reality of South-South obstacles to mobility via visas which, at any rate, merely reinforce a sense of post-colonial immobility. On a more theoretical level, the Article hopes to be a contribution to how law and infrastructure—the infrastructure within which the law operates but that it also makes possible—work hand in hand to produce profoundly problematic global mobility conditions. This will underscore the fundamentally distributional dimensions of the visa infrastructure and, indeed, the extent to which distribution is its very *raison d'être*.

B. Infrastructure: Process

The visa application infrastructure, fundamentally, outlines the contours of a process that amounts to a series of hurdles. These hurdles need to be passed in order to secure the visa—although evidently not even having passed all the hurdles is a guarantee that one will obtain one. The density and frequency of the hurdles itself acts as a sort of membrane that can be more or less porous in certain circumstances. It effectively rewards a certain persistence and stamina, as well as knowledge, connections and wealth. It encourages strategic thinking, such as applying for a Schengen visa with the countries that have the lowest rejection rates.²⁶ In that respect, the visa application process emulates and imitates the broader hurdle race that lies at the root of all

²³Juliette Dupont, *La Mise En Oeuvre Privatisée de La Politique de Visa Schengen En Algérie: Enquête Sur l'industrie Migratoire Au Niveau Local 3* (Cahiers du CÉRIUM, Working Paper No. 18, 2019), https://cerium.umontreal.ca/public/FAS/cerium/Images/4_nouvelles_evenements/legacy/cahier_18.pdf.

²⁴Steffen Mau, Fabian Gültzau, Lena Laube, & Natascha Zaun, *The Global Mobility Divide: How Visa Policies Have Evolved over Time*, 41 J. ETHNIC & MIGRATION STUDS. 1192, 1205 (2015).

²⁵Mathias Czaika, Hein de Haas, & María Villares-Varela, *The Global Evolution of Travel Visa Regimes*, 44 Population & Dev. Rev. 589, 595 (2018).

²⁶*Comment obtenir le visa Schengen le plus rapidement possible pour un voyage en Europe en toute simplicité*, TRAVEL AND TOUR WORLD (last visited Dec 5, 2024), <https://www.travelandtourworld.fr/nouvelles/article/Comment-obtenir-le-visa-Schengen-le-plus-rapidement-possible-pour-un-voyage-en-Europe-facile/>; *Why Germany Remains the Best Option for a Multiple-Entry Schengen Visa in 2024?*, TIMES OF INDIA (last visited June 26, 2024), <https://timesofindia.indiatimes.com/>

restrictive migratory processes, albeit in much less dramatic form than those who have to flee for their lives across seas and deserts at considerable personal risk.

That process is not homogeneous. Global statistics on visa award and delays, in particular, give a distorted view of what is in reality a deeply variegated reality.²⁷ Interrogating the differences in treatment that exist across time, space, and populations, at the same time, has never been easier as foreign or immigration ministries increasingly volunteer information through new public management tools—for example, about average waiting times—ironically as part of the constant regulation, channelling and policing of application flows. Although the law frames that process, in practice visa decisions are a particularly interesting prism to observe infrastructural effects because of the administration, geography and logistics-heavy dimension of visa processing, which tends to saturate the law's operation.

I. Access

One conspicuous element of the infrastructure of the visa application process is the challenge of even being able to even make an application. This translates, first, in barriers to access to information about visas. The sheer complexity of some non-immigrant visa regimes may in itself act as a deterrent. For example, the US has more than 80 types of non-immigrant visas,²⁸ the structure of which has been described as “Byzantine” and a “veritable alphabet soup” that creates “peculiar migration channels sustained by vested client interests.”²⁹ Merely understanding the possibilities involved, let alone taking advantage of them, takes significant mobility literacy.

Second is the issue of access to the *place* of application where one is required to appear in a person, in a context where the need for a visa is itself part of a complex of “remote border control” by which screening of outbound passengers is largely performed at the point of departure.³⁰ Distance may at times be the single biggest factor in explaining likelihood of success in obtaining a visa. The “closest consulate” may sometimes be at considerable distance, especially when no normal diplomatic relations exist between states. For example, the US has neither consulate nor embassy in 24 countries, or closed them in another 12, including Iran, Ukraine and Russia.³¹ Iranian applicants to Canadian visas need to go to the Canadian consulate in Ankara. The reality of these challenges to access is well known and sometimes identified as a problematic impediment to mobility. One tourism industry executive testified in Congress about Brazil that:

Distance becomes a problem in many ... emerging markets ... An example in Brazil would be the city of Manuas [sic], with a population of more than 2 million people, and it's located more than 1, 000 miles from the closest consulate. We expect a family to travel a greater distance than I flew to attend this committee hearing on the chance that they will be awarded a visa to come to our shores.³²

[travel/travel-news/why-germany-remains-the-best-option-for-a-multiple-entry-schengen-visa-in-2024/articleshow/111281142.cms](https://www.germlaw.com/travel/travel-news/why-germany-remains-the-best-option-for-a-multiple-entry-schengen-visa-in-2024/articleshow/111281142.cms).

²⁷Tanelorn & Anderson, *supra* note 15, at 271-272.

²⁸Jeanne Batalova & Nicole Ward, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POLICY (Mar. 13, 2023), <https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states>.

²⁹Favell et al., *supra* note 10, at 18.

³⁰John Torpey, *Passports and the Development of Immigration Controls in the North Atlantic During the Long Nineteenth Century*, in *MIGRATION CONTROL IN THE NORTH-ATLANTIC WORLD: THE EVOLUTION OF STATE PRACTICES IN EUROPE AND THE UNITED STATES FROM THE FRENCH REVOLUTION TO THE INTER-WAR PERIOD* 73-86 (Andreas Fahrmeir, Olivier Faron, & Patrick Weil eds., 2003).

³¹David J. Bier, *U.S. Has No Immigrant Visa Processing in 67 Countries—Indefinitely*, CATO INST.: CATO AT LIBERTY BLOG (Nov. 10, 2022, 12:40 PM), <https://www.cato.org/blog/us-has-no-immigrant-visa-processing-67-countries-indefinitely>.

³²*Tourism in America: Removing Barriers and Promoting Growth: Hearing on S.R. 253 Before the Subcomm. on Competitiveness, Innovation, and Exp. Promotion of the S. Comm. on Commerce, Sci., and Transp.*, 112th Cong. 43 (2011).

Of course, distance may be a problem for the travel industry as in that illustration, but it may be more or less deliberately part of an infrastructure that under-serves zones that are not considered key in terms of mobility priorities. Access to consular facilities is only as good as the extent of a state's consular network, resources and staffing. By contrast, many Western travelers can avoid foreign consulates altogether and obtain a visa upon arrival or benefit from broader consular access. Although online application options have become more common, they come with their own infrastructural limitations, especially in the Global South where internet access may be scarce, slow or otherwise unreliable.

Schengen Area rules require that Schengen states have representation for visa purposes in all states whose nationals are subject to visa requirements, if need be through representation agreements if a state does not have a consulate in a particular country. The representing state then accepts Schengen short term visas on behalf of the represented state. A good example is the Czech Republic, a state that is both represented by several other European states—including Spain, Portugal and France, typically in their former colonies—and represents others, including Slovakia, in a variety of countries where its consular network extends. This evidently extends consular reach, although it may still mean that consular facilities are hundreds of miles away from applicants, lending a clear advantage to city dwellers as opposed to rural inhabitants. Moreover, the degree of flexibility and availability of appointments can make a crucial difference in the ability to secure one for those with limited means or flexibility.

Another challenge is the queue, both metaphorical and literal. Applying for a visa typically involves first come, first served logics that favor those who can get in early. It sometimes requires literally waiting for long hours, sometimes in extreme climactic conditions. This is not only inconvenient but prohibitive, notably for the elderly, the disabled or those with caring responsibilities. Systems of electronic queuing have been implemented in some cases, allowing applicants to make an online prior appointment.³³ “Fast-track” systems have also prospered that allow in some circumstances for applicants to jump queue. In some countries, offers have sprung up to have a person queue for oneself for a fee.³⁴ Overall, the queue is necessarily the result of policy decisions made upstream in terms of level of service and can thus be conceptualized as itself a tool of infrastructural management. This is evident in the way in which some consulates have made much of the fact that they have effectively managed to eliminate queues,³⁵ whilst other locations impose almost prohibitive waiting-times on applicants.

II. Costs

Costs of visas vary in real and relative terms vary tremendously and act as a “tool for states to control population movements.”³⁶ It has been argued that the cost of visas worldwide reveals a “strong global visa cost divide that exposes the injustice in the right to travel for people located in different areas of the world.”³⁷ Ironically, it is those coming from the richest countries who pay least for their visas.³⁸ Because the cost of visas is typically the same the world over, this means that in real terms a visa may be considerably more expensive for some. In Sub-Saharan countries, the

³³New Queue System Saves Time for US Visa Applicants, THE HINDU (June 30, 2011, 11:14 PM), <https://www.thehindu.com/news/national/tamil-nadu/new-queue-system-saves-time-for-us-visa-applicants/article2148154.ece>.

³⁴Don't Have Time to Wait? You Can Now Pay Someone to Queue for You, NEWSTALK (Feb. 17, 2015, 1:34 PM), <https://www.newstalk.com/news/passport-via-queuing-applications-cyclone-courier-ireland-669912>.

³⁵US Embassy Moves to Cut Visa Wait Time for Indians, BBC NEWS (Jan. 23, 2023), <https://www.bbc.com/news/world-asia-india-64369761>.

³⁶Ettore Recchi, Emanuel Deutschmann, Lorenzo Gabrielli, & Nodira Kholmatova, *The Global Visa Cost Divide: How and Why the Price for Travel Permits Varies Worldwide*, 86 POL. GEOGRAPHY 102350 (2021), <https://www.sciencedirect.com/science/article/pii/S096262982100010X>.

³⁷*Id.*

³⁸*Id.*

cost of a visa can be very significant compared to income. It has even been suggested that the price of visas is “a visible drainage pipe through which African financial resources are taken when one considers the huge amounts of money squandered on unsuccessful visa applications.”³⁹

In addition to the basic costs of processing visas, expenses may increase because, given the difficulties or perceived difficulties of securing one, applicants retain commercial services to boost their chances. An entire ecosystem of law firms and various sui generis consultancies helping applicants navigate the complexities of obtaining visas has sprung up globally. Searches for information about visas on Google often list commercial offers first with official sounding names that make it difficult to distinguish them from the real thing. Some companies provide “coaching” services for visa interviews, often organized by former immigration officers.⁴⁰ This reinforces existing inequalities in mobility given the costs involved.

The significance of these costs has to be weighed in relation to the likelihood—a high one in most cases—of having one’s visa application more or less arbitrarily denied and thus losing the “investment” made in the application. It also has to be evaluated, more fundamentally, in terms of the “emotional tax of racism” imposed by onerous or even arbitrary visa practices that rely on tired and provincial tropes of applicants from the South necessarily wanting to migrate to the North. As one group of Egyptian and Ethiopian doctors put it:

These inequities are profoundly disorienting when in your country you are considered an academic leader who champions capacity building among health professionals, and you have collaborated internationally to develop training programs in an attempt to staunch the brain drain of local talent to more developed countries. But in higher-resource countries—if we use the visa process as a proxy—you are considered dishonest at best and a potential criminal at worst.⁴¹

In short, the costs imposed on applicants in terms of delays, money and vexation are in themselves not insignificant and, what is more, borne unequally.

III. Delays

Delays are clearly an infrastructural effect, the reflection of deliberate under-investment in the infrastructure of visa processing, with clear distributional effects. Canada, for example, has a chronic delay problem for most categories for visas, that keeps getting worse. It can take as much as a year and a half to process a visa application.⁴² This is even though Immigration, Refugees and Citizenship Canada, the relevant ministry, indicates 60 days as its “service standard” for study and work permits, and 14 days for ordinary visitor applications. There are, in addition, considerable time disparities between different consulates and different countries. Many foreign ministries provide regularly updated information on delays for various categories of visa. Although this sort of culture transparency can help applicants pace themselves, by itself it does nothing to slow delays. Disaggregated data based on the city in which one is applying also reveals—perhaps unwittingly—stark differences between different locales.⁴³

³⁹Agbor, *supra* note 15.

⁴⁰VISA INTERVIEW COACH (last visited Sept. 12, 2023), <https://visainterviewcoach.com>.

⁴¹Dawit Wondimagegn, Lamis Ragab, Helen Yifter, Monica Wassim, Mohammed A. Rashid, Cynthia R. Whitehead, Deborah Gill, & Sophie Soklaridis, *Breaking Borders: How Barriers to Global Mobility Hinder International Partnerships in Academic Medicine*, 97 ACAD. MED. 37, 38 (2022).

⁴²Anne Marie Provost & Lisa-Marie Gervais, *Longs délais pour les visas de visiteur malgré les promesses d’Ottawa*, LE DEVOIR (last updated Feb. 2, 2023), <https://www.ledevoir.com/societe/780039/immigration-longs-delaix-pour-les-visas-de-visiteur-malgre-les-promesses-d-ottawa>.

⁴³Visa Appointment Wait Times, U.S. DEPARTMENT OF STATE: BUREAU OF CONSULAR AFFAIRS (last visited Sept. 12, 2023), <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/wait-times.html> (search by city in the “Wait Times for embassy/consulate” box—dropdown menu will appear).

In effect, delays act as a sort of hidden cap on visa demands, especially when they are unpredictable and do not allow for appropriate planning. Would-be applicants will be discouraged by the risk of incurring expenses but not receiving a visa on time for a set date of travel, for studies, a family occasion, etcetera. Statistics on delays disaggregated by region of origin are not always available but may reveal forms of discrimination based, if nothing else, on the availability or proximity of consulates. Delays are uniquely vulnerable, moreover, beyond the means of each state, on bilateral relations. For example, a diplomatic rift between India and Canada starting in 2023, led first India and then Canada to significantly diminish their consular staff each other's country, leading to greatly increased delays.⁴⁴

Delays can be increased significantly if extra checks are required. For example, those applying for scientific research positions in the US are often subjected to extra security and background checks. So-called Mantis checks, required to combat industrial and technological espionage, add an extra layer of delay in the process, typically 90 days, but up to several months.⁴⁵ False "name hits" can further draw out the process, especially for persons with common names. Visa delays can discourage persons from even applying, leave individuals in a limbo, and push them into irregular situations at great personal expense and risk. For those seeking renewal of their status, it can create challenges with employers or landlords, who are under increased pressure to verify the status of foreigners.⁴⁶ For students, it can lead to costly deferrals,⁴⁷ not to mention the inconvenience for host institutions.⁴⁸

C. Conditions

Obtaining a visa typically requires that one be able to fulfill certain conditions. Some of these conditions relate to one's personal suitability, others more specifically to the conditions of one's visit. The conditions require an elaborate performance of compliance with the criteria set by the state to which one seeks to gain access. In that respect, the visa infrastructure, mediated by the law but also administrative practices, locale and various technologies of verification insert the visa applicant within a web of expectations about appropriate candidacies and, consequently, a certain vision of the "desirable" and "undesirable" visitor. As such, it is also part of an infrastructure of surveillance, one that requires visa applicants to "bare all" in an attempt to convince immigration authorities that they are "worthy" of being admitted to a country. This reinforces a sense that, even for the mere purpose of a visit, one needs to fit into the categories of "deservingness" more generally produced by the management of migration.⁴⁹

⁴⁴Neha Dewan, *Canada Says It Will Only Be Able to Process Half of the Visa Applications from India before End of the Year*, THE ECONOMIC TIMES (last updated Oct. 26, 2023, 6:40 PM), <https://economictimes.indiatimes.com/nri/visit/canada-says-it-will-only-be-able-to-process-47-visa-applications-from-india-before-end-of-the-year/articleshow/104731358.cms?from=mdr>.

⁴⁵Adrienne Froelich, *US Visa Delays: Keeping Scientists from Where They Want to Be?*, 54 *BIOSCIENCE* 296, 296 (2004).

⁴⁶Amelia Gentleman, *UK Visa Delays "Causing Rent, Employment and Healthcare Issues"*, THE GUARDIAN (Sept. 30, 2022, 9:01 AM), <https://www.theguardian.com/uk-news/2022/sep/30/uk-visa-delays-causing-rent-employment-and-healthcare-issues>.

⁴⁷Riya Tandon, Tenzin Pema, & Sanhati Banerjee, *Canada Visa Delay? Don't Lose Hope, It's Almost There!*, THE ECONOMIC TIMES (last updated Sept. 27, 2022, 3:51 PM), <https://economictimes.indiatimes.com/nri/migrate/canada-visa-delay-dont-loose-hope-its-almost-there/articleshow/94478570.cms?from=mdr>.

⁴⁸Laura Osman, *Visa Delays Leaving International Students in Limbo for Fall Semester*, CTVNEWS (last updated Aug. 25, 2022, 5:10 PM), <https://www.ctvnews.ca/politics/visa-delays-leaving-international-students-in-limbo-for-fall-semester-1.6042220>.

⁴⁹Sébastien Chauvin & Blanca Garcés-Mascareñas, *Becoming Less Illegal: Deservingness Frames and Undocumented Migrant Incorporation*, 8 *SOCIO. COMPASS* 422, 426 (2014).

I. Personal Suitability

A number of requirements for a visa relate to the broad suitability of applicants for travel. Suitability is not a term of art but instead refers to sort of typical profile of the appropriate candidate for travel. It includes requirements of good character, good health, and even language and values tests. Combined, these requirements, which are only demanded of certain nationalities, create considerable hurdles and potential for arbitrariness. They go to the heart of the purpose of the visa infrastructure as one that distributes benefits to some and denies them to others.

Many countries prohibit travel to those with a criminal record, including the US, the UK, China, India, Israel, Japan, etcetera. In the European Union, a criminal record is not a bar to entry so long as the conviction is not for more than 3 years, and one was not arrested for crimes related to human trafficking or drug smuggling. In New Zealand, a sentence of 5 years or more will lead the authorities to decline a visa, but even having been charged or being under investigation for serious criminal offending can lead one to not normally being granted one. A sentencing exception exists in the US if one was convicted of only one crime with a maximum sentence of a year. Similarly, New Zealand can approve character waivers if the issue was minor. Waivers are also possible for emergencies, but difficult to obtain. Even more countries than prohibit travel for those with criminal records do so for those convicted of felonies.⁵⁰

In Canada, immigration officers may solicit ministerial opinions on danger to the public. For that purpose, they must constitute a “danger opinion package” containing all relevant information on the nature and severity of the threat.⁵¹ There are no or few opportunities to highlight the fact that a criminal record can be the result of persecution in the country of nationality, effectively enlisting the destination country in a process of transnational repression.⁵² Although countries do not typically ask applicants to provide a criminal record, or evidence of lack of it, merely to visit, discovery of its existence can be a motif of rejection or expulsion. In addition, would-be visitors may be preempted from obtaining visas on the basis of “unsuitability” as a result of the long arm of their state of nationality which will have, for example, issued arbitrary arrest warrants leading to Interpol “red notices.” Although such notices can be challenged, they are often deferred to uncritically by host authorities, who typically do not need much encouragement to deny visas in the first place. This form of transnational repression casts a long shadow on the ability of dissidents specifically to travel.

Second, many countries include rules that require that visa applicants not be a danger to public health, or not have a health condition that could be a danger to public safety—that is, unpredictable or violent behavior—or that they not risk imposing excessive demand on health or social services. This means that they may be required to pass a medical examination. Although these rules are more onerous for long term immigrants, they can exist for short term travel as well. The binding International Health Regulations anticipate that, as part of a ramped up regime to fight contagious diseases, “a State Party may require for public health purposes, on arrival or departure . . . a non-invasive medical examination which is the least intrusive examination that would achieve the public health objective.”⁵³ Invasive procedures, by contrast, “shall not be required as a

⁵⁰Benjamin Van Severen, *Planning to travel as a felon? Consider this list of countries that you cannot visit*, VAN SEVERAN LAW OFFICE (Dec. 5, 2024, 12:51 PM), <https://milwaukee-criminal-lawyer.com/travel-as-felon-banned-countries/>.

⁵¹IMMIGRATION, REFUGEES AND CITIZENSHIP CANADA, ENF 28: MINISTERIAL OPINIONS ON DANGER TO THE PUBLIC, NATURE AND SEVERITY OF THE ACTS COMMITTED AND DANGER TO THE SECURITY OF CANADA (2017), <https://www.canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/enf/enf28-eng.pdf>.

⁵²Tom Phillips, *Hong Kong Student Fears UK Visa May Be Denied over Protest Conviction*, THE GUARDIAN (Sept. 14, 2016, 7:49 AM), <http://www.theguardian.com/world/2016/sep/14/hong-kong-student-alex-chow-fears-uk-visa-denied-umbrella-protest>.

⁵³*International Health Regulations*, Art. 23(1)(a)(iii), World Health Organization [WHO] (2nd ed. 2005), https://www.afro.who.int/sites/default/files/2017-06/international_health_regulations_2005.pdf [hereinafter “IHR”].

condition of entry of any traveler to the territory of a State Party except . . . when necessary to determine whether a public health risk exists.”⁵⁴

The evaluation of whether any given applicant poses such dangers is in nature quite vague. For example, Immigration Canada speaks of the possibility that “the health or social services needed to treat your health condition would negatively affect wait times for services in Canada” or that “the services needed to treat and manage your health condition would likely cost more than the excessive demand cost threshold”—in 2023, the cost threshold was estimated at \$128,445 over 5 years, or \$25,689 per year. Visa applicants are presented as potentially lowering the host country’s health standards: “Australia enjoys some of the best health pool standards in the world. To maintain these standards, most visa applicants must meet minimum health standards before we will grant them a visa.” This is in part so that “Australian citizens and permanent residents can access health and community services that are in short supply.”⁵⁵

This sometimes leads immigration services to produce estimates of the potential cost to the health system of visitors. There have been concerns that obesity is a condition that may lead one to fail the medical for longer visas. Countries like New Zealand even indicate a maximum body mass index—35—to meet health requirements. Although obesity does not per se mean that an “applicant does not have an acceptable standard of health,” “it could be treated as an indication of future “significant cost to, or demands on, New Zealand’s health services.” New Zealand would therefore be considered as failing in their responsibility if this did not trigger further medical tests.⁵⁶

Although, again, typically only for longer visas—notably work and studies but still short of immigration—language and values tests have crept up as part of the ordinary visa infrastructure in some countries. In Canada, courts have pushed back against immigration officers’ discretionary judgment as to what level of language proficiency is required, essentially guarding them against substituting their own judgment to that of the potential employer’s. Yet tests remain for many visas and in France, for example, spouses of French citizens seeking visas have been required to take a test on Republican values.⁵⁷ Such a practice is part of a broader “phenomenon of “renationalization” of citizenship.⁵⁸ Together, these conditions for visa obtention combine and solicit a variety of police, medical or instructional services that further expand the visa infrastructure.

II. Guarantees of Return

Assurances that a temporary visa will not be exploited toward permanent migration have become a central plank of visa delivery, with differing consequences for different countries. In many systems, the goal of the non-immigrant visa granting process is convincing an immigration agent that one will, in fact, return to one’s country of residence. In France, for example, the authorities have to satisfy themselves that the motive for the trip as stated is indeed the true motive, and there will be no “détournement du visa à des fins migratoires” (undermining of the visa for migratory ends). In some systems, such as the US, the presumption is in fact of “immigrant intent.” This involves somewhat paradoxically proving, as one applies to leave one’s country, that one has considerable links to it, be it in the form of employment, property, or family, that will “compel”

⁵⁴IHR, Article 30 (1)(a).

⁵⁵*Immigration and Citizenship*, AUSTRALIAN DEPARTMENT OF HOME AFFAIRS (last visited Sept. 13, 2023), <https://immi.gov.au>

⁵⁶*Acceptable Standard of Health*, IMMIGRATION NEW ZEALAND (last visited Sept. 14, 2023), <https://www.immigration.govt.nz/about-us/media-centre/common-topics/acceptable-standard-of-health> (discussing obesity as a factor in determining whether a visa applicant has an acceptable standard of health).

⁵⁷Myriam Hachimi-Alaoui & Janie Pélabay, *Contrats d’intégration et « valeurs de la République » : un « tournant civique » à la française ?*, 36 REVUE EUROPÉENNE DES MIGRATIONS INTERNATIONALES 13 (2020).

⁵⁸Dora Kostakopoulou, *The Anatomy of Civic Integration*, 73 MOD. L. REV. 933, 940 (2010).

one to leave the visited country. In the US, for a B-1/B-2 visa, the standard is that one have “strong ties” to one’s country of origin.

Part of the infrastructure of short-term mobility, then, is geared towards establishing applicants’ close connection to their country. On the part of visa applicants, this involves a sophisticated performance of one’s rootedness. As one law firm advises potential clients:

It may be the case that your strongest connection to your home country is your family, or wider social circle. If this is the case, you may be able to provide evidence including the following:

- Birth certificates of spouse and dependents.
- Marriage certificate.
- Photos showing a sincere connection to family and friends.
- Signed letters from family and friends indicating a close bond.

If you can provide substantiated dates with the photos, that’d be ideal. The more concrete the proof, the better.⁵⁹

Note that these particular requirements suggest not only considerable filtering power on the part of the destination states, but also the potential dependency of applicants on their own state and kin networks at home, and how supportive they are of their traveling abroad.⁶⁰ The visa infrastructure is transnational in that respect to the extent that it solicits resources and institutions in the state of origin to co-validate, as it were, the continuing belonging of applicants.

Courts occasionally review rejections of visa applications based on the absence of an intent to return, giving us glimpses into the factors that are relevant. In a French case involving a Guinean woman who wanted to visit her son in France, the *Tribunal administratif* de Nantes found that the fact that she had three other children who stayed behind with her husband in Guinea as well as a position as a trader in a market in Conakry and savings in her bank account suggested there was no reasonable doubt she had the intention to return to her country and should have been granted a visitor’s visa.⁶¹ By contrast, in a Canadian case involving an applicant for a student visa from Vietnam, it was found to *not* be “patently unreasonable” for a visa officer to have considered the applicant’s parents low income and lack of employment, income or assets and the fact that the education sought was available locally at a fraction of the cost as well as the applicant’s low level of English to evaluate the credibility of his intentions.⁶² What would be unreasonable is for an immigration officer to make a decision whilst clearly neglecting some of the information provided to them by the applicant.⁶³

Closely linked to guarantees of return are guarantees that one will not seek employment in the country to which one travels. Again, consider the following legal advice on the internet:

If your spouse and children are remaining behind in your country, be prepared to address how they will support themselves in your absence. This can be an especially tricky area if you are the primary source of income for your family. If the consular officer gains the impression

⁵⁹How to Prove Strong Ties for a B-1/B-2 Travel Visa, BOUNDLESS (last visited Oct. 21, 2024), <https://www.boundless.com/immigration-resources/how-to-prove-strong-ties-b1-b2-travel-visa/>.

⁶⁰Paolo Gaibazzi, *Visa Problem: Certification, Kinship, and the Production of “Ineligibility” in the Gambia*, 20 J. ROYAL ANTHROPOLOGICAL INST. 38, 44 (2014).

⁶¹TA Nantes, 10ème ch., Dec. 26, 2022, n°2204901.

⁶²Tran v. Canada (Minister of Citizenship & Immigration), 2006 FC 1377.

⁶³Wang v. Canada (Minister of Citizenship and Immigration), 2001 CanLII 22069 (F.C.).

that your family members will need you to remit money from the United States in order to support themselves, your student visa application will almost certainly be denied.⁶⁴

A factor often taken into account by immigration officers to satisfy themselves of the intent to return of applicants and to not seek employment locally is the existence of a travel history, notably one evidencing previous returns. This tends to favor the relatively privileged who have already experienced international travel, although lack of travel experience has been described by one Canadian court as at best a neutral factor.

Aside from concerns about unworkability, the insistence on applicants not having any intention to stay in the host country once their visa expires may appear artificial. Especially when it comes to work or student visas, persons may simply not know what it is they will aspire to do later on. The fact that they eventually decide to try and stay by applying for a more permanent status is their choice and certainly not evidence that they misled immigration officials coming in. Even if applicants entertain vague thoughts of perhaps immigrating down the road, entertaining such thoughts is not necessarily a good predictor of actual behavior when their visa expires, nor is there reason to think it is fundamentally problematic.

III. Means of Subsistence

In the US, one cannot obtain a visa if one risks becoming a “public charge.”⁶⁵ The determination of whether someone will represent a public charge is made by consular officers. In the absence of a legal definition in US law of what constitutes a public charge, guidance is typically found in the Foreign Affairs Manual (FAM). Public charge has been understood since 1999 to mean a person who is or is likely to become primarily dependent on public cash assistance or government-funded institutionalization for long-term care. The Department of State has since revised the FAM so that consular officers will consider an alien’s “past or current receipt of public assistance of any type” to determine whether an alien is likely to become a public charge.⁶⁶

For Schengen, the equivalent requirement is one of “proof of financial means,” indicating sufficient money to support oneself throughout one’s stay. This can be proved by a bank statement or a sponsorship letter whereby another person confirms they will provide financial support during the stay. Depending on the country, the requirement is anything between 14 and 130 Euros per day, although there is no evident logic—Greece requires 300 Euros per day, Estonia 130 Euros and Finland only 30, for example. The point here is not to suggest that such requirements are necessarily illegitimate—indeed, they may to an extent be in the applicant’s interest—but to they certainly represent a further evidentiary and material hurdle to a successful visa application.

Sponsorship typically originates from family members. This gives considerable advantage to those who already have a “foot in” the host country. Although sponsorship is typically for the purposes of full immigration, it is also occasionally required for temporary tourist or business visas. The sponsor will at the minimum provide a letter of invitation.⁶⁷ However, they may also be required to commit to take on certain responsibilities to ensure that the sponsored individual will comply with the country’s immigration rules and will not become a burden. This role of guarantor is rarely analyzed as such, but it is a potent part of the infrastructure of mobility, essentially enlisting relatives or friends as suppletives of the state in the policing of mobility. “Hosts” are required or encouraged to write a letter to the consular authorities in charge of processing the visa.

⁶⁴10 Tips for a Successful Visa Interview, AMERICAN HONORS (last visited June 26, 2024), <https://americanhonors.org/VisaInterviewTips> [hereinafter “AMERICAN HONORS”].

⁶⁵Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, § 212(a)(15), 66 Stat. 163, 183 [hereinafter “INA”].

⁶⁶ABIGAIL F. KOLKER, CONG. RSCH. SERV., IF11467, IMMIGRATION: PUBLIC CHARGE 1 (2020).

⁶⁷Comment puis-je aider un parent ou un ami à présenter une demande pour venir au Canada?, IMMIGRATION, RÉFUGIÉS ET CITOYENNETÉ CANADA (last updated May 10, 2024), <https://www.cic.gc.ca/francais/centre-aide/reponse.asp?qnum=421&to p=16>.

Again, one can receive assistance from specialized firms that will help or in some cases write the letter of invitation.⁶⁸ Employers are typically required to do the same to justify the travel of their employees, either in the applicant's or in the destination country. Failure to honor one's commitments as a guarantor can have consequences in future sponsorship attempts.⁶⁹

D. Decision

Finally, the award of a visa centers a decision process made by the authorities of the host country. That decision occurs in a particular environment in which the decks are stacked in favor of the decider because of information asymmetries, secrecy and a degree of insulation from review. The process can itself be seen as imbricated in a much broader "ad-hocratic immigration governance" through which states keep control over immigration by maintaining a state of "intentional ambiguity" about the regime.⁷⁰ A considerable part of the global visa infrastructure is devoted, in fact, to protecting the integrity of these processes against challenges by those denied visas.

I. Interview

Many non-immigrant visa application processes require interviews, even though such interviews are more characteristic of long-term immigration. The interview is the culmination and often the only face-to-face moment in the application process. It typically occurs in a consulate or embassy. It is a crucial link in the infrastructure of visa applications. To successfully pass an interview is to present oneself in the right light. It is, in particular, to fit a certain role and confirm what is contained in one's visa application through a sort of performance of conformity and as part of what Mark Salter, borrowing on Foucault, has described as the international management of populations' "confessionary complex."⁷¹ The point is not that one is not necessarily the things one claims, but that one needs to *perform* being those things—indeed, one might be everything one claims and still fail to convince a suspicious consular officer of it.

In the following, I juxtapose one presentation of what applicants should do, and one of what consular officers are supposed to do to highlight the centrality of the interview as an encounter between worlds. I do so for no other reason than to suggest some of the asymmetries but also the convergence of applicant and official discourses, along an axis of domination and subjugation. Consider, first, this advice from one US university to student to visa applicants:

Do not bring parents or family members with you to your interview. The consular officer wants to interview you, not your family. A negative impression is created if you are not prepared to speak on your own behalf. If you are a minor applying for a high school program and need your parents there in case there are questions, for example, about funding, they should wait in the waiting room.

If you are not able to articulate the reasons you will study in a particular program in the United States, you may not succeed in convincing the consular officer that you are indeed planning to study, rather than to immigrate. You should also be able to explain how studying in the United States relates to your future professional career in your home country.

⁶⁸*Lettre d'Invitation Visa France : Exemple de Lettre*, MONVISA FRANCAIS.COM (last visited Sept. 12, 2023), <https://www.monvisafrancais.com/demande-visa-france/lettre-dinvitation-visa-france/>.

⁶⁹*10 Tips for a Successful Visa Interview*, AMERICAN UNIVERSITY (last visited Sept. 12, 2023), <https://www.american.edu/student-affairs/iss/visa-interview-tips.cfm>.

⁷⁰Katharina Natter, *Ad-Hocratic Immigration Governance: How States Secure Their Power over Immigration Through Intentional Ambiguity*, 11 TERRITORY, POL., GOVERNANCE 677, 679 (2023).

⁷¹Salter, *supra* note 15, at 168.

Because of the volume of applications that are received, all consular officers are under considerable time pressure to conduct a quick and efficient interview. They must make a decision, for the most part, on the impressions they form during the first minute or two of the interview. Consequently, what you say first and the initial impression you create are critical to your success. Keep your answers to the officer's questions short and to the point . . .

Do not engage the consular officer in an argument. If you are denied a student visa, ask the officer for a list of documents he or she would suggest you bring in order to overcome the refusal, and try to get the reason you were denied in writing.⁷²

Consider, then, the following detailed instructions by Canada Immigration on how to “conduct effective interviews”:

- Try to put the applicant at ease: most people will be more forthcoming if they feel relaxed
- Keep vocabulary simple and sentence structure uncluttered
- Avoid jargon, rephrase questions if it appears that the applicant has not understood a question
- Maintain the dignity of the applicant
- What to ask:
 - ask only what cannot be determined from the file
 - use the application form as a guide
 - be alert for inconsistencies, gaps and evasiveness. Personal questions are acceptable as long as the officer is respectful.
- [. . .]
- Probe by asking closed questions about details that the client should be able to provide
- Use closed questions in a cross-examination style
- Observe the client's demeanor as they answer
- Remain neutral and objective
- Maintain rapport during this phase of the interview.⁷³

What is striking here is the degree to which the interview is understood on both sides as a highly codified performance that is heavily policed by certain requirements of behavior. The performance of both involves anticipating the behavior of the other. Applicants must tread a fine line: Be seen as uncooperative or defensive and risk arousing suspicion; volunteer too much information and risk having some of it used against them. In both cases, the risk is that one will “self-incriminate” leading to a denial of the application which can be chalked up, in part, to one's sub-par “performance.” This is, in addition, an area rife with possibilities for inter-cultural misunderstanding.

II. Discretion

The award of visas, especially of the shorter kind, is characterized through and through by discretion. Discretion typically can go both ways: Denying someone a visa they would otherwise legally fulfill the conditions of, or granting a visa to someone whose application does not strictly conform to the stated conditions. Discretion includes the granting of visas on “compassionate and humanitarian grounds.”

⁷²See AMERICAN HONORS, *supra* note 64.

⁷³*Conducting Interviews*, IMMIGRATION, REFUGEES, & CITIZENSHIP CANADA (last updated Aug. 30, 2023), <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/interview/application/conducting-interviews.html>.

In the US the sole authority to approve or deny visa applications belongs to consular officers at U.S. Embassies and Consulates.⁷⁴ Discretion creates not only a considerable potential for arbitrariness but also for unpredictability, such that persons may simply decide to not apply for visas in the first place rather than risk being denied one.

The element of discretion is increased by an element of secrecy. States have access to the information voluntarily given to them by visa applicants but also other sources. This includes photographs, fingerprints, information about family members, employers, holdings of the applicant, as well as their criminal history and medical records. US consular officers have ready access to this sort of information through the Consular Consolidated Database which contains more than 143 million records of visa applications going all the way back to the mid 1990s, including biometric information, marriage history, etcetera. In some cases, foreign agencies and private entities may have access to more confidential information than domestic authorities in the applicant's state.

Immigration officers will normally be instantly aware of one's previous immigration record in the US, in addition to information contained in the Consular Lookout and Support System (CLASS) database that aggregates FBI and DEA information. The Department of Homeland Security also provides its own Automated Biometric Identification System (IDENT). Facial recognition technology may be used to compare the photos of applicants and suspected terrorists. If a consular officer flags someone as a security risk, a Security Advisory Opinion can then be solicited from the Department of State as coordinator.

The role of discretion is further problematized and compounded by the use of data analysis tools and algorithms to help process visa applications. For example, the UK has implemented algorithmic tools that grade every visa application, in an effort at streamlining. Similarly, Canada Immigration uses automated processing and predictive learning to automatically triage and approve low-risk online temporary resident visa applications from China and India, with only high-risk applications due for review by an officer. The system has since been extended to other countries. The Chinook software also allows bulk processing of applications.⁷⁵

Governments have been keen to emphasize that algorithms are not decisional but merely tools to assist in the process. It is argued they may even remedy biases in individual officers and allow for more homogenous across-the-board treatment of applications. For example, Canada immigration recognizes that it “uses advanced data analytics systems to help officers identify routine applications for streamlined processing, as well as to sort and triage applications to officers based on their level of complexity” in ways that “automate some processing steps for routine applications” and helps realize “processing efficiencies and have officers focus on more complex or sensitive applications.” However, the Ministry also insists that “[t]hese systems are not used to refuse applications or deny entry to Canada” and that “officers remain central to immigration processing.” Moreover, whilst there are no “absolute bars” to the circumstances in which such tools will be used, the Ministry has “employed a cautious approach” to make sure that they are used “responsibly, effectively and efficiently” for example by putting in place an internal governance framework to monitor the use of support tools.⁷⁶

Nonetheless, the emerging algorithmic infrastructure of visa processing has already been challenged amidst concerns that it is reducing the time humans have to evaluate files, influences those who do—especially when AI flags security risks—and leads to boiler plate rejections.⁷⁷ In the UK, the Joint Council for the Welfare of Immigrants and law firm Foxglove have asked the courts to find it to be unlawful based on the fact that it may have violated the UK Equality Act,

⁷⁴See INA § 104(a).

⁷⁵*The Increasing Role of AI in Visa Processing*, CANADIAN (last visited Sept. 12, 2023), IMMIGRANT, <https://canadianimmigrant.ca/immigrate/immigration-law/the-increasing-role-of-ai-in-visa-processing> [herein after “CANADIAN IMMIGRANT”].

⁷⁶*CIMM – Question Period Note - Use of AI in Decision-Making at IRCC – November 29, 2022*, IMMIGRATION, REFUGEES, & CITIZENSHIP CANADA (last updated Mar. 28, 2023), <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/transparency/committees/cimm-nov-29-2022/question-period-note-use-ai-decision-making-ircc.html>.

⁷⁷CANADIAN IMMIGRANT, *supra* note 75.

leading the Home Office to suspend its use. The algorithm, in giving applicants a risk score in part based on their nationality, was accused of entrenching “racist feedback loops” and discrimination, and of leading to heightened scrutiny by Home Office officials as well as extra delays.⁷⁸

Discretion increases the risk of corrupt “fast tracking” by officials—for example, the Polish “cash-for-visas” scandal⁷⁹—who have the upper hand on visa awards and proceed with little supervision. There has been a tentative move in some jurisdictions towards limiting discretion for those awarding visas. In Canada, for example, the trend is towards obtaining third party assessments rather than relying on immigration officers’ own judgment for language skills. This followed some notorious cases where persons born in the UK as well as having studied in Canada but for some reason unable to provide proof of their education had had their applications rejected, despite the fact that they could clearly—as immigration officers could plainly see—speak and write English.

Some countries specify that consular officers are supposed to provide a reason why a visa is denied, and in some cases require a certain granularity in justification. Tribunals have pushed back against poorly substantiated or logically flawed visa refusal decisions. For example, claiming that there is a risk that an applicant will use the visa to stay in the country when the visa solicited is, precisely, a long-term visa which the applicant has said he needs to move in with his family, will not do.⁸⁰ Moreover, courts have occasionally been alert to covertly or overtly racist presuppositions in the process. For example, the fact that the officer found that the applicant would have had “a greater earning potential in Canada” and therefore a “strong socio-economic incentive to stay here illegally despite having family in India” was found to be inappropriate. As the judge put it:

The thought that he would abandon his wife and children in order to take advantage of better socio-economic opportunities here is distasteful. It is rather sanctimonious to suggest that our society is more of a draw for him than India, where he would be in the bosom of his family, simply because he would have 30 pieces of silver in his pocket The decision was unreasonable not simply because it was stereotypical, but also because it relied on the very factor which would induce someone to come here temporarily in the first place as the main reason for keeping that person out.⁸¹

The Canadian Supreme Court has also clarified that applicants for visas are entitled to procedural fairness, including an opportunity to address concerns relating to the credibility of information they have submitted.⁸² Moreover, immigration officers should not “make up” requirements for delivery of a visa that are not in the law—for example, creating more onerous work requirements than are, in fact, demanded—although they are required to conduct an independent assessment of applicants’ ability to perform the work sought. This is distinct, however, from immigration officers not being satisfied that the material furnished by an applicant is insufficient to satisfy visa eligibility.⁸³ As Canadian courts have put it, “[t]he onus is upon an applicant to put their best case forward in their application. The Visa Officer is not required to assist in this process by contacting an applicant and advising them on any deficiencies.”⁸⁴

⁷⁸Natasha Lomas, *UK Commits to Redesign Visa Streaming Algorithm After Challenge to “Racist” Tool*, TECHCRUNCH (Aug. 4, 2020, 5:04 AM) <https://techcrunch.com/2020/08/04/uk-commits-to-redesign-visa-streaming-algorithm-after-challenge-to-racist-tool/>.

⁷⁹AP, *Poland Is Shaken by Reports That Consular Officials Took Bribes to Help Migrants Enter Europe and US*, EL PAÍS ENGLISH (Sept. 16, 2023, 4:19 AM), <https://english.elpais.com/international/2023-09-16/poland-is-shaken-by-reports-that-consular-officials-took-bribes-to-help-migrants-enter-europe-and-us.html>.

⁸⁰Conseil d’État (CE), 7ème - 2ème chambres réunies, Feb. 4, 2021, 434302 [Fr.].

⁸¹Jagpal Singh Dhanoa v. Canada (Minister of Citizenship and Immigration), 2009 FC 729, para. 18.

⁸²Hassani v Canada (Minister of Citizenship and Immigration), 2006 FC 1283, para. 24.

⁸³Sangha v. Canada (Minister of Citizenship and Immigration), 2020 FC 95, para. 48.

⁸⁴Pacheco Silva v Canada (Minister of Citizenship and Immigration), 2007 FC 733, para. 20.

Nonetheless, the trend towards imposing a certain degree of justification in visa decisions is by no means universal. One typical dimension of discretion overall is a lack of transparency about the fundamental reason why a visa was denied. A typical answer is that the application simply did not meet “the criteria of visa issuance.” The Japanese Ministry of Foreign Affairs, for example, goes to remarkably candid lengths to explain why it will not give “specific reason of the rejection”:

[I]f we do so, the information would eventually become known to the public. Once that happened, there is a danger that some people might misappropriate such information to get around the visa examination process and try to enter Japan for illegal purposes. It would impede the proper visa examination process in the future and have negative effects on Japanese society.⁸⁵

The centrality of discretion has thus long raised concerns about arbitrariness and prejudice. It highlights the lack of standardization behind decision making and the possibility that some immigration officers or some consulates “are more reasonable and make better quality decisions than others.” For example, “Quality of decisions in Islamabad is very poor, for example, whereas New York is far better.”⁸⁶

One question is whether human rights considerations should further constrain visa decisions, notably by states bound by international human rights instruments. The UK Home Office has published guidelines on “Considering human rights claims in visit applications.”⁸⁷ This includes the rather evident reference to the fact that an application “says that it is a human rights claim” or amounts “to an implied human rights claim if it does not say that it is a human rights claim” or where the “matters raised (are) capable of engaging human rights”, in addition to an evaluation of “any prospects of success.” The Home Office is only open to the possibility of human rights claims arising when the visit is between close family members—spouses, parents and minor child. In the Mostafa case, the Court found that the right to family life was implicated in the request by a wife to come and visit her UK resident husband.⁸⁸ However, the Court was unclear as to whether this would also apply beyond spousal relationships, namely, siblings.

In practice, the British Home Office has been adamant that family life can be conducted from abroad by using “modern means of communication” and that it remains possible for family members to meet in other countries, presumably the one where the non-UK based family member resides. Indeed, it claims that “the existence of phones, messaging apps, Facebook, and other internet modes of communication makes the distance immaterial” a statement to which married couples separated by a visa denial have taken strong objection.⁸⁹

In France, human rights considerations have similarly taken a more central role in the close family context, notably through the invocation of the “best interest of the child.” In one case concerning a French national who had judicially obtained parental rights over a niece in Cameroon, for example, the Appeal court found, at the insistence of the French *Défenseur des droits*, that the minor in question, who was taken care of in her country of origin by her invalid grandmother, should be allowed to live with her aunt despite the modesty of their lodging and

⁸⁵*Frequently Asked Questions*, MINISTRY OF FOREIGN AFFAIRS OF JAPAN https://www.mofa.go.jp/j_info/visit/visa/faq.html (last visited Sept. 12, 2023).

⁸⁶Colin Yeo, *Visit Visa Refusals: Appeal or Judicial Review?*, FREE MOVEMENT (Aug. 14, 2018), <https://freemovement.org.uk/visit-visa-refusals-appeal-or-judicial-review/>.

⁸⁷*Human Rights Claims in Visit Applications: Caseworker Guidance*, GOV.UK (Apr. 24, 2015), <https://www.gov.uk/government/publications/considering-human-rights-claims-in-visit-applications>.

⁸⁸Mostafa (Article 8 in entry clearance) [2015] UKUT 00112, [10]–[17] (IAC).

⁸⁹*Live Your Married Life on Skype and Facebook? This Is Shocking*, THE SMARTMOVE2UK (May 15, 2018) <https://smartmove2uk.com/uk-visa-refusal-news/>.

income and therefore granted a long term visitor's visa.⁹⁰ The trend is towards an even broader allowance of a "right to a visa" for the relatives of European citizens who are entitled to the free and expeditious delivery of such a document, except for duly justified considerations of "public order."

The incidence of human rights remains limited, however, to particular countries, a narrow subset of family situations, and the ability to bring up relatively complex human rights-based challenges. Other institutional and legal factors pull in the opposite direction, producing excessively cautious approaches to visa applications. For example, US regulations have been proposed that would make consular officers criminally liable if they issue a visa to someone who later becomes a terrorist. Although such a consequence may be countered to some degree by pressures in the other direction that make consular officers' decisions reviewable judicially, it can clearly have a chilling effect.

III. Justiciability

In some countries such as the US, non-immigrant visa denials cannot be administratively reviewed or judicially appealed. This is what is known as "consular non-reviewability," and it applies to final decisions.⁹¹ It is regularly described as a form of "consular absolutism."⁹² One can ask for the reason an application was denied and one may be in a position to correct items in one's application as a result, but otherwise the only option is to apply anew. Similarly, in New Zealand, a review of a decision to decline a visa application is only undertaken by another immigration officer of equal grade or senior to the one who made the decision, or by the Minister of Immigration, but is then "final and conclusive, and no further application for reconsideration of that decision may be made."⁹³ This confirms a sense that visa applicants are caught up in a permanent "state of exception," not that different—if with less harsh consequences—than candidates to long-term immigration.⁹⁴

Even in systems that are reticent to fundamental review of denials of visas, one may nonetheless be able to sue a consulate for unreasonable delay or failure to reach a decision at all, for example in the US by way of a mandamus action. In the *Patel v. Reno* case—a case involving an immigration visa—Mohanbi Patel, a naturalized US citizen, convinced the US Ninth Circuit Court of Appeals to force the US consulate in Bombay to make a decision about a relative's application. The application had been pending for eight years.⁹⁵ This means that in effect judicial review in the US will be granted "where a consular officer has a nondiscretionary duty to act and refuses to do so."⁹⁶ There is discretion about the content of the decision, but not about whether to render it at all. It may also be the case that a review exists where a consulate has not offered a "facially legitimate and bona fide reason."⁹⁷

⁹⁰Défenseur des droits, decision No. 2021-273, Nov. 15, 2021, (Fr.), https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=21088 [hereinafter "DDD"].

⁹¹*Kerry v. Din*, 576 U.S. 86, 3 (2015).

⁹²Tatyana E. Delgado, Note, *Leaving the Doctrine of Consular Absolutism Behind*, 24 GEO. IMMIGR. L.J. 55, 55 (2009).

⁹³*Appealing Against a Decision to Refuse a Visa*, IMMIGRATION NEW ZEALAND (Feb. 1, 2023), <https://www.immigration.govt.nz/about-us/media-centre/common-topics/appealing-against-a-decision-to-refuse-a-visa>.

⁹⁴Birgit Spengler, Lea Espinoza Garrito, Sylvia Mieszkowski, & Julia Wewior, *Introduction: Migrant Lives in a State of Exception*, 27 PARALLAX 115, 128 (2021); Daria Davitti, *Biopolitical Borders and the State of Exception in the European Migration "Crisis"*, 29 EUR. J. INT'L L. 1173, 1176 (2018); Monica Dolores Bosquez, *Fear and Discipline in a Permanent State of Exception: Mexicans, Their Families, and U.S. Immigrant Processing in Ciudad Juarez* (2011) (M.S.C.R.P./M.A. thesis, University of Texas at Austin), <https://repositories.lib.utexas.edu/handle/2152/ETD-UT-2011-05-3510>.

⁹⁵*Patel v. Reno*, 134 F.3d 929, 933 (1997). See also *Assad v. Holder*, Civ. No. 2:13-00117 (WJM), 2013 WL 5935631, at 2 (D.N.J. Nov. 1, 2013).

⁹⁶*Assad*, 2013 WL 5935631, at *6–7.

⁹⁷*Kleindienst v. Mandel*, 408 US 753, 770 (1972).

In Canada, appeal of visa refusal is allowed. The Federal Court of Canada has jurisdiction to hear such appeals, and an appeal is sometimes recommended over reapplying because it is unlikely that another, or the same, immigration officer will give a different ruling, especially with the previous denial now becoming part of the record. The standard of review is one of reasonableness, it being understood that “the courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility.”⁹⁸ Even in case of a favorable ruling, the application will merely be sent back to another immigration officer for reevaluation. However, successful appeals of visa denials do exist. In the Mohinder Singh case, for example, a citizen of India had been denied a visa by the officer due to insufficient funds and lack of travel history. He was able to show that his significant personal savings and his tax returns indicated substantial income and that considering his lack of travel history as a negative factor was therefore unreasonable.⁹⁹

In the UK, visa rejections can be appealed through an administrative review from outside the UK. This can be done online using the MyHMCTS service within 28 days of getting a rejection. It is also possible in some circumstances to obtain a judicial review before the Upper Tribunal or High Court. The key grounds for doing so are that there was an error of law in the decision-making process; irrationality or unreasonableness; procedural impropriety and unfairness; or breach of the Human Rights Act 1998. This can lead to a settlement whereby UK Visas and Immigration agree to reconsider an application. In cases where human rights violations may be involved, an appeal to the First-tier Tribunal is also available.

In France, the possibility of appealing (a *recours*) a refusal of the right to enter French territory also exists. Since 2000, a special *Commission de recours contre les décisions de refus de visa d'entrée en France* (CRRV) is tasked with examining such appeals at the outset. The Commission serves a filtering role to limit the number of “recours contentieux” that make it to the Nantes Administrative tribunal. The system provides what is, essentially, an administrative review.

However, in all cases, it should be clear that appeal from a foreign country can be a lengthy and costly process typically requiring professional representation, and unlikely to be incurred merely in connection to travel. Most of the case law concerns permanent visa applications, notably by spouses. A UK administrative review can take up to six months and is expensive. The system is complicated by the fact that one may need to challenge a visa denial through different paths depending on the nature of the allegation, for example if human rights are involved in the UK. This has led one commentator to note that:

The lack of an affordable and effective mechanism for challenging visit visa refusals has led to a marked decrease in the quality of decisions. The reasons provided for refusal are often spurious and important documents are often simply ignored. There is little oversight or accountability and decision-makers can essentially do what they want, safe in the knowledge that few have the money or wherewithal to challenge their decision.¹⁰⁰

Occasionally, protests have yielded results in relation to consulates with particularly dismal records in granting visas,¹⁰¹ although these are clearly isolated developments.

⁹⁸Maple Lodge Farms Ltd. v.Canada, 1982 CanLII 24 (S.C.C.), [1982] 2 S.C.R. 2, 7.

⁹⁹Refusal of Visitor Visa - When Could That Be Appealed, LAWPOINT (last visited June 26, 2024), <https://www.lawpoint.ca/news/appealing-canadian-visa-refusal-lack-of-travel-history>.

¹⁰⁰Yeo, *supra* note 86.

¹⁰¹Arta Desku, *Spanish General Consulate in Morocco Closes Following Unjust Schengen Visa Denial Accusations* SCHENGENNEWS (June 21, 2024), <https://schengen.news/spanish-general-consulate-in-morocco-closes-following-unjust-schengen-visa-denial-accusations/>.

Conclusion

This Article has sought to highlight a sort of “ideal type” of the visa globally. That ideal type is necessarily a composite, but it does point to a set of characteristics that, repeated over time and space, constitute the visa as a technology and what might be described as the global visa infrastructure. I have suggested that whilst non-immigrant visas remain a category apart, their processing and the sort of conditions they impose are in practice increasingly wedded to those of migrant visas. This is partly because the two rely on a common infrastructure which on the one hand seeks to weed travelers from would-be migrants, and on the other hand seeks to restrict the latter as much as possible especially when coming from certain countries. That the two processes become intertwined is also visible insofar as, in a context where it has become nearly impossible to make an in-country asylum demand, asylum seekers are indeed tempted to use the non-migrant visa route to flee persecution.¹⁰²

The global distribution of denials also leaves no doubt as to the extent to which the visa infrastructure is part of an international political economy of desirable migration,¹⁰³ suffused by latent racism that is only partly disrupted by class and status privilege. It reinforces colonial legacies that see mobility as one way street and over time accrue most of the benefits of fluid mobility to some parts of the world, at the expense of others. By using nationality as a “neutral” proxy and considering that entire nations do not require visas, or pro forma ones, whereas others do, this global architecture is part of the cultural production of safe/unsafe, desirable/undesirable foreigners through blanket assumptions that would never pass human rights muster in a domestic context. It reinforces a “global color line” that is paid particularly dearly by some nationals.¹⁰⁴

At the same time, the competition over visas and the performance of one’s suitability to travel to the North can reveal deep class and privilege fault lines in the Global South as well, as the ability to travel becomes a relative marker of success and worldliness, testing social and family solidarities. It can lead to elaborate performances of one’s elite, post-racial status and belonging to a globalized world, compared to one’s “ethnic,” “low skilled” and condemned-to-immobility less privileged co-nationals. For example, those whom for educational, family or business reasons can already show a record of traveling to the North are much more likely to obtain visas, thus reinforcing their already privileged status; by contrast, the inability to provide a record of traveling makes first-time travelers much more vulnerable to being found unsuited for a visa.

This adds to the self-fulfilling and self-perpetuating nature of the global visa infrastructure, even as efforts to embody the desirable migrant are not always rewarded. It also reinforces logics of elite cooptation and dominance, whilst entrenching global patterns of discrimination; the Northern white lower classes do not for the most part need visas to travel to the Global South. Even “Global South cosmopolitans,” it turns out, are ultimately treated as racially suspect. This can reinforce perverse class dynamics at home and encourage logics of resentment where racialized elites feel they are being tainted by their visa-unworthy “subaltern” fellow nationals.

One dimension on which this Article has not dwelt is the extent to which the ability to even apply for visas is also, historically and in practice, mediated by the state of nationality’s own policies, including in terms of favoring the mobility of some groups and others, notably through

¹⁰²Dylan Robertson, *Asylum Claims Followed Montreal AIDS Summit Marred by Visa Woes, Planning Issues*, CBC (July 23, 2023, 10:26 AM), <https://www.cbc.ca/news/politics/aids-summit-montreal-visas-refugees-1.6915326>; Justin Schon & David Leblang, *Why Physical Barriers Backfire: How Immigration Enforcement Deters Return and Increases Asylum Applications*, 54 COMPAR. POL. STUDS. 2611, 2619 (2021) (noting that “walls may backfire by motivating a change in legal status from migrant to asylum-seeker if there is a perception that asylum claims may be more efficacious than turning to unauthorized entry”). See also Mathias Czaika & Mogens Hobolth, *Do Restrictive Asylum and Visa Policies Increase Irregular Migration into Europe?*, 17 EUR. UNION POL. 345, 357 (2016).

¹⁰³Claudia Finotelli & Giuseppe Sciortino, *Through the Gates of the Fortress: European Visa Policies and the Limits of Immigration Control*, 14 PERSPS. ON EUR. POL. & SOC’Y 80, 82 (2013).

¹⁰⁴Nicolas Garon, Note, *How Iranians Are Barred from the West through Reactive Visa Policies Fueled by Politics* [2023] U.N. TEX. DALL. L. REV. ON CUSP 1, 3 (2023).

the promotion of “commodified” workers, unequal access to passports or documentation or the already mentioned occasional use of Interpol Red Notices. States of nationality can decide to intervene on behalf of their nationals, provide patronage conducive to bulk visa awards, or complain of discriminatory or capricious visa policies, although they may do so for narrow self-serving reasons or with limited success. But they can also not make a move in favor of their nationals, judging that a foreign state’s visa policy is part of its *domaine réservé* and not worth the challenge. In short, the visa infrastructure is truly transnational in that perspective because it reaches all the way into the state of nationality, soliciting sovereign complicity in the enforcement of other sovereign’s mobility priorities.

The very fraught conditions under which visas are awarded create a need to think about ways in which the contestation of that infrastructure does and might further arise. The normal liberal prescription has long been that at the very least the visa application process should be reviewable and possibly appealable as well, thus recognizing the rights of applicants. This Article has suggested ways in which the visa process is already being constrained in this way, notably in the European context. Whilst no doubt more accountability in the process would be welcome and the global visa infrastructure is still a long way off from being fully normalized in terms of rule of law, it is unclear whether such correctives can challenge some of the very liberal foundations on which the right to exclude aliens rests in the first place.

Alternatively, “telling counter-stories of global mobility” in an effort to “[make] global South bodies visible” is an exercise that can be engaged in.¹⁰⁵ Indeed, “[s]uch storytelling can also subvert processes that categorise some bodies as dangerous or not, while also illustrating how pseudo-objective many of these surveillance and categorisation techniques are.”¹⁰⁶ The telling and retelling of the intimate travails of visa application processes is one step in that direction, one that documents the peculiar humiliation involved in the performance of one’s eligibility for transnational mobility. It can lead to occasional recognition of the injustice and indignity visited on subaltern visa applicants, leading to the odd restorative measure.¹⁰⁷ However, those stories have been told and known for a while, and that has often failed to fundamentally change the equation, except to occasionally deplore how special cases are treated¹⁰⁸ and seek special treatment for them.

One possibility in this context would be to challenge the migrant/non-migrant paths to entry into countries of the West, for example because proving an intent to return is “obsolete and unworkable.”¹⁰⁹ If these statuses are converging, maybe this convergence should be fully acknowledged and even encouraged. This is a possibility that may commend itself sociologically: The distinction between relatively long term “non migrant” visitors and migrant ones is one of nuance, peoples’ life calculations evolve, the categories are hardly full-proof, etcetera. But it could also have perverse effects if it means that the regime of non-migrant visas is further legally aligned with the comparatively onerous requirements of immigrant travel.

Regular intimations that Global South states should and will impose reciprocal arrangements¹¹⁰ go to the crux of the issue. But they are rarely followed up in practice because of very unequal

¹⁰⁵Dixit, *supra* note 8, at 68.

¹⁰⁶*Id.*

¹⁰⁷Alza Kryeziu, *US to Let Citizens of 7 Muslim Countries Denied Visas Under Trump’s “Muslim Ban” Reapply for Free*, VISA GUIDE NEWS (June 14, 2024) <https://visaguide.world/news/us-to-let-citizens-of-7-muslim-countries-denied-visas-under-trumps-muslim-ban-reapply-for-free/>.

¹⁰⁸*Union leader invited to CISPES National Convention denied visa by U.S. Embassy in San Salvador*, CISPES: COMMITTEE IN SOLIDARITY WITH THE PEOPLE OF EL SALVADOR (last visited June 27, 2024), <https://cispes.org/action-alerts/union-leader-invited-to-cispes-national-convention-denied-visa-by-u-s-embassy-in-san-salvador?language=es>; Tom Olver, *Who Is Shoaib Bashir? Why England Cricketer Has Been Denied Visa for India Test?*, METRO NEWS (last updated Jan. 24, 2024, 11:48 AM), <https://metro.co.uk/2024/01/24/shoaib-bashir-england-cricketer-denied-visa-india-test-20162867/>.

¹⁰⁹Daniel Walfish, Note, *Student Visas and the Illogic of the Intent Requirement*, 17 Geo. Immigr. L.J. 473, 476 (2002).

¹¹⁰Yudhijit Bhattacharjee, *Groups Urge Easing of Restrictions on Visa Policies Affecting Scientists*, 304 SCI. 943, 943 (2004).

geopolitical and geoeconomic relations that put some states in conditions where they can hardly afford to impose onerous conditions on foreign travel or where such hurdles would have little impact. They may also obscure the extent to which arbitrary visa denial has long ago also become a South-South phenomenon.¹¹¹ There are occasional talks of negotiating global visa arrangements, thus transforming the global visa infrastructure hypothesis into an actual, institutional reality—in effect, this is already what Schengen is, albeit on a regional basis—but such discussions will only be as productive as they simultaneously manage to challenge existing biases in the visa structure.¹¹²

Denial of visas often contradicts host states' stated economic, educational, cultural or even security policies¹¹³ with significant costs¹¹⁴ occasionally pitting host institutions against their own governments in ways that can be helpful and manifest the obvious self-defeating character of both encouraging and stifling the mobility of the same persons at the same time.¹¹⁵ Universities in the West for example have sometimes emerged as advocates against restrictive and, particularly, discriminatory visa granting practices.¹¹⁶ Civil society has organized for “visa justice” particularly in relation to human rights defenders, civil society and journalists.¹¹⁷ However, pleadings for academics unfairly denied access to international conferences, for example, although sometimes successful because of their visibility,¹¹⁸ can feed into and reinforce an image of “desirable” travelers, possibly at the expense of less privileged categories, in ways that reproduce class divisions at the further cost of ignoring the racial segregation involved in much immigration policing.

Forms of transnational solidarity whereby, for example, academics from the Global North travel to conferences in the Global South, where they have relative ease of access, to contradict policies aimed at preventing academics from the Global South from accessing the Global North¹¹⁹ are certainly symbolically potent but remain ambiguous because, in the end, they may normalize existing asymmetrical privileges. One could imagine ways in which privileged travelers could themselves more radically refuse to travel to certain countries lest discrimination against certain types of travelers from certain nationalities in their own countries be lifted, but such solidarities largely remain to be invented. Finally, one could imagine forms of “migratory disobedience” where nationals—for example migrant workers—refuse to travel to certain countries lest conditions of access be equalized for all, in an attempt to reshape the global visa infrastructure by depriving it of their bodies.

¹¹¹40 *Foreign Delegates Denied Visa to Fest*, THE TIMES OF INDIA (Feb. 15, 2019, 9:38 AM), <https://timesofindia.indiatimes.com/city/rajkot/40-foreign-delegates-denied-visa-to-fest/articleshow/67999914.cms>.

¹¹²Eric C.Y. Ng & John Whalley, *Visas and Work Permits: Possible Global Negotiating Initiatives*, 3 REV. INT'L ORGS. 259, 280 (2008).

¹¹³Wondimagegn et al., *supra* note 41; Froelich, *supra* note 45, at 37.

¹¹⁴Eric Neumayer, *Visa Restrictions and Bilateral Travel*, 62 PRO. GEOGRAPHER 171, 173 (2010).

¹¹⁵Ubadah Sabbagh, *Science Is Better When We Open Our Doors to Immigrants*, WASHINGTON POST (June 25, 2020, 6:09 PM), <https://www.washingtonpost.com/opinions/2020/06/25/science-is-better-when-we-open-our-doors-immigrants/>; Sally Weale, *Rishi Sunak Backtracks Plan to Restrict Graduate Visas after Cabinet Opposition*, THE GUARDIAN (May 12, 2024, 5:39 PM), <https://www.theguardian.com/education/article/2024/may/21/indian-students-union-urges-uk-to-retain-graduate-visas>.

¹¹⁶Aline Barros, *Education Advocates Push to Lower High US Visa Denial Rate for African Students*, VOICE OF AMERICA (Apr. 7, 2024, 2:46 AM), <https://www.voanews.com/a/education-advocates-push-to-decrease-high-visa-denials-for-african-students-/7557339.html>.

¹¹⁷*Joint Statement: Passport and Visa Systems Must Not Exclude Members of the Human Rights Community from Cross-Border Convenings*, ACCESS NOW (last visited June 30, 2024), <https://www.accessnow.org/campaign/joint-statement-passport-and-visa-systems/>.

¹¹⁸UK Home Office Grants Visa to Visiting Student after Media Uproar, THE PIE NEWS (Oct. 24, 2018) <https://thepienews.com/uk-home-office-grants-visa-to-visiting-student-after-media-uproar/>.

¹¹⁹*No Visa, No Worries! Making Global Health Conferences Accessible for All*, BMJ GLOB. HEALTH BLOG (Sept. 27, 2022), <https://blogs.bmj.com/bmjgh/2022/09/27/no-visa-no-worries-making-global-health-conferences-accessible-for-all/>.

Acknowledgements. The author declares none.

Competing Interests. The author declares none.

Funding Statement. This Article was completed following a workshop held at the MOBILE Center of Excellence for Global Mobility Law and financially supported by the Danish National Research Foundation, grant no. DNRF169.