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Qualitative Methods in the Study of Migration and Refugee Law

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To study migration and refugee law, it is often critical to study diverse cases. For example, to study whether asylum determinations depend primarily on the applicant's nationality, on the judge assigned the case, or systemic factors, it is important to compare different systems. Where should researchers start their comparisons? How can they know whether they are cherry-picking examples that favor their preferred conclusions? When is it best to develop examples from countries that are very different from one's own, and when should a researcher focus on similar ones? Which aspects of foreign systems are most relevant for particular inquiries? And how best to conduct within-case analysis? The fields of comparative law and comparative politics have made tremendous progress on each of these questions. This essay synthesizes their key insights and applies them to fundamental questions in migration and refugee law.

Introduction

Migration and refugee law address inherently global problems. These bodies of law govern the voluntary or forced movement of individuals across national borders. They also encompass the laws and policies that states and international organizations adopt to regulate

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migrant movement, resettlement and naturalization. Cross-national comparisons and comparative case studies therefore promise to advance the study of the questions that animate scholars in these fields. Research methods that are commonly applied in the fields of comparative law and comparative politics, but remain underutilized by legal scholars, can help researchers produce more structured and robust findings when they engage in such inquiries.[1]

For example, to assess whether the non-refoulement principle—a fundamental international refugee law obligation that prohibits receiving states from turning asylum seekers back to danger—is respected universally, scholars must compare its implementation across different jurisdictions. The same is true for determining what policies lead to better integration of migrants into receiving societies, what mechanisms for sharing responsibility for refugees are effective,[2] whether individual traits of asylum seekers increase or decrease their chances of being granted asylum, and what design of asylum determination mechanisms leads to better compliance with the requirements of international refugee law.

Despite these advantages, use of qualitative methods in migration and refugee law scholarship remains relatively infrequent. A simple search of articles in this area on the HeinOnline database found direct references to common qualitative research methods in only a fraction of approximately 99,151 articles that mention migration, refugees or immigration between 2010-2022. Although 79,502 of those articles —approximately 80 percent—include the word "example", far fewer also reference qualitative research methods. Table 1 elaborates the frequencies with which different qualitative methods appeared in

[1] *Compare* Irene Bloemraad, *The Promise and Pitfalls of Comparative Research Design in the Study of Migration*, 1 MIGRATION STUD. 27 (2013); Irene Bloemraad, *What the Textbooks Don't Tell You: Moving From a Research Puzzle to Publishing Findings*, in HANDBOOK OF RESEARCH METHODS IN MIGRATION 502 (Carlos Vargas-Silva ed., 2012) IRENE BLOEMRAAD, BECOMING A CITIZEN: INCORPORATING IMMIGRANTS AND REFUGEES IN THE UNITED STATES AND CANADA (2006); David Fitzgerald, *Towards a Theoretical Ethnography of Migration*, 29 QUALITATIVE SOCIOLOGY 1 (2006).

[2] For discussion of responsibility sharing mechanisms, see, e.g., Katerina Linos & Elena Chachko, *Refugee Responsibility Sharing or Responsibility Dumping?* 110 CAL. L. REV. __ (2022); *Jaya Ramji-Nogales, Ukraine in Flight: Politics, Race and Regional Solutions*, AJIL UNBOUND __ (2022); Elena Chachko & Katerina Linos, *Sharing Responsibility for Ukrainian Refugees: An Unprecedented Response*, Lawfare (Mar. 5, 2022), https://www.lawfareblog.com/sharing-responsibility-ukrainian-refugees-unprecedented-response.

those articles.[3] This is a rough and overinclusive estimate, but it illustrates the limited engagement in refugee and migration law scholarship with common qualitative methods widely deployed in other disciplines.

Table 1: Qualitative Methods in Migration and Refugee Law Scholarship, 2010-2022

Case Selection Techniques

Case Selection	802	Outlier Cases	132
Most Similar Cases	35	Least Likely Cases	5
Most Different Cases	12	Diverse Cases	53
Critical Cases	104	Representative Cases	127
Deviant Cases	29	Mill's Methods	1

Within-case Analysis

Process Tracing	198	Empirical implications	158
Causal Process Observations	5	Congruence Testing	0
Within-case Analysis	14	Plausibility probe	24
Scope Conditions	126	Strategic Narrative	33

Case Analysis Techniques

Counterfactual	1345	Typology	3655
Content Analysis	1305	Causal Inference	449
Participant Observation	694	Causal Effect	569

[3] The list of methods we used to run these searches is based on Katerina Linos & Melissa Carlson, *Qualitative Methods in Law Review Writing*, 84 UNI. OF CHI. L. REV. 213, 216 (2016). The methods for inclusion in that study were selected in consultation with methods syllabi, textbooks and colleagues from other social sciences disciplines.

The number of articles citing each method was out of a total of 99,151 articles on HeinOnline (the Law Journal Library) between 2010-2022 that also referenced "refugee", "migration" or "immigration".

Qualitative Methods	637	Interaction Effects	554
Cross National Comparisons	152	Necessary and Sufficient Conditions	134

This essay draws on research methods from the social sciences to illustrate how refugee and migration law scholars can make their descriptive and theoretical insights stronger when they engage in both comparative inquiries and within-case analysis. Many migration and refugee law studies are analogous to socials scientific inquiries because they often aim to establish causal connections between the law and political, societal, or economic developments.

Correct application of qualitative methods may help scholars generalize beyond the specific cases they focus on and avoid common pitfalls such as selection and confirmation biases: It can minimize example selection that confirms an author's theory while ignoring examples that challenge it, or interpretation of inconclusive findings to favor the author's argument.[4] For all these reasons, migration and refugee law research would be advanced by better and more frequent application of social scientific research methods.

Gaining better understanding of qualitative methodologies could also prove useful for those who do not themselves engage in empirical research, but who cite and build on empirical scholarship. It would help scholars better asses the strength of empirically-grounded theoretical claims. Similarly, immigration and refugee law advocates and practitioners could benefit from tools to assess empirical claims and evidence in their own work.

We identify and analyze studies that have successfully deployed qualitative methods in addressing important questions in migration and refugee law. We focus on methods for comparing cases and for establishing causal relationships in the analysis of a single case. One study explores the interplay between expertise and politics in border policing.[5] Other

[4] Julia H. Littell, *Evidence-Based or Biased? The Quality of Published Reviews of Evidence-Based Practices*, 30 CHILDREN & YOUTH SERV. REV. 1299 (2008).

[5] *See* Trym N. Fjortoft, *More Power, More Control: The Legitimizing Role of Expertise in Frontex after the Refugee Crisis*, 16 REGULATION & GOVERNANCE 557 (2022).

studies considers how policies designed by states to prevent asylum seekers from reaching their territory spread across jurisdictions,[6] or why policies receptive to refugees fail.[7] Yet other studies explore how migration and refugee law operate within national systems. Research questions here include determining which political actors within national systems have the most influence over the trajectory of migration and asylum policies,[8] examining the relationship between immigration status and the willingness of migrants to assert their rights in other contexts,[9] and explaining variation in the outcomes of different national refugee determination regimes.[10]

In highlighting these studies and methodologies we hope to offer advice and tools for scholars and practitioners. Where should researchers and advocates working in the fields of migration and refugee law start their comparisons? How can they know whether they are cherry-picking examples that favor their preferred conclusions? When is it best to develop examples from countries that are very different from one's own, and when should one focus on countries that are very similar? Which aspects of foreign systems are most relevant for particular inquiries? The fields of comparative law and comparative politics have made tremendous progress on each of these questions. They should inspire a similar movement among migration and refugee law scholars.[11]

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[6] *See* David Scott Fitzgerald, REFUGE BEYOND REACH: HOW RICH DEMOCRACIES REPEL ASYLUM SEEKERS (2019). *Cf.* AYELET SHACHAR, THE SHIFTING BORDER: LEGAL CARTOGRAPHIES OF MIGRATION AND MOBILITY (2020).

[7] Melissa Carlson, Laura Jakli & Katerina Linos, *Rumors and Refugees: How Government-Created Information Vacuums Undermine Effective Crisis Management*, 62 INTERNATIONAL STUDIES QUARTERLY, 671 (2018).

[8] *See* Saskia Bonjour, *Speaking of Rights: The Influence of Law and Courts on the Making of Family Migration Policies in Germany*, 38 LAW & POLICY 328 (2016).

[9] *See* Shannon Gleeson, *Labor Rights for All? The Role of Undocumented Immigrant Status for Worker Claims Making*, 35 LAW & SOCIAL INQUIRY, 561 (2010).

[10] *See* Rebecca Hamlin, *International Law and Administrative Insulation: A Comparison of Refugee Status Determination Regimes in the United States, Canada, and Australia*, 37 LAW & SOCIAL INQUIRY 933 (2012).

[11] *See also* Katerina Linos & Melissa Carlson, *Qualitative Methods in Law Review Writing*, 84 UNI. OF CHI. L. REV. 213 (2016); Katerina Linos, *How to Select and Develop International Law Case Studies: Lessons from Comparative Law and Comparative Politics*, 109 AJIL 475 (2015).

I. Principles for Case Selection

In migration and refugee law scholarship, like in legal scholarship more broadly, concerns about case selection and sampling are widespread. Scholars are often criticized for cherry-picking cases that best fit an argument. But there are ways to mitigate these concerns by selecting cases to make credible, generalizable causal claims. Case selection techniques are used to make structured and focused comparisons across cases in order to strengthen causal claims. In what follows, we introduce some helpful case selection techniques.

1. Most Difficult Case Design

Selecting cases in which one's theory is least likely to hold true can make for sounder theoretical conclusions. These cases, called "least-likely" cases, undergird most difficult case design.[12] If a researcher demonstrates that her theory holds true in an unlikely case, the argument is likely to hold in a broader range of cases as well.

In *Speaking of Rights: The Influence of Law and Courts on the Making of Family Migration Policies in Germany*,[13] Saskia Bonjour challenges the "control gap" theory in migration scholarship. This common theoretical claim posits that courts force states hostile to migration to accept migrants contrary to the will of politicians and the public. Bonjours argument, by contrast, is that judicial influence is in fact far more limited.

Bonjour criticizes the control gap theory through a study of family migration cases in Germany in the 1970's and 1980's. She argues that court cases had little direct impact on migrant acceptance because contrary to theoretical expectation. Courts were reticent to interfere with the stated positions of politicians and the public, which were hostile to

[12] *See* Harry Eckstein, Case Study and Theory in Political Science, in Fred I. Greenstein and Nelson W. Polsby, eds, 7 Handbook of Political Science: Strategies of Inquiry 79, 119 (Addison-Wesley 1975). *See also* Jack S. Levy, Case Studies: Types, Designs, and Logics of Inference, 25 Conflict Mgmt & Peace Sci 1, 12 (2008).

[13] *See* Bonjour, *supra* note 8.

migrants. Bonjour finds that the impact of German courts on German migration policies was only indirect, although she acknowledges that it was nevertheless substantial.[14]

Bonjour selected the German case because it was arguably the most-likely case to display a "control gap", or, conversely, the least-likely case to support her own theory. First, German courts are powerful, and judicial review is well established in Germany. Strong courts with a robust tradition of judicial review are more likely to enforce their views on a reluctant polity than weak courts whose judicial review powers are contested or poorly established. Second, the "control gap" paradox was clearly present in the *outcomes* of the German case study. Germany was the top migrant destination in Europe in the second half of the 20th Century. At the same time, it was the country most reticent to accept migrants, displaying a clear preference for ethnic Germans.

To put it another way, Germany met the paradigmatic requirements for a control gap to exist: strong courts and a high number of migrants despite the polity being hostile to migration. Therefore, as Bonjour argues, "Family migration policy making in the federal republic of Germany is a 'most-likely' case to evaluate the hypothesis that the courts have obliged liberal states to accept unwanted migration, in the sense that it is a case that 'ought … to invalidate or confirm theories if any cases can be expected to do so." The study was a most-likely case for the control gap theory, but a least-likely case for Bonjour's own claim. It is therefore a textbook example of most difficult case design.

2. Most Similar Case Design

In a "most similar case" design, the researcher chooses cases that have similar values on theoretically important characteristics but differ on the outcome and the independent

[14] Some have argued, though, that the case does not present a real "most difficult case" because while the Federal German Courts, at the time, were relatively sympathetic to migrants, decisions were made by local German courts who were significantly less so. We thank Stella Elias for this observation.

variable—the variable of interest.[15] This allows the researcher to hold the effects of other variables "constant".

For example, in *International Law and Administrative Insulation: A Comparison of Refugee Status Determination Regimes in the United States, Canada, and Australia*,[16] Rebecca Hamlin compares the refugee status determination regimes (RSDs) of three popular asylum seeker destinations—the United States, Canada, and Australia. Her aim is to isolate factors that explain the national variation in status determination outcomes, as the acceptance rates of asylum applications from individuals from the same country of origin vary greatly across the three countries.[17] Hamlin argues that this variation in outcomes can primarily be explained by the design of the RSD regime in each state, and more specifically, "the degree of insulation the administrative agencies conducting front-line RSD decision making enjoy" from judicial and political interference.[18]

Hamlin selected the three case studies because they share similar characteristics on dimensions that could impact the outcomes of refugee status determination proceedings. But the cases diverge on the variable of interest—the institutional design of the status determination mechanism.

The cases are similar along important theoretically relevant dimensions. All three countries are parties to the same international instruments that govern status determination decisions, and therefore "are interpreting an identical text in determining the validity of asylum".[19] Moreover, the three countries are popular destinations for migrants, and migration is part of their national identity. They have participated in large scale historical refugee resettlement efforts. All three countries are federal systems in which migration

[15] *See* Jason Seawright and John Gerring, Case Selection Techniques in Case Study Research: A Menu of Qualitative and Quantitative Options, 61 Polit. Rsrch. Q. 294, 304 (2008); Ran Hirschl, The Question of Case Selection in Comparative Constitutional Law, 53 Am. J. Comp. L. 125, 133–39 (2005).

[16] *See* Hamlin, supra note 10.

[17] In 2009, Australia accepted 14 percent of Chinese applicants, whereas the United States accepted Chinese claims at a rate of 35 percent. Canada's acceptance rate for Chinese applicants was 58 precent.

[18] *Id*, at 935.

[19] *Id*, at 934.

policy is determined at the national level. All three have substantial immigration bureaucracies whose decisions are subject to judicial review. They all share a common law legal tradition and have powerful and independent courts. They conduct refugee status determinations on a large scale. They have similar border policies. In addition, Hamlin only looks at refugee status determinations with respect to Chinese applicants across the three systems in order to rule out alternative explanations for the variation in outcomes due to the identity of the applicants or their countries of origin.

At the same time, there is variance in the design of the refugee status determination regime and its level of insulation from courts and legislators across the three case studies. Canada, Hamlin argues, has a centralized system that has evolved "much more quickly and unidirectionally" than that of the United States or Australia. Canada also has high levels of administrative insulation because the decisions of its administrative review body are rarely challenged. By contrast, both the Australian Parliament and the United States Congress have been more interventionist in setting refugee policy and changing the legal definitions of a refugee in ways that affect refugee status determination mechanisms—the former more so than the latter. As a result, Canada has by far the highest asylum grant rates for Chinese applicants. Australia has the lowest, and the United States' asylum grant rate is intermediate.

By using most similar case design, Hamlin effectively isolates her variable of interest – refugee status determination mechanism design—and makes a plausible claim that that variable accounts for the difference in refugee status determination outcomes across otherwise very similar cases.[20]

[20] Compare Jenni Millbank, *'The ring of truth': A case Study of Credibility Assessment in Particular Social Group Refugee Determinations*, 21 INT'L J. OF REFUGEE L. 1 (2009). This is an example in which the method applied is the most similar case method, but the findings would be stronger had the author selected the most different case method. See section X. The article uses Canada, the U.K., Australia and New Zealand to study the function of credibility assessments by first-instance refugee status determination tribunals in the adjudication of refugee status applications. The cases were selected because they all use an informal inquisitorial decision-making body to adjudicate status determination applications at the first instance. The article focuses on applications invoking sexual orientation and relies on a qualitative analysis of 1000 decisions. It argues that across all case studies, decision makers overestimated their own sense of truth, while undervaluing the truthfulness of asylum applicants' sexual orientation claims based on flawed and poorly articulated assumptions. Millbank successfully shows that this pathology is present in the systems she studies. But the findings would be more robust and potentially generalizable had she demonstrated the presence of the bias in legal systems otherwise very different from one another.

Another successful example of the most similar cases method is Irene Bloemraad's *Becoming a Citizen: Incorporating Immigrants and Refugees in the United States and Canada*.[21] In this comprehensive study, Bloemraad examined how government policies influence immigrants' political incorporation in receiving societies. She asked why levels of citizenship among immigrants in Canada were, at the time, significantly higher than in the United States. Most existing scholarship treated Canada and the United States as most similar in the sense that they were both north American immigrant countries, and attributed differences in political integration outcomes such as naturalization to personal traits of the migrants in each country. By contrast, Bloemraad attributed the difference to the two countries' diverging public policies concerning migrant integration.

To learn how policy could affect immigrants in otherwise similar countries like the United States and Canada, Bloemraad first sought to neutralize the impact of individual migrant traits and patterns. To that end, she focused on Portuguese immigrants. This was a group with very similar characteristics and migration trajectories in both the United States and Canada. The focus on otherwise similar countries and a specific group of migrants allowed Bloemraad to isolate he diverging public policies in the two countries, the mechanisms through which they affected individual migrant decisions about citizenship, and how they influenced the creation of a civic infrastructure amenable to political incorporation. She argued that Canadian integration and multiculturalism policies facilitated naturalization and political engagement, whereas the U.S. hands-off approach to integration and focus on border control stemmed integration and the attainment of citizenship.

A final example is David Scott FitzGerald's *Refuge Beyond Reach*.[22] The book studies the "remote control" measures that powerful western countries deploy to prevent access to asylum by stopping asylum seekers from reaching their territory or applying for protection. Fitzgerald offers a typology of remote control measures that draws inspiration from medieval times. "Caging" includes measures designed to contain asylum seekers beyond the border, like maintaining refugee camps in other countries and supporting campaigns to persuade

[21] *See* BLOEMRAAD, *supra* note 1.

[22] *See* Fitzgerald, supra note 6.

asylum seekers to stay home. A "dome" prevents asylum seekers from entering through visa restrictions that mostly target Asian and African nationals, as well as carrier sanctions for allowing passengers without visas to board. "Buffering" involves using neighboring states to halt migrant flows. "Moating" is maritime interception, and the "barbican" is the creation of zones of exception within the state's territory.

One of the themes that the book explores is why some jurisdictions are more constrained than others in deploying remote control methods. Much like Hamlin, Fitzgerald looks at four powerful western jurisdictions to study this question: Australia, Canada, the EU, and the United States. Those four jurisdictions are similar along some of the parameters that Hamlin also identifies, like democratic governance, availability of judicial review, and adherence to basic refugee law instruments and obligations. But the four jurisdictions are different in their degree of resort to "remote control" measures over time.

Fitzgerald concludes that "embedded liberalism" limits the resort of all four states to remote control tactics, but the degree varies widely over time and place. He attributes this variance to the degree of each jurisdiction's commitment to individual rights. "Countries that guarantee significant constitutional rights to everyone on their territory, such as the United States and Canada," he argues, "provide stronger protections for asylum seekers than Australia, which lacks a constitutional bill of rights." According to Fitzgerald, the degree of constraint is the highest in the European Union, where supranational courts, the European Court of Human Rights and the European Court of Justice, add another layer of constraint that induces respect to human rights.[23]

Fitzgerald's case selection is not as robust as Hamlin's, and significant differences among the case studies beyond the variable of interest—resort to "remote control" measures—may impact the persuasiveness of his conclusions. In particular, the European Union is different along many dimensions from the other three case studies. It is a supranational organization, not a single state. It has a civil law tradition while the other three cases are quintessential common law states. This difference is fundamental. Civil law

[23] *Id,* at 14.

jurisdictions differ from common law jurisdictions in origins, legal principles, doctrine and method, the role of courts and judicial review, and many other aspects key to analyzing the role of legal constraint and respect for individual rights in these three systems. Fitzgerald papers over these differences by grouping all four jurisdictions as liberal members of the global north.

4. Most different case design

In most different case design, researchers select cases that differ on all relevant characteristics except the explanatory variable and outcome. As such, most different case designs can suggest that the same variable produces the same effect across very different contexts. For example, in *Labor Rights for All? The Role of Undocumented Immigrant Status for Worker Claims Making*,[24] Shannon Gleeson studies the influence of undocumented status on migrant's willingness to assert their rights in the workplace.

Gleeson argues that undocumented status is what sociologists call a "master status"—a defining individual trait that percolates across all aspects of life, much like race or gender. Undocumented status shapes workers' legal consciousness in deep ways. Their reluctance to assert their work rights is not the result of lack of knowledge, but rather an outcome of their unique relationship to the law constructed by their undocumented status. The implication of these insights is that existing efforts such as worker education, strengthening labor laws, and targeting abusive employers are insufficient for sparking undocumented worker rights mobilization.

Gleeson uses a most different case research design to test her argument. She selected San Jose, California, and Houston, Texas as her case studies. These two cities differ on key features that might impact undocumented immigrants' litigiousness and readiness to assert their rights, yet the narrative patterns Gleeson divines from her interviews with undocumented restaurant workers in both cities are remarkably similar.

[24] Gleeson, supra.

One major difference between the case studies is the legal and policy environment. In theory, a more generous legal framework should invite greater willingness on the part of undocumented immigrants to assert their rights, and a stringent legal framework should encourage the opposite. San Jose has relatively generous work law and is much more unionized compared to Houston, where worker protections are minimal and workplace unionization is limited. Texas state laws offer the weakest protections for workers in the nation, while California's law is among the most generous. Texas wage, hour and antidiscrimination standards generally replicate federal minimums, while California goes beyond the minimum. Texas is a "Right to Work" state and is far less unionized than California. Worker health and safety standards in California are governed by a state agency, the California OSHA, whereas Texas relies on the federal OSHA agency. Furthermore, Texas is the only state in the nation where employers are not required to carry workers compensation insurance. The two cities also differ in public opinion toward immigration, with Houston generally being a lot more conservative.

Despite these key differences between the case studies, the interviews Gleeson conducted with undocumented restaurant workers revealed strikingly similar patterns. This strengthened her overall argument about the influence of undocumented status on migrant's willingness to assert their rights in the workplace. The narratives coming out of the interviews were similar despite diverging legal frameworks and public opinion.[25]

[25] For additional examples of successful implementation of the most different cases method, see, e.g., Ibrahim Soysüren & Mihaela Nedelcu, European Instruments for the Deportation of Foreigners and their Uses by France and Switzerland: The Application of the Dublin III Regulation and Eurodac, J. of Ethnic & Migration Stud. 1 (2020). This study explores how state actors interpret and apply the diversity of instruments for deportation of foreigners available under the EU Dublin III system. Deportation rates across the EU are relatively low. The authors selected Switzerland and France as most different cases. France is a key member of the EU with a centralized system of government, while Switzerland is a decentralized associated country. The comparison allowed the authors to argue that administrative organization is one reason for low deportation rates. Centralized administration is more conducive to deportation than de-centralized administration.

See also JENNIFER M. CHACON, SUSAN BIBLER COUTIN, STEPHEN LEE, SAMEER ASHAR, EDELINA BURCIAGA & NIDIA GARZA, NAVIGATING LIMINAL LEGALITIES ALONG PATHWAYS TO CITIZENSHIP: IMMIGRANT VULNERABILITY AND THE ROLE OF MEDIATING INSTITUTIONS (2015); Jennifer M. Chacon, Susan Bibler Coutin, Stephen Lee, Sameer Ashar, Edelina Burciaga & Nidia Garza, *Citizenship Matters: Conceptualizing Belonging in an Era of Fragile Inclusions*, 52 U.C. DAVIS L. REV. 1 (2018). These studies explore how non-citizens and organizations providing them immigration-related services construct the liminal legal status of non-citizenship under programs like Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents (DAPA). The study is based on two case studies from two counties in California—Orange County and Los Angeles County—selected because they differ substantially on parameters of interest

Most different case design has important limitations: when selected cases share more than one relevant similarity, this technique cannot, on its own, help the researcher distinguish between them. Moreover, scholars tend to select cases based on continence and data availability, which means that case studies often concentrate on a limited number of western countries. For the most different cases method to work best, scholars ought to select examples as different as possible from one another and expand their research beyond a limited set of familiar countries and regions.

More broadly, qualitative work requires that case selection be combined with within-case analysis, to which we turn next. Systematic within-case analysis allows the researcher to reach more robust conclusions about causal relationships between the elements that comprise each case, and to trace outcomes to the factors that produced them.

II. Process Tracing: Developing Multiple Empirical Implications

After imagining alternative plausible outcomes and selecting cases, qualitatively oriented scholars trace the events prior to the outcome, parsing their theory into logically interconnected propositions that explain why the outcome occurred. If a legal scholar attributes an outcome to a particular cause, it is reasonable to think that this cause would produce other "traces," or implications. Using available evidence, this scholar can see whether these expected implications occurred, thereby strengthening (or weakening) her explanation of the outcome. Additionally, scholars can weigh the plausibility of these implications against alternative explanations of the outcome.[26]

For example, in the wake of the Russian invasion of Ukraine, the Biden administration granted Temporary Protected Status (TPS) to Ukrainians residing in the United States. The

like the size of immigrant population, the authorities' stance toward non-citizens, the political inclination of the general population and more.

[26] *See* Lawrence B. Mohr, The Reliability of the Case Study as a Source of Information, 2 Advances Info Processing Orgs 65, 67–69 (1985).

measure granted temporary protection from deportation to Ukrainians present in the United States prior to a designated cut-off date.

Ukrainians received TPS on March 3, 2022.[27] Not long thereafter, on April 15, 2022, the Biden Administration announced that it would also grant Temporary Protected Status to Cameroonian nationals amid an armed conflict and humanitarian crisis unfolding in the country.[28] Were these two occurrences causally related? Was the Biden administration pressured into expanding TPS to additional nationalities because it had granted Ukrainians that protection? This is the very sort of questions that process tracing can help investigate.

One theory would posit that the events were unrelated, and that each grant of TPS was independently motivated by urgent developments on the ground in both Ukraine and Cameroon that required the grant of emergency special protections at a similar timing. Under this theory, the fact that the grants of TPS in both cases were nearly simultaneous is purely coincidental. Another explanation would maintain that the administration felt compelled to extend TPS to groups other than Ukrainians to avoid being accused of selectively preferencing a refugee crisis involving Europeans and an overwhelming majority of white, Christian refugees.

The researcher can evaluate each of these hypotheses through careful analysis of evidence about the administration's decision-making process, public statements, and public and elite sentiment to which the administration was likely responding. She can look for documents and reporting about the administration's internal decision-making process, information about calls from lawmakers to extend TPS beyond Ukraine, evidence of public opinion and mobilization in favor of groups other than Ukrainians, and a wealth of other

[27] Secretary Mayorkas Designates Ukraine for Temporary Protected Status for 18 Months, U.S. Dep't of Homeland Security (Mar. 3, 2022), https://www.dhs.gov/news/2022/03/03/secretary-mayorkas-designates-ukraine-temporary-protected-status-18-months. The Biden administration extended the cut-off date on April 19, 2022. Designation of Ukraine for Temporary Protected Status, Dep't of Homeland Security (Apr. 19, 2022), https://public-inspection.federalregister.gov/2022-08390.pdf.

[28] Miriam Jordan, *U.S. Offers Protection to People Who Fled War in Cameroon,* N.Y. Times (Apr. 15, 2022), https://www.nytimes.com/2022/04/15/us/cameroon-temporary-protected-status.html.

evidence that could illuminate the reasons behind the decision to grant TPS to Cameroonians.

What in fact transpired supports the theory that the grant of TPS to Cameroonians was motivated in large part by the blowback from the decision to grant that status to Ukrainians. Advocates for Cameroonian asylum seekers long lobbied the U.S. government to grant them temporary protection without success. It was only after the Biden administration decided to grant TPS to Ukrainians so quickly that Cameroonians finally secured that status as well. While it is difficult to locate a "smoking gun" to that effect in official administration documents—most confidential—and public addresses, extensive contemporaneous news and advocate coverage attributes the Cameroon TPS decision to outcry over the "double standard" that the administration applied in originally only granting protections to Ukrainians.[29]

The logic of process tracing should not be unfamiliar to lawyers and particularly migrant advocates. Similar logic is used to assemble evidence in individual cases. In process tracing, scholars form multiple hypotheses about what caused an outcome, identify implications of each hypothesis, and weigh the hypotheses against available evidence. Likewise, to link a suspect to a crime, a prosecutor identifies a motive and develops a theory connecting a suspect's motive to the time, place, and method of the crime. The prosecutor examines whether the evidence is more consistent with her theory or alternative theories. In refugee law, a status review official or mechanism must ascertain whether an asylum seeker's claim for refugee status is supported by available evidence about their country of origin and individual circumstances. If an individual has been personally persecuted, they would be

[29] *See, e.g.*, *Cameroonians Win Temporary Protected Status After Outcry Over "Double Standard" for Ukrainians*, DEMOCRACY NOW! (Apr. 18, 2022), https://www.democracynow.org/2022/4/18/biden_admin_grants_cameroonians_temporary_protection; Char Adams, *African Immigrant Advocates Point to 'Double Standard' as Ukrainians Receive U.S. Relief*, NBC News (Apr. 5, 2022), https://www.nbcnews.com/news/nbcblk/african-immigrant-advocates-point-double-standard-ukrainians-receive-u-rcna23092; Rebecca Beitsch, *Critics Decry Double Standard on Migrants Amid Ukraine Crisis*, THE HILL (Marc 3, 2022), https://thehill.com/policy/national-security/600440-critics-decry-double-standard-on-refugees-amid-ukraine-crisis/.

eligible for refugee status. But that status would not be available to them if they left their country to seek better employment opportunities.

Although lawyers "process trace" when composing legal briefs and establishing narrow causal propositions, legal scholars do not use this logic systematically in scholarship. That is, in brief writing, lawyers often assess how diverse facts contribute to their legal arguments, but in academic writing, we often see less effort spent to collect and assess key facts that would make theoretical propositions plausible.

Evidence will vary in probative value. After developing a theoretical explanation of the outcome, scholars using process tracing must assess how diagnostic evidence increases or decreases the probability that this explanation is true. These pieces of diagnostic evidence are called causal process observations (CPOs) because they elucidate the broader causal mechanism linking the variables.[30] These pieces of evidence differ from the independent observations used in statistical analyses; they do not add breadth but depth, and are logically connected, rather than independent of one another. Different types of CPOs have varying probative value. In Professor David Collier's language, "doubly decisive" evidence and "smoking gun" evidence have high probative value: doubly decisive evidence supports one theory and discredits alternatives, while smoking gun evidence supports one theory but does not speak to alternatives.[31] In contrast, "straw-in-the-wind" evidence and "hoop" evidence are only mildly helpful.[32]

In *More Power, More Control: The Legitimizing Role of Expertise in Frontex After the Refugee Crisis*,[33] Trym Fjortoft considers why the post-2015 mandate of the European Border and Coast Guard Agency, Frontex, involved greater reliance on quantitate measures for border security despite broad agreement that such metrics are largely inadequate in the border security context. Fjortoft argues that the metrics were added for political reasons to

[30] David Collier, *Understanding Process Tracing*, 44 PS: POLIT SCI & POLIT 823, 826 (2011).

[31] *Id*, at 825.

[32] *Id*. "Straw-in-the-wind" evidence does not prove or disprove a theory, but suggests that its validity is more likely than it would otherwise be. "Hoop" evidence can disprove a theory but cannot independently establish its validity.

[33] Sura.

strengthen the impression that Frontex exercises depoliticized and technical expertise. They were intended to allay member state concerns that Frontex would interfere with their sovereignty if granted broader authorities over border security in the aftermath of the 2015 EU refugee crisis.

Frontex's new mandate granted the agency the authority to conduct vulnerability assessments of weaknesses in the border control systems of EU member states. It further granted the agency the authority to intervene—with EU Council approval—by sending officials to member states in certain cases. The agency was required to deploy a common methodology and rely on quantitative metrics in assessing vulnerability.

The study employs a process tracing methodology. Fjortoft marshals a rich set of evidence—public documents, formerly confidential documents, interviews with officials at both the EU and state level and more—to adjudicate between two potential theories about the role of expertise and "objective" metrics in Frontex's new mandate to conduct vulnerability assessments.

The first is a political approach. Under this approach, the 2015 refugee crisis exposed clear weaknesses in European border control. This in turn increased political debate around border control and migration, put pressure on Frontex, and challenged its legitimacy as a common system for managing EU external borders. Expertise was one of the key resources that Frontex and policymakers mobilized to address these legitimacy and political challenges. To prove this theory, then, Fjortoft needed to show that a series of interrelated implications of the theory had occurred:

(i) The refugee crisis exposed weaknesses in EU border management.

(ii) This increased the political contestation around border control and migration, and in turn added pressure on Frontex.

(iii) Frontex and policymakers turned to expertise and "objectivity" in response to this political pressure by introducing vulnerability assessment.

Under the epistemic approach, by contrast, risk analysis in general and Frontex-type vulnerability assessments in particular are valuable for their functional, problem-solving

qualities, not for their political signaling function. Under this approach, the refugee crisis exposed previously unknown gaps in EU border management, and vulnerability assessments were introduced to address those knowledge gaps. The epistemic approach posits that decision makers do not always recognize their limited knowledge and understanding. "It often takes a crisis to spur decision-makers to seek help from an 'epistemic community' of experts".[34] To vindicate this theory, Fjortoft argues, the evidence must show that the new Frontex mandate was a response to a purely functional problem—lack of knowledge about the state of EU borders—and Policymakers' view that a more robust mandate with vulnerability assessment authority would help address this problem. Put differently, he had to demonstrate that:

(i) The refugee crisis was a knowledge problem—it exposed previously unknown weaknesses in EU border security.

(ii) The solution according to EU policymakers was to create more knowledge by empowering experts and using "objective" metrics.

Fjortoft ultimately rules in favor of the political approach despite countervailing evidence. He first concludes, based on language used in several documents, that the 2015 border control crisis was not a crisis of knowledge, but rather a crisis of inaction. States and the EU alike failed to take necessary action to secure their borders. A further key piece of evidence is an early version of the common vulnerability assessment methodology—i.e., the method that Frontex would deploy under its new mandate to conduct vulnerability assessments. As negotiations over the mandate advanced, and political member state sovereignty concerns intensified, policymakers faced pressure to add quantitative indicators for vulnerability determinations. The document reflects those pressures. It states, among other points, that "the objective criteria will ensure the establishment of the vulnerability assessment *as a technical rather than political exercise*".[35]

Fjortoft argues that this document "provides 'smoking-gun' evidence that the experts and policymakers involved in drafting the document explicitly believed that quantitative

[34] At 562.

[35] At 565.

indicators would help insulate the procedure against political interference." The evidence lends strong support to that statement. We should note, however, that for the evidence to truly constitute a "smoking gun", we would expect stronger language to the effect that use of objective metrics was purely or largely political.

Fjortoft complements these pieces of evidence with evidence that the epistemic merits of vulnerability assessments were "of secondary concern."[36] Among other evidence, he cites interviewees and documents that conceded that quantitative metrics in border security are crude and insufficient, and that they ultimately have to be complemented with qualitative and subjective risk assessments. If the aim of the new mandate was to fill epistemic gaps about the EU border control system, then the emphasis on quantitative metrics would be hard to explain.

This study is a strong example of robust process tracing. It outlines potential explanations for the outcome, breaks them down into distinctive falsifiable implications, and carefully assesses a variety of evidence to determine which of the theories has a stronger basis in the facts of the case. It is also careful to consider counterarguments for the interpretation of every piece of evidence.

Process tracing often involves systematic analysis of counterfactuals. In *Rumors and Refugees: How Government-Created Information Vacuums Undermine Effective Crisis Management,*[37] Melissa Carlson, Laura Jakli and Katerina Linos ask why only few of the migrants that arrived in Greece during the 2015 EU refugee crisis applied for asylum in that country or sought transfer to a different country through official channels. Most arrivals either traveled north to other EU countries using smugglers and other informal methods or remained in Greece unlawfully, often in adverse living conditions. This occurred despite the

[36] At pp. 565-66.

[37] Melissa Carlson, Laura Jakli & Katerina Linos, *Rumors and Refugees: How Government-Created Information Vacuums Undermine Effective Crisis Management*, 62 INTERNATIONAL STUDIES QUARTERLY, 671 (2018).

availability of the option to apply for asylum or be transferred to other countries through official mechanisms. How, then, to explain this policy implementation failure?

Existing explanations point to selective law enforcement and limited state capacity. They also highlight "push-pull" factors that are particularly influential in the migration context, such as conditions in the host country, legal status, personal security, and presence of family members and co-ethnics. The researchers show why each of these explanations fails to fully explain the observed reluctance of migrants in Greece to avail themselves of the legal routes for asylum and relocation offered by government.

Greek politicians had little to gain politically from mishandling the crisis, and hence the strategic law enforcement explanation was not satisfactory. Although Greece certainly faced gaps in bureaucratic capacity and is considered a moderate capacity country, it did have significant EU resources at its disposal. Moreover, there is little evidence that low-capacity states mishandle refugee crises more than high-capacity states. Push-pull factors can explain why refugees decided to move on to other countries, but they cannot explain *how* they decided to do so—foregoing the formal application process and turning instead to smugglers.

Instead, the researchers argue that rumors and government information mismanagement best explain the outcome observed in Greece. They maintain that even unintentional deception or failure to produce accurate, consistent, and timely information exacerbate refugee reliance on rumors and "create negative feedback cycles that weaken compliance."[38] To support this theoretical claim, the researchers rely on interviews and NGO materials.

The single most powerful piece of evidence that rumors and misinformation were crucial to the outcome in Greece was the observed fact that migrants remained at the borders in uninhabitable refugee camp and ended up being violently dispersed despite having much better legal options. The researchers show that rapid asylum policy changes increased confusion about the asylum application process. Restricted information about the asylum process increased confusion about legal status during the pendency of an asylum application

[38] At 674.

and decreased trust in government, as did restricted refugee movement. Arbitrary application of refugee laws increased migrant willingness to turn to smugglers.

The researchers complement this analysis of the evidence to reject alternative explanations with counterfactual analysis: what would be different in an environment with better, fuller, more consistent information? In that universe, we would expect a much higher rate of asylum applications, at least among groups like Syrians whose applications Greece largely granted. We would expect asylum seekers to know that they have certain protections once they apply even before the application is granted, increasing the application rate even further. We would also expect greater trust in government. None of these elements was observed, strengthening the claim that rumors and government information mismanagement offer a strong explanation for the outcome in Greece.

Conclusion

[TK]