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SYMPOSIUM ON TRANSDISCIPLINARY APPROACHES TO MIGRANT SOLIDARITY IN THEORY, LAW, AND PRAXIS

SOLIDARITY AS LEGAL MOBILIZATION

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Introduction

The criminalization of humanitarianism has become prevalent in the Global North.[1] Overbroad definitions of the crimes of migrant smuggling and the facilitation of irregular migration are commonplace in Europe and the United States,[2] despite their well-known perverse effects on the rights of organizers and civil society at large. The "crimmigration"[3] paradigm is so pervasive that there is little debate across the political spectrum on the legitimacy of a criminal law response to solidarity-based engagements with non-citizens,[4] especially those in an irregular situation. Countries of destination have normalized hostility vis-à-vis (irregular) migrants and their allies and firmly entrenched it in the legal regime. By contrast, this essay aims to illustrate how law can paradoxically also serve as a medium to articulate solidaristic action following an egalitarian conception and mobilization of legal norms. Challenging state-centric visions, such forms of action transform law into a space of coming together across power divisions, jointly organizing, and collectively countering injustice.

The first section expands on the features and function of law as a structure of control, used by states to criminalize solidarity. The second section demonstrates how certain activists involved in humanitarian search and rescue (SAR) have responded to this ongoing criminalization through a solidaristic mobilization of the law that challenges the state's claim to monopoly over legal interpretation. Drawing on the experience of Make the

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Authors are listed in alphabetical order to reflect the non-hierarchical solidaristic co-production of knowledge underpinning this essay, entailing a trans-disciplinary collaboration among scholars from different backgrounds and non-academics.

[1] This essay focuses on Europe and the United States, reflecting the location and expertise of the authors. Regarding Europe, see Violeta Moreno-Lax, *Solidarity Crimes, Legitimacy Limits: Punishing Civil Obedience as an Abuse of Power*, VerfBlog (Apr. 17, 2024); for the United States, see Lorne Matalon, *Extending "Zero Tolerance" to People Who Help Migrants Along the Border*, NPR (May 28, 2019).

[2] For a Canadian example, see R. v. Appulonappa, 2015 SCC 59, [2015] 3 S.C.R. 754.

[3] Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 Am. U. L. Rev. 367 (2006).

[4] *Cf.* Letter of 15 U.S. Senators Calling on Justice Department to Stop Criminalization of Humanitarian Aid Work at Southern Border (June 28, 2019); European Parliament Resolution of 5 July 2018 on Guidelines for Member States to Prevent Humanitarian Assistance from Being Criminalised (2018/2769(RSP)).

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Road New York (MRNY),[5] the third section provides a practical perspective on solidarity as legal mobilization, presenting law as a solidarity tool.

The Criminalization of Solidarity

Although the UN Protocol Against the Smuggling of Migrants by Land, Sea and Air defines "smuggling of migrants" as "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident,"[6] the profit requirement has either been omitted in domestic transpositions or interpreted so capaciously as to encompass activities such as the provision of legal assistance for a fee, the rendering of basic services on a salaried basis, and the receipt of donations by non-governmental organizations (NGOs).[7] Life-saving interventions, including sea rescue across the Mediterranean[8] or water dropping in the Arizona desert,[9] have also been affected. According to the laws in place, merely assisting a person to enter/stay without authorization through whatever means, whatever the purpose, is sufficient for criminalization.[10] There is no distinction between abusive or exploitative action and action undertaken for selfless reasons. Even mere "attempts," "instigation," or "participation" in the acts concerned may attract prosecution,[11] thereby conflating humanitarianism with migrant smuggling.

That blameless and harmless conduct is being targeted is illustrated by the declarations of Michael Bailey, U.S. Attorney for the District of Arizona, in the case against *No Más Muertes/No More Deaths* volunteer Scott Warren. At the time of Warren's acquittal, Bailey shared his "disappoint[ment] in the verdict," but warned that "it won't deter [the U.S. Department of Justice] from continuing to prosecute . . . all the harboring and smuggling cases," underscoring that "we won't distinguish between whether someone is harboring . . . for money or whether they're doing it out of . . . a misguided sense of social justice or belief in open borders."[12]

Criminal responsibility in these cases is construed by association through the link, however tenuous, with the act of irregular border-crossing, and without pondering whether solidarians' interventions align with core democratic values, international human rights, and constitutional commitments. Such considerations may warrant eventual acquittal but do not prevent investigation and prosecution in proceedings that may last years.[13] In this context, trial processes are in themselves punitive and have a chilling effect, stifling dissent and resistance to power structures considered unjust. Preventive measures like seizures (e.g., of rescue vessels) de facto impede operations and inhibit humanitarian action, in practice dismantling NGOs' activities.[14]

[5] Make the Road New York (MRNY).

[6] UN Protocol Against the Smuggling of Migrants by Land, Sea and Air, 2241 UNTS 507, Art. 3(a).

[7] Shaun Walker, *Hungary to Criminalise Migrant Helpers With "Stop Soros" Legislation*, GUARDIAN (May 29, 2018); Eur. Comm'n v. Hungary, ECLI:EU:C:2021:930 (2021).

[8] Amnesty International, *Greece: "Farcical" Trial of Rescue Volunteers Begins Next Week* (Jan. 5, 2023).

[9] Bobby Allyn, *Jury Acquits Aid Worker Accused of Helping Border Crossing Migrants in Arizona*, NPR (Nov. 21, 2019).

[10] *See, e.g.*, Council Directive 2002/90/EC, [2002] OJ L 328/17, Art. 1(1)(a).

[11] *Id.* Art 2. For a map of prosecutions in the European Union, see Lina Vosyliūtė & Carmine Conte, *Crackdown on NGOs and Volunteers Helping Refugees and Other Migrants*, ReSOMA, 23–30 (Final Synthetic Report, June 2019).

[12] Michel Marizco, *Arizona Border Aid Worker Scott Warren Found Not Guilty in Second Case*, KJZZ (Nov. 20, 2019).

[13] Recommendation by the Council of Europe Commissioner for Human Rights, Protecting the Defenders: Ending Repression of Human Rights Defenders Assisting Refugees, Asylum Seekers and Migrants in Europe (Feb. 2024).

[14] See, e.g., *Jugend Rettet* in Italy and *Team Humanity* in Greece, whose rescue ships have been impounded and their crews prosecuted, putting both organizations out of the game.

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"Crimes of solidarity"[15]—as they are known—are forward-looking constructs that aim to deter others from taking similar action by wielding the threat of prosecution and potential punishment. They do not redress past misdeeds. These crimes rather focus on preventing the (supposed) ultimate results of the action, cast as illegal. The liability paradigm thereby constituted expands upon the classic fault model, which typically lays individual responsibility for intended or negligent conduct causally linked to a harmful/wrongful outcome.[16] Here, neither the mental state of the perpetrator nor their motives, intention, or carelessness come into play.[17] Participation in innocuous, even morally praiseworthy, action, if it can be construed as part of a broader process that (is understood to) produce irregular migration, is enough. That rescue saves life and complies with the legal duty to render assistance under international law is irrelevant.[18] What counts is that it puts migrants in a position to access borders and national territory unauthorized. The parameters of connection with the final outcome (of irregular entry) are less relevant than the (perceived) connection itself, however remote. Insofar as acts of solidarity are (seen as) disruptive of the (desired) status quo marked by the (state's interpretation of the) law, they are criminalized. Yet this "all-out" criminalization—characterizable as an instance of "state disobedience,"[19] even an abuse of power[20]—has not gone unchallenged.

Solidaristic Mobilizations of Law

Such contestation can be seen, for example, in the Euro-Mediterranean region, where humanitarian SAR organizations have countered states' charges by insisting that their rescue efforts, far from unlawful, are required by existing legal frameworks.[21] As discussed below, turning the tables around, they have argued that it is in fact the states that are engaging in law-breaking by adopting illegitimate migration laws and unduly restricting SAR operations in violation of their constitutional and international obligations. These humanitarian efforts exemplify a *solidaristic* mobilization of law in two ways: first, they take law in an egalitarian direction by insisting that fundamental rights, including the right to life, cannot be denied on the basis of arbitrary and discriminatory factors, such as migration status, country of origin, and/or race. While international human rights lawyers have long engaged in such legal contestation, what is new in these humanitarian efforts is the egalitarian mobilization of law by civil society actors beyond the official legal sites to appeal to a broader public. Second, many of these organizations break with conventional humanitarianisms that establish hierarchical divides between the "providers" and "beneficiaries" of aid; adopting an egalitarian understanding of solidarity, they strive to act in concert with, and not in the name of, migrants.[22]

[15] Liz Fekete, *Europe: Crimes of Solidarity*, 50 Race & Class 83 (2009).

[16] Antony Duff, *Two Models of Criminal Fault*, 13 Crim. L. & Phil. 643 (2019).

[17] *Cf.* Matthew Dyson, *Fault Doctrines in Criminal Law*, *in* Matthew Dyson, Explaining Tort & Crime 37 (2022).

[18] International Convention for the Safety of Life at Sea, 1184 UNTS 278, Annex, Ch. 5, Reg. 33(1); International Convention on Maritime Search and Rescue, 1405 UNTS 119, Annex, para. 2.1. These instruments develop the universal rescue obligation in the UN Convention on the Law of the Sea, 1833 UNTS 3, Art. 98, deemed to codify customary norms.

[19] Lina Vosyliūtė, *Guilty Without Crime: The Policing of Solidarity with Refugees and Other Migrants*, *in* Democratic Protests & New Forms of Collective Action 125 (Liana Maria Daher ed., 2023).

[20] Moreno-Lax, *supra* note 1.

[21] *See* Violeta Moreno-Lax, Daniel Ghezelbash & Natalie Klein, *Between Life, Security and Rights: Framing the Interdiction of "Boat Migrants" in the Central Mediterranean and Australia*, 32 Leiden J. Int'l L. 715 (2019) (discussing the duty that binds ship masters of both warships and private vessels in international law and the legal framework under which NGO ships can perform sea rescue).

[22] Historically, humanitarian organizations, such as the International Red Cross, have characterized their work as an apolitical effort to ease human suffering in times of emergency. For critics, this conventional approach depoliticizes human suffering and establishes a hierarchy between providers and beneficiaries of assistance. *See*, e.g., Didier Fassin, Humanitarian Reason (2012).

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The case of *Sea-Watch 3* Captain Carola Rackete, who entered the Italian port of Lampedusa without authorization in June 2019 to disembark migrants rescued in international waters, offers an example of such solidaristic mobilizations of law. Upon arrival, Captain Rackete was detained on the charge of "resisting a warship" and put under investigation for facilitating illegal immigration.[23] In a series of posts on social media, Matteo Salvini, then Italy's interior minister, praised the arrest of "the lawbreaking captain," for what he claimed to be "a criminal act, an act of war."[24] Both Rackete and Sea-Watch resisted that characterization by insisting that the decision to defy the authorities was legally the right thing to do, since it "upheld the law of the sea and brought people to safety."[25] In a press release, Sea-Watch stated that they were ready "to take full responsibility for enforcing human rights, the law of the sea and the Italian constitution," and added: "We will not give up and defend solidarity against every inhumane and racist policy from both single politicians and EU institutions."[26]

Such acts of reinterpreting and reclaiming the law by SAR organizations in their resistance against the state deserve attention for exposing the lawlessness of migration policies that have turned borders into sites of violence and criminalized solidarity with migrants. States justify these policies by mobilizing a problematic understanding of lawfulness that reduces law to "a means of social control."[27] Following Robert Cover, we can describe this statist interpretation of law as "jurispathic"—i.e., justifying sovereign violence wielded in the name of border control by arrogating to states an exclusive and supreme authority to interpret the law.[28] Closing off law to alternative interpretations, states strive to impose one meaning, taken to be authoritative, at the expense of others, and do that with the backing of "superior brute force."[29]

As migrant solidarity activists stand up against states' efforts to delegitimize and criminalize their actions, they contest the states' claim to monopoly over the legitimate interpretation of law and refuse to concede to state authorities the prerogative to be the sole arbiters of legality/illegality. In so doing, they bring to view another dimension of law as a site of creative meaning-making, or "jurisgenesis," which, as Cover emphasizes, expands law into a political-normative universe that cannot be exhausted by state-centric adjudications of "right and wrong, of lawful and unlawful, of valid and void."[30] Such jurisgenerative practices are often animated by an "inability to bear the dissonance of the lawfulness of the intolerable."[31] In challenging governmental decrees that render "the intolerable" lawful, they transform law into a dynamic and heterogeneous site of interpretive contestation, in an attempt to place "a potential restraint on arbitrary power and violence."[32]

[23] *Salvini Dubs Sea-Watch Incident "Act of War,"* Deutsche Welle (June 29, 2019).

[24] *Id.*

[25] Sea-Watch International, @seawatch_intl, X (June 28, 2019, 8:10 p.m.).

[26] *Sea-Watch and Cpt. Rackete Enforce Human Rights Where EU Fails*, Sea-Watch (June 29, 2019). Rackete's prosecution came to an end in July 2019 when an Italian judge ruled that she was merely fulfilling her humanitarian obligation to save lives.

[27] Robert M. Cover, *Nomos and Narrative*, 97 Harv. L. Rev. 4, 46 (1983). For the "lawful lawlessness" of European states' migration control policies and practices, see Ayten Gündoğdu, *From the Colony to the Border: Lawful Lawlessness of Racial Violence*, *in* Lawless Zones, Rightless Subjects (Ayelet Shachar & Seyla Benhabib eds., 2024).

[28] Cover, *supra* note 27, at 43.

[29] *Id.* at 44.

[30] *Id.* at 4.

[31] *Id.* at 39.

[32] *Id.* at 68.

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Legal Mobilization in Practice

Such practices are important not only for challenging states, but also for generating solidaristic action that brings together humanitarian workers and migrants in egalitarian ways. The work of MRNY, the largest membership-led organization across New York State, offers a striking example in this regard. While MRNY is mainly focused on the organizing practices of community gatherings and action-based events, a crucial part of MRNY's work is tied to its survival services, particularly its legal department, which, among others, provides key immigration support.[33] Through its immigration practice, MRNY has spearheaded national litigation cases, such as *Batalla Vidal v. Nielsen*,[34] most recently known as *Wolf v. Vidal* in the U.S. Supreme Court hearings,[35] which showed that the termination of the Deferred Action for Childhood Arrivals (DACA) program[36] was based on arbitrary decisions by Homeland Security.

MRNY's challenge of the state via its litigation and defense practices embodies the idea of "movement lawyering" to contest intolerable-but-lawful practices of criminalization. Movement lawyering focuses on a holistic approach, using a social justice lens when interpreting the law.[37] The definition of "movement" is one of community and, in practice, a group of people that seeks to transform systems of oppression and move toward the collective good, using law as a vehicle of solidarity and a tool of collective organizing.

At the macro level, the pathway to a fair and just immigration reform has been almost non-existent. During the Biden administration, Homeland Security guidelines were issued to focus on high-risk subjects, with histories of felonies or extensive criminal backgrounds. Yet the U.S. Immigration and Customs Enforcement (ICE) still targeted a broad spectrum of individuals falling outside this category, deviating from their own internal guidelines.[38] MRNY operates in this context through legal mobilization, including the "rapid response legal collaborative" that seeks to address emergency detention cases.[39]

At the heart of this scheme is a deep egalitarian conviction that uses law as a solidarity-building tool to bridge power differentials between those offering and those receiving support, generating a self-awareness space of mutual recognition in the process. This solidarity-based conception of the law at the core of MRNY's interventions serves to connect members *inter se* and to transform them into actors. Through a solidarity-inspired reading and practicing of the law, MRNY's members are galvanized and re-made into organizers, advocates, and campaigners of their own rights. Solidarity as legal mobilization thereby allows for collective resistance and organized counteraction to challenge state categorizations that criminalize and punish (irregular) migrants and those standing in solidarity with them.

The culmination of this vision is the self-empowerment that several of MRNY's programs aspire to achieve through "Know Your Rights" resources[40] and the "deportation defense manual,"[41] which can lead to the full subjectivation of migrants. Migrants, in this configuration, are no longer passive recipients but become part of a solidarity movement where each is an equal player in the struggle toward the realization of their rights and the egalitarian vision of the law.

[33] MRNY, *Legal Services*.

[34] Batalla Vidal v. Nielsen, 291 F. Supp. 3d 260 (E.D.N.Y. 2018).

[35] Wolf v. Vidal, 591 U.S. (2020).

[36] U.S. Citizenship and Immigration Services (USCIS), Consideration of DACA.

[37] Movement Law Lab, *What Is Movement Lawyering?*

[38] Nicole Acevedo, *Sick Father in ICE Detention Faces Deportation Despite Biden's New Immigration Priorities*, MRNY (Feb. 25, 2021).

[39] MRNY, *Rapid Response Legal Collaborative*.

[40] MRNY, *Resources in English*.

[41] MRNY, *Deportation Defense Manual* (Aug. 2022).

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Conclusion

While state efforts to criminalize migrant solidarity have increasingly limited the legal space where activists can operate, these tactics have been challenged by reclaiming law and taking it in an egalitarian direction. As Carola Rackete's case demonstrates, SAR activists resist the ongoing criminalization by transforming the law into a site of contestation, thereby standing up against states' attempts at reducing the law to a mechanism of domination and control. In a different context but faced with an equally limiting legal environment, MRNY activists turn to the law not only to defend the rights of migrant populations but also to create solidarity networks where migrants become equal participants in the struggle for the realization of an emancipatory vision of law. Understood in these terms, solidarity as legal mobilization bears the potential of transforming not only interpretative approaches, but also practices and experiences of the law, realizing democracy's promise of justice, freedom, and equality.

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