

Michael Trebilcock's The Law and Economics of Immigration Policy sets out a broad prescriptive model for migration policy. It is informed by a classically liberal endorsement of free movement of labour, a commitment to efficiency, and a preference for market over state regulation. Trebilcock claims that his policy proposal will significantly liberalize immigration in prosperous liberal democratic states and be politically palatable. The key lies in pre-empting the objection that increased levels of immigration will impose or exacerbate the negative fiscal impact of immigrants on receiving states. Trebilcock would privatize selection by delegating it entirely to the market (employers) or the family (relatives), and institute a mandatory private insurance scheme payable by sponsors to insure against the risk that an immigrant will impose fiscal burdens on the state in the period leading up to eligibility for citizenship. While applauding the objective animating this proposal, the author relies partly on Ninette Kelley and Michael Trebilcock's historical account in The Making of the Mosaic: A History of Canadian Immigration Policy to challenge its viability. First, the author suggests that Trebilcock's claim that his model is politically pragmatic is predicated on a contestable understanding of the nature of political opposition to immigration. Second, it is not obvious that Trebilcock's model, on its own terms, would actually liberalize immigration across the range of states where he would seek to implement it. The author concludes by reflecting on the capacity of broadly conceived, transnational policy prescriptions to grapple with the complexity of migration as a global phenomenon, the specificity of national contexts, and the limits on state actors' ability to socially engineer the character of present and future generations through immigrant selection. Where the vast majority of immigrants are admitted on the basis of ascriptive kinship criteria, family matters – and will continue to matter – in the future direction of immigration.

Keywords: Migration/fiscal impact/political economy/privatization

1 Introduction: Michael on the border

A few years ago, I was chatting with Michael Trebilcock about his upcoming keynote address as president of the American Law and Economics

* Professor, Faculty of Law, University of Toronto.

† Thanks to Colleen Flood, Karen Knop, Richard Moon, and two anonymous reviewers for comments and suggestions, and to Rayner Thwaites for superb research assistance at the eleventh hour. I am grateful for the generous financial support of the Social Science and Humanities Research Council of Canada. My greatest debt of gratitude is owed to Michael Trebilcock, as teacher, scholar, mentor, colleague, and friend.

Association. His topic was immigration, and his working title (playing on the classic liberal defence of free movement) was something like 'Why We Should Treat People More Like Goods.' I'm pretty sure he giggled when he told me. He eventually opted for the more anodyne title 'The Law and Economics of Immigration Policy.' I happen to prefer the first title, mostly because it better captures the mischievous way in which Michael simultaneously provokes sceptics of law and economics with his methodology and provokes conservative law and economics proponents with his outcomes, in this case a more liberal immigration policy.

I consider that kind of provocation entirely salutary, and I think it springs from the same source as the remarkable intellectual generosity that Michael has displayed for as long as I have known him. His willingness to engage with other methodologies, other perspectives, and other disciplines is among the qualities that I most admire, speaking as a direct beneficiary. To skip from the personal to the professional, it does not surprise me that one so open to scholarly ventures across disciplinary borders would also incline toward the free movement of labour – and not just goods – across geopolitical borders.

Michael's important contribution to immigration scholarship spans the positive and the prescriptive. *The Making of the Mosaic*, which Michael co-authored with Ninette Kelley, is a lucid and indispensable narrative of the political economy of Canadian immigration policy from Confederation to the present.² Its thorough, detailed, rigorous, and sophisticated historical account makes a singular and unparalleled contribution to Canadian migration scholarship. Its quality was unmatched when it was published, and it has not been surpassed.

Michael's normative intervention is elaborated most fully in the aforementioned 'Law and Economics of Immigration Policy' and in 'The Political Economy of Emigration and Immigration.'³ His historical analysis and his normative project speak in different registers. That Michael operates equally comfortably within different methodological frameworks is evidence of his admirable versatility and depth. Certainly, no one could explain better to Michael the normative law and economics scholar than Michael the political economist the reasons why policy makers might resist his proposals for reforming immigration policy.

1 Michael Trebilcock, 'The Law and Economics of Immigration Policy' (2003) 5 Am.L. & Econ.Rev. 271 [Trebilcock, 'Law and Economics of Immigration'].

2 Ninette Kelley & Michael Trebilcock, *The Making of the Mosaic: The History of Canadian Immigration Policy* (Toronto: University of Toronto Press, 1998) [Kelley & Trebilcock, *Making of the Mosaic*].

3 Michael Trebilcock & Matthew Sudak, 'The Political Economy of Emigration and Immigration' (2006) 34 N.Y.U.L.Rev. 234.

My own scholarship in the field probably bears a greater superficial affinity to Michael's historical analysis than to the law and economics framework that informs his normative project. This observation, however, understates the influence that his work has had on me – though not in immediately apparent ways, and perhaps not necessarily in ways that Michael would endorse. I certainly have profited from Michael's supple and compelling scholarship as an intellectual whetstone for sharpening my thoughts. And that is what I hope this brief comment will illustrate. Using Michael both as foil and as inspiration, I inquire into the specific proposal contained in 'The Law and Economics of Immigration Policy.' My external critique questions whether Michael's univalent economic prescription for immigration policy – focused exclusively on fiscal impact – is adequate to the task of disarming the political opposition to freer migration. My internal critique examines whether Michael's proposal is likely to succeed on its own terms. In pursuing these lines of enquiry, I notionally pit Michael the normative law and economics scholar against his most worthy opponent – Michael the political economist.

Like Michael, I support migration regimes more liberal than those that currently prevail among the wealthy industrialized states. This is unremarkable. Across a range of disciplines and orientations, the overwhelming drift of serious academic literature supports, with varying degrees of qualification, borders that are more porous than at present.⁴ And while the bald claim that states have an unfettered right to control entry and exit of non-citizens enjoys overwhelming popular support, this view does not dominate in the scholarly domain.

Liberal theories that promote open (or more open) immigration as a matter of justice fall roughly into one of two categories. The first casts freedom of movement as an individual liberty right that flows from the

4 Prominent liberal proponents of open borders include Joseph Carens, 'Aliens and Citizens: The Case for Open Borders' (1987) 49 *Rev. Politics* 251; Philip Cole, *Philosophies of Exclusion: Liberal Political Theory and Immigration* (Edinburgh: Edinburgh University Press, 2000); and Ann Dummet, 'The Transnational Migration of People Seen from within a Natural Law Tradition' in Brian Barry & Robert Goodin, eds., *Free Movement: Ethical Issues in the Transnational Migration of People and Money* (University Park: Pennsylvania State Press, 1992) 169. Defenders of presumptively closed borders include Michael Walzer, *Spheres of Justice* (Boston: Basic Books, 1983); David Miller, 'Immigration: The Case for Limits' in Andrew Cohen & Christopher Wellman, eds., *Contemporary Debates in Applied Ethics* (Oxford: Blackwell, 2005) 193; and Donald Galloway, 'Liberalism, Globalism and Immigration' (1993) 18 *Queen's L.J.* 266. Catherine Dauvergne, 'Amorality and Humanitarians in Immigration Law' (1999) 37 *Osgoode Hall L.J.* 597, argues that liberalism is incapable of providing a coherent response to the question of borders. As Dauvergne notes, theorists at almost all points on the spectrum acknowledge some form of duty to admit refugees.

recognition of each person's inherent moral equality. The other evaluates the virtues of migration in terms of the outcomes it will produce. This usually (but not necessarily) takes the form of a utilitarian calculus that asks whether aggregate welfare will be maximized under a regime of free, or freer, migration. Typically, but again not necessarily, utility is measured in economic terms. A cosmopolitan calculus weighs the welfare of each individual (citizen and prospective migrant) equally. A state-centric calculus takes as given the existing organization of the globe into states for which sovereignty subsists in the entitlement of existing members to decide whether to admit non-members. This may be articulated as a hardheaded concession to reality or defended in the name of protecting the institutions of the welfare state or the democratic *polis*.⁵ Whether conceded or defended, the implication of a domestic calculus is that the welfare that must be demonstrably improved by liberalized immigration is that of existing members. Insiders and outsiders do not negotiate entry; insiders make the rules, render judgment, and enforce the outcome.

The argument from freedom of movement corresponds roughly to a deontological, rights-based theory, while the other contenders might be described as consequentialist. The theoretical merits of deontological versus consequentialist theories of justice lie beyond the scope of this essay, as does the conceptual stability of the dichotomy itself.⁶ Rights-based theorists (such as Joe Carens) who favour a right to migrate do accept the legitimacy of limits when the risks or consequences for the host state are too dire (however that threshold is defined and measured). The obverse is that utilitarian theories usually limit what can weigh in the welfare calculus by eliminating, for example, illiberal preferences (such as racism) that strike at basic individual rights. In other words, it is common for adherents of one approach to incorporate side constraints borrowed from the other. This may explain why almost all theories of immigration converge on the principle that states ought to accept some unspecified number of imprecisely defined refugees.

The implicit or explicit recognition of the limits to consequentialist approaches may also partly explain why utilitarian models tend to focus on economic factors. The relevance of economic impact to any theory of justice in immigration is uncontroversial, even though there is considerable disagreement about how relevant it ought to be and whether it ought to be determinative in each case or only in the aggregate.

5 For an example of the latter see Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004).

6 For example, Wayne Sumner, *The Moral Foundation of Rights* (Oxford: Oxford University Press, 1987), argues for a consequentialist understanding of rights.

Economic impact also presents as more amenable to objective measurement, although, it turns out what ought to be measured, the inferences one draws from the data, and the policy implications thereof are all contested.⁷

Michael's law and economics approach to immigration policy plays in the consequentialist league, utilitarian division: free movement of labour would improve global economic welfare, full stop. Freer movement – though more restricted than under a cosmopolitan calculus – would enhance welfare at the national level.

A cosmopolitan utilitarian calculus that weighs each person's welfare also devalues sovereignty. But many utilitarians (Michael included) go on to concede the sovereigntist predicate and argue that the state's self-interest will in fact be better served by choosing to admit (many) more migrants, given a contingent set of postulates about the benefits that will ensue.⁸ Michael's distinctive intervention in this debate takes the form of a response to the objection that lowering barriers to entry will result in catastrophic levels of fiscally induced migration.

Michael and I proceed from different theoretical points of departure. Normative arguments within the liberal tradition in favour of more open borders have been circulating widely in the academic literature for some time, with increasing degrees of variegation and sophistication. My work often operates alongside these approaches by investigating and theorizing the impediments and conditions precedent to making those normative arguments resonate. Like Michael, I engage with conventional political economy determinants of migration and migration policy, but also with a range of socio-legal considerations, including culture and discourse. Rather than derive a normative case for freer migration from a set of abstract postulates, I use liberal states' ostensible commitment to the rule of law and to a set of legally and politically articulated conceptions of justice as mirrors for critical reflection on contradictory currents within existing practices. I exploit the various gaps between liberal commitments and state practice across the institutional range (legislature,

7 Recent literature in sociology and political science has attempted to devise a credible metric for quantifying and measuring the squishier idea of 'social cohesion' as an additional or alternative criterion for evaluating migration policies. See, e.g., the work of the International Migration, Integration and Social Cohesion network, online: IMISCOE <<http://www.imiscoe.org/>>; and Focus Consultancy Ltd., *Study on Immigration, Integration and Social Cohesion* (Brussels: European Commission Employment and Social Affairs, 2005), online: European Commission <http://ec.europa.eu/employment_social/spsi/docs/social_situation/vc04_171_immigration_report.pdf>.

8 Michael's proposal delegates more direct authority over selection from state to market in relation to labour migration. This devolution of authority is more operational than political, since, almost by definition, the selection of economic migrants has always been about serving the needs of the labour market.

bureaucracy, judiciary) in the service of enabling incremental policy shifts. These, in turn create openings in social, cultural, political, and legal space to imagine further advance in policy.⁹

I do share with Michael an inclination toward a consequentialist view of justice in migration, as against a free-standing liberty-based human right to migrate. I admit to this somewhat reluctantly, since the alternative of an independent mobility right holds considerable appeal as an aspirational ideal. My doubt that transnational migration can convincingly be extracted from the matrix of forces and phenomena that produce it and then re-packaged as a free-standing right. Below I sketch out some preliminary thoughts in support of this claim.

Some people migrate because they love to move, in search of adventure, in pursuit of education or experience unavailable at home, or to make a good life into a better life. But the ones who preoccupy me from the perspective of justice are not those people. Nor am I comfortable confining the ambit of concern to those who are fleeing persecution, in the narrow sense demarcated by the definition of a refugee in the UN Convention Relating to the Status of Refugees.¹⁰ The people who preoccupy me are those described by the narrator in Yann Martel's *Life of Pi*:

Why do people move? What makes them uproot and leave everything they've known for a great unknown beyond the horizon? Why climb this Mount Everest of formalities that makes you feel like a beggar? Why enter this jungle of foreignness where everything is new, strange and difficult?

The answer is the same the world over: people move in the hope of a better life. People move because of the wear and tear of anxiety. Because of the gnawing feeling that no matter how hard they work their efforts will yield nothing, that

9 See Audrey Macklin, 'Who Is the Citizen's Other? Considering the Heft of Citizenship' (2007) 8 *Theor.Inq.L.* 333 [Macklin, 'Heft of Citizenship']; Audrey Macklin, 'Public Entrance, Private Member: Privatisation, Immigration Law and Women' in Brenda Cossman & Judy Fudge, eds., *Privatisation, Feminism and Law* (Toronto: University of Toronto Press, 2002) 218 [Macklin, 'Public Entrance']; Audrey Macklin, 'Refugee Roulette in the Canadian Casino' in Jaya Ramji-Nogales, Andrew I. Schoenholtz, & Philip G. Schrag, eds., *Refugee Roulette* (New York: New York University Press, 2009) 135.

10 *Convention Relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S. 137, Can. T.S. 1969 No. 6, art. 1:

A person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

As an example of the incorporation of the convention's definition of refugee into domestic law see *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 96.

what they build up in one year will be torn down in one day by others. Because of the impression that the future is blocked up, that they might do all right but not their children. Because of the feeling that nothing will change, that happiness and prosperity are possible only somewhere else.¹¹

I realize that a statement by a fictional character is not evidence, but I think there is a truth to it that the data support. Most of the would-be immigrants shut out by the immigration regimes of countries like Canada, the United States, Australia, New Zealand, and Europe want to go elsewhere to make a decent life for themselves and their existing or future children, and to provide the same for family left behind (through remittances or sponsorship). Some flee oppression or privation so extreme that they come within the legal – or, at least, the popular – definition of ‘refugee,’ but most do not. Mainly they are pushed by the absence of conditions at home that make a decent life attainable, and pulled by the hope of conditions elsewhere that will at least allow their children to flourish. They believe they must emigrate in the hope that their children will not feel that they, too, must emigrate some day for the sake of their own children. And, importantly, they are already embedded in a field of socially mediated norms that makes migration imaginable. One cannot underestimate economic motivation, but nor should one overestimate the explanatory force of models whose commitment to methodological individualism occludes the operation of complex social phenomena.¹² Sophisticated scholarly accounts of structure and agency, transnational networks and globalization, and familial and national strategies all assist in explaining the feasibility, trajectory, modality, and character of interstate migration. These factors help answer the *how*, the *whether*, the *when*, the *who*, and the *where* of migration. Ultimately, they elaborate (without completing) the answer to the question, *Why*?¹³

One might reasonably object that my assertion about the motivation for migration unduly romanticizes place, rootedness, family, and familiarity. After all, polls indicate that many people desire to emigrate, and many immigrants express satisfaction with their decision to migrate.¹⁴

11 Yann Martell, *Life of Pi* (Toronto: Vintage Books, 2004) at 86.

12 For a recent discussion of the advantages and shortcomings of economic methodologies see Christina Boswell, ‘Combining Economics and Sociology in Migration Theory’ (2008) 34 *Journal of Ethnic and Migration Studies* 549.

13 See United Nations Development Program, *Human Development Report 2009, Overcoming Barriers: Human Mobility and Development* (New York: UNDP, 2009), c. 2–3, online: UNDP <<http://hdr.undp.org/en/reports/global/hdr2009/>>.

14 ‘Reflecting [the] desire, rather than the reality of the numbers that actually migrate, Gallup finds about 16% of the world’s adults would like to move to another country permanently if they had the chance’: Neli Esipova & Julie Ray, ‘700 Million Worldwide Desire to Migrate Permanently’ (Gallup, 2 November 2009), online: Gallup <<http://www.gallup.com/poll/124028/700-million-worldwide-desire-migrate-permanently.aspx>>.

But pollsters rarely ask, 'If you were able to earn a living, enjoy basic freedoms, and raise your children with a sense of security in the future, would you still desire to emigrate?'

The European Union provides a useful laboratory for speculating on the answer. Citizens of the original fifteen member states (EU15) enjoy more or less full *de jure* mobility for residence and employment throughout the EU. The walls are down; the doors are open.¹⁵ The outcome? Fewer than 1 per cent of EU15 citizens of working age live and work in another European country.¹⁶ My hypothesis is that citizens of these states surmise that the opportunities available through migration will not apparently or significantly improve their well-being. I have elsewhere expressed this in terms of the *heft of citizenship*.¹⁷ As is true of solutions across a semi-permeable membrane, one expects little diffusion where the quantum and distribution of legal and social entitlements of citizenship are at rough parity on either side of the border.¹⁸ Even in the face of more or less unimpeded mobility, the Dutch or French citizen finds little reason to move within the EU: What can life in another EU state offer – in terms of rights, opportunities, or participation in social and cultural life – that makes migration worthwhile? In contrast, the Senegalese or Moroccan citizen faces nothing but obstacles to mobility into an EU state; yet the diminished heft of their citizenship in relation to what they believe they can attain in the EU (even where lawful status, much less formal citizenship, is a legal mirage for most) motivates them to migrate in the face of extraordinary risk and peril.¹⁹

15 Administrative and institutional barriers to free movement remain at the level of portability of pensions, recognition of credentials, and access to social services. Linguistic barriers also make individual mobility more costly.

16 Ibrahim Awad, 'Labour Mobility within the EU: Member States' Nationals versus Third Country Nationals' (Paper presented at the Conference on Economic Integration 2008, 17 November 2008), online: Österreichischen Nationalbank <http://www.oenb.at/en/img/awad_labour_mobility_in_the_eu_vienna_presentation-17_nov_08_rev_3_tcm16-94301.pdf>. According to a 2006 European Central Bank report,

In 2000, only 0.1% of the total EU-15 population (or 225,000 people) changed official residence between two member countries. Furthermore, at 0.4% of the EU-15 population, only a small proportion of individuals are known to commute across borders to work and half of this amount is to a non EU-15 country. In contrast, in the United States, geographical labour mobility is considered to be far higher. Evidence suggests that around 5.9% of the total US population changed residence between US counties in 1999.

Frigys Ferdinand Heinz & Melanie Ward-Warmedinger, *Cross-Border Mobility within an Enlarged EU* (Frankfurt: European Central Bank, 2006) at 7, online: Social Science Research Network (SSRN) <http://ssrn.com/abstract_id=923371>.

17 Macklin, 'Heft of Citizenship,' supra note 9.

18 Ibid. at 359–61.

19 Meanwhile, the story of the recent EU accession countries is still being written. Original EU15 states that granted full mobility and employment rights to citizens of the

As these remarks indicate, I adopt a similar normative posture toward immigration as Michael, namely one that makes the case for open borders contingent on impact, on consequences, on effects. We may embrace different versions of the relevant impacts, consequences, and effects, but on this occasion I would like to recognize the commonality rather than focusing on the divergence.²⁰

To Michael's credit, his scholarship advances not only the objective of freer migration but also the goal of reducing the exigency of migration. While his work on immigration merits appreciation in its own right, it should also be valued in tandem with his scholarship on law and development.²¹ All too often, the indisputable claim that migration should not be seen as a substitute for or a solution to lack of development in the global South is converted into a justification for restrictive migration policies in the global North. That Michael's work recognizes the priority of

accession countries certainly witnessed a major inflow of workers (captured by the British stereotype of the 'Polish plumber') during the economic boom of the last decade. However, anecdotal evidence suggests that the recent economic downturn appears to have precipitated significant return migration. See, e.g., Migration Information Source, 'Top 10 Issues of 2009 Issue #1: The Recession's Impact on Immigrants' (December 2009), online: Migration Policy Institute <<http://www.migrationinformation.org/Feature/display.cfm?id=757>>. It may be that the geographic proximity of EU states to one another, as well as the guaranteed possibility of future re-migration, will ultimately render voluntary circulatory migration a stable feature of intra-EU migration. In contrast, one of the unanticipated consequences of the militarization of the US-Mexico border is that non-status migrants already in the United States have become more sedentary because they cannot reliably expect to re-enter the United States if they leave. See generally Demetrios Papademetriou & Aaron Terrazas, *Immigrants and the Current Economic Crisis: Research Evidence, Policy Challenges, and Implications* (Washington, DC: Migration Policy Institute, 2009), online: MPI <http://www.migrationpolicy.org/pubs/lmi_recessionJan09.pdf>.

20 Without an understanding of the function of nationalism, sovereignty, and the self-other distinctions that reside at the core of resistance to open borders, the economic model remains a crucial but necessarily incomplete account of migration impact, discourse, policy, and law.

21 On a practical level, there is little evidence that discrete development policies correlate with reduced migration. For example, Chantal Thomas, 'Migration and Social Regionalism: Migration as an Unintended Consequence of Globalization in Mexico, 1980-2000' (Cornell Legal Studies Research Paper No. 09-013, 18 June 2009), online: SSRN <<http://ssrn.com/abstract=1422041>>, describes how trade liberalization between the US and Mexico appeared to have the opposite effect on migration. I am less persuaded than Michael is that remittances adequately compensate for the 'brain drain' of skilled emigration from less developed countries, but I take it that Michael would not overstate the role of remittances as a tool of development in any case.

development while retaining a commitment to more open borders provides an important corrective to that tendency.

I turn now to Michael's specific proposal for reforming the immigration policy of Western industrial states. I admit my skepticism about the existence of neat answers to the theoretical question (What is the correct theory?) or the prescriptive problem (What is the correct policy?) when it comes to phenomena of the scale and complexity of migration. Any attempt to devise a national immigration policy must confront at least two limitations. First, many of the forces shaping migration exceed national purview and sovereign control; and, second, any immigration policy sufficiently generic to apply across several states elicits the objection of insufficient sensitivity to the domestic political, economic, social, and cultural context that would be required to make it feasible in any particular state.

It is to Michael's credit that these challenges do not daunt him. My critique presses these objections, but does not detract from my respect for his intellectual fortitude and tenacity in tackling the problem. My first step is to situate Michael's policy prescription in relation to his historical analysis. Michael's proposal is driven by a law and economics preference for market-driven solutions, while the specific design features of the program appear motivated by the pragmatism characteristic of political economy. However, I suggest that the political economy account at work in 'The Law and Economics of Immigration Policy' is rather thinner than that presented in *The Making of the Mosaic*, and not fully able to sustain its claim of feasibility.

I then turn to the mechanics of Michael's proposal and ask whether, assuming adoption and implementation, his proposal can deliver what it promises: more open migration, with no derogation from the settler-state premise that immigration should set people on a path to citizenship.²² Here I scale back my assessment to ask whether Michael's policy produces a preferable set of problems than the *status quo* and its various alternatives. We rarely solve problems, but if we are wise and fortunate, we might at least trade up for a better set of problems. This might sound like an evaluative standard with a serious self-esteem issue, but I consider it appropriately modest to the task, and consistent with the virtue of intellectual generosity that Michael embodies so well.

22 The idea that one can achieve and sustain higher migration by successfully restricting migrants' access to permanent status in the host country lies at the heart of large-scale temporary migrant worker regimes. See, e.g., Martin Ruhs, 'The Potential of Temporary Migration Programmes in Future International Migration Policy' (2006) 146 *Int'l Labor Rev.* 1. Michael's proposal does not embrace this agenda.

II *Michael vs. Michael (Part 1): Who's afraid of fiscally induced migration?*

The Making of the Mosaic is a diachronic account of Canadian immigration law and policy. 'The Law and Economics of Immigration Policy' and 'The Political Economy of Emigration' are synchronic analyses; they take a snapshot of the present and use the picture as the informational base from which to formulate policy prescriptions. Michael's prescriptions are not confined to any single country – though the United States and Canada figure prominently as sources of data, policy instruments, and critique – and I take it they are meant to apply broadly to the prosperous liberal states and regions of Canada, the United States, the EU 15, Australia and New Zealand.

Reading *The Making of the Mosaic* confirms the endurance of certain popular preoccupations about the negative economic and social impact of migration. These can be summed up as follows:

- (1) Migrants will displace native-born workers and depress wages.
- (2) Migrants will impose fiscal burdens on the state.
- (3) Migrants will not integrate, and will thereby pose a threat to the values, traditions, security, and culture of the receiving state.

When we hear these fears expressed today, we often look to the distinctive characteristics of today's immigrant population to prove the legitimacy of the fears. To pick a contemporary example, one encounters with some frequency the claims that Muslim immigrants do not, cannot, or will not integrate because of their religious beliefs and practices. Islam allegedly condones personal violence (especially against women), as well as political violence directed at the destruction of secular, liberal Western states. Muslims are reproducing at a rate that will alter the demographic map of these states, and so they pose a cultural, demographic, and political threat to the survival of secularized Western liberal democracies. However qualified by the admission that 'not all' Muslims fit these descriptors, such arguments nonetheless encourage one to draw the conclusion that Muslim immigration poses a serious political, cultural, and physical menace and should be restricted.²³

23 For two recent examples from the popular press see Mark Steyn, 'The Future Belongs to Islam' *Maclean's* (20 October 2006), online: Maclean's <http://www.macleans.ca/article.jsp?content=20061023_134898_134898>; Margaret Wente, 'Montreal Massacre Death Cult' *The Globe and Mail* (8 December 2009) A21, online: The Globe and Mail <<http://www.theglobeandmail.com/news/opinions/montreal-massacre-death-cult/article1392013/>>. For an instance of scholarly slippage into nativist discourse see John Finnis, 'Endorsing Discrimination between Faiths: A Case of Extreme Speech?' in Ivan Hare & James Weinstein, eds., *Extreme Speech and Democracy* (Oxford: Oxford University Press, 2009) 430; John Finnis, 'Nationality, Alienage and Constitutional Principle' (2007) 123 *Law Q.Rev.* 417 at 445.

But one lesson I take from a diachronic reading of Canadian immigration policy, as Kelley and Trebilcock narrate it, is that we are mistaken to believe that these allegations are generated by dominant and specific features of any particular group of foreigners at any given historical moment. *The Making of the Mosaic* refutes the nativist position in two ways. First, by recounting the almost liturgical incantation of negative themes, motifs, personages, plot lines, and tropes about migrants, Kelley and Trebilcock urge us to consider that maybe the critique of today's immigrant does not derive from who today's immigrant happens to be; perhaps we are simply witness to the latest staging of a long-running drama in which the cast changes but the roles do not. At some point in the history of Canadian immigration policy, Catholics were unpatriotic because of their allegiance to the Pope, Irish were a separate and inferior race, Japanese were unassimilable, South Asians were seditious, Jews were cunning and cosmopolitan, Chinese were immoral and debauched, Italians were lazy and criminal, East Europeans were backward peasants, and Blacks were primitive.²⁴ The astute reader, confronted with this toxic legacy of racist caricatures, will surely acknowledge the possibility that the stereotypes applied to contemporary immigrant groups (such as Muslims) are no more legitimate or defensible than yesteryear's demonization of some other group. Only the most unreflective reader could conclude that whereas past victims of exclusionary invective were wrongly attacked, today's targets are accurately described and deservedly vilified.

Second, *The Making of the Mosaic* implicitly invites the reader to look around at the present and conclude that the nativists of the past were simply wrong in their prediction of the impact of diversity: Canada's pluralist society flourishes economically, politically, and culturally. In sum, *The Making of the Mosaic* provides an antidote to the standard anti-immigration claims, even as it confirms their resilience.

In 'The Law and Economics of Immigration Policy,' Michael defends the cosmopolitan claim that global welfare (measured in economic terms) would be maximized by free movement. For what I presume to be pragmatic reasons, he shrinks his frame to the national landscape, and argues that the welfare of insiders will also be improved by freer movement, if that movement is managed appropriately.²⁵ His proposal is

24 Kelley & Trebilcock, *Making of the Mosaic*, supra note 2 at 94–6 (regarding attitudes toward Chinese), 131–5 (East Europeans), 143 (Japanese), 144 (South Asians), 154 (Blacks), 220 and 259 (Jews).

25 Michael does not defer normative claims about the legitimate scope and objectives of national immigration policies. Compare Adam Cox & Eric Posner, 'The Second Order Structure of Immigration Law' (2007) 59 Stan.L.Rev. 809, who focus exclusively on the efficacy of policy instruments by which a state's immigration goals may be realized while abjuring any normative position about those objectives. They do acknowledge the existence of positive legal constraints internal to the state's legal order.

centrally motivated by the idea that there is a compelling case for devolving and decentralizing power over immigration decision making to private parties to a much greater extent than currently prevails ... This reorientation would allow the international movement of people to be much freer and would promote a more efficient mix of international movements in goods, services capital and labour.²⁶

Michael's idea is that more privatization of migrant selection would promote greater efficiency and freer movement. Dispense with government-imposed quotas and selection criteria; instead, let employers recruit foreign labour, family members unite with relatives, private citizens nominate refugees. Rich people can self-select.²⁷ Confine the state to health, criminality, and security screening and to operating an asylum system.

Michael acknowledges the persistence of the three classic objections to freer migration that recur in the historical account provided by *The Making of the Mosaic*. He addresses each in a different way. He dispatches with celerity the concern that migrants displace native workers and drive down wages by accepting lower pay and inferior working conditions. First, he points to evidence that immigration has 'little impact on labor market outcomes',²⁸. Second, true to his overarching law and economics framework, he asserts that the prerequisites imposed on employers to demonstrate adequate efforts to attract domestic labour at prevailing wages before recruiting immigrant labour 'are protectionist and inefficient because they impose additional costs on hiring foreigners (making domestic workers arbitrarily more attractive) ... Under a decentralized approach, the labor market would regulate the inflow of persons congruently with demand. Employers would sponsor immigrant workers as frequently as is deemed to be cost justified.'²⁹

Michael tackles the integration objection less peremptorily, but with equal vigour. Michael Walzer is the most credible proponent of the view that states are entitled to exclude non-members in the name of preserving a 'community of character' that gives shape, meaning, and value to the lives of members.³⁰ Michael responds by suggesting that external norms of international law might constrain liberal states in relying on

26 Trebilcock, 'Law and Economics of Immigration,' supra note 1 at 298.

27 Ibid. at 298–302.

28 Ibid. at 280. It might be more accurate to indicate that there exists evidence of some wage depression and displacement among the most marginal of US workers in some areas.

29 Ibid. at 299.

30 Walzer, *Spheres of Justice*, supra note 4 at 61, quoted in Trebilcock, 'Law and Economics of Immigration,' supra note 1 at 292–3.

invidiously discriminatory bases of exclusion.³¹ Unfortunately, international law says little and does less to limit states' sovereign power to deny admission to non-citizens. The 1951 UN Convention Relating to the Status of Refugees is the singular exception that proves the rule.³² It prohibits states from 'refouling' (deporting) persons who meet the refugee definition back to a country where they have a well-founded fear of persecution. Refugee-receiving states in the global North, such as Canada, the United States, the EU countries, and Australia, expend extraordinary effort on evading their international obligation by adopting measures to deter the arrival of asylum seekers.³³ International legal norms protecting the principle of family unity and the rights of the child are weak on claims for admission, though they have exerted some force in preventing deportation.³⁴ No other international instrument constrains states in their initial admission decisions.³⁵

Leaving aside the role of international law, Michael's more compelling claim is that to the extent that liberal states can plausibly be described and defended as 'communities of character,' their character is constituted thinly by an adherence to common liberal principles – including non-discrimination – and not by a thick rendition of ethnic or racial identity.³⁶ Michael's broader aim – with which I sympathize – is to delegitimize the assimilation objection as a basis for limiting immigration into liberal states. At the same time, Michael also values integration into liberal values enough to exclude public education (the primary vehicle for public inculcation of values) from the costs that migrants should have to internalize. Only the fiscal concern is left standing: it warns that private selection would facilitate the arrival of large numbers of people who, given the opportunity, would suck the welfare state dry. Michael regards the fear of fiscally induced migration, unlike the other objections, as unyielding to argument, and so he proposes a mandatory private

31 Trebilcock, *ibid.* at 293.

32 *Supra* note 10.

33 See Audrey Macklin, 'Disappearing Refugees: The Value(s) of the Canada-US Safe Third Country Agreement' (2005) 36 *Colum.Human Rights L.Rev.*; Audrey Macklin, 'Asylum and the Rule of Law in Canada: Hearing the Other (Side)' in Susan Kneebone ed., *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives* (Cambridge: Cambridge University Press, 2009) 78.

34 The provision in the Convention on the Rights of the Child that makes the best interests of the child a priority played a role in the Supreme Court of Canada's judgment in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

35 It is certainly the case that international human-rights instruments oblige states to respect fundamental human rights of citizens and non-citizens alike, once the latter are within the state's border and jurisdiction, but this is not relevant to the point Michael makes about discriminatory rules of entry.

36 Trebilcock, 'Law and Economics of Immigration,' *supra* note 1 at 290–4.

insurance scheme whereby the state will be reimbursed for income-support expenditures to newcomers. His proposal is designed to ensure that migrants or their sponsors internalize any fiscal costs arising during the period prior to citizenship eligibility (usually three to eight years, variable by state).

Why does Michael regard the fear of fiscally induced migration as valid? His own survey of the academic debate on this issue concludes that the fiscal impact of immigrants is likely neutral or slightly positive: 'even the most pessimistic of these estimates [of fiscal impact] ... is positive, which to some extent dispels the myth that immigrants impose a net economic burden on destination countries.'³⁷ If fears of fiscal burden are largely illusory, why construct an immigration policy around a non-existent or highly exaggerated risk?

Michael explicitly justifies his concession on two grounds. First, he suggests that at some threshold level of growth in migration – say, an order of magnitude greater than at present – 'negative congestion externalities and adverse labour market or fiscal effects'³⁸ might convert the net welfare benefit of migration into a net loss. Second, he argues that the decreasing employment and earnings performance of recent immigrants compared to earlier generations of immigrants and to citizens – despite overall higher levels of education – gives cause for concern about future fiscally induced immigration.³⁹

In my view, neither of these empirical claims support letting concerns about fiscally induced migration drive the design of immigration policy. Conjecture about the fiscal impact of a tenfold increase in immigration is a highly tenuous rationale for informing contemporary immigration policy unless Michael can sustain a prediction that his regime would free up migration by a full order of magnitude. The underemployment of current skilled immigrants might plausibly sustain a claim that these immigrants contribute less to the public fisc than they could, and relatively less than their predecessors, because their employment is more precarious meaning that they earn less income and pay less in taxes.⁴⁰ But the appropriate policy response is not to burden or deter them with further expenses but, rather (as Michael acknowledges), to 'mitigate inefficient labor market rigidities' that lead to brain waste,

37 Ibid. at 281.

38 Ibid.

39 Ibid. at 281–2.

40 See Garnett Picot & Arthur Sweetman, *The Deteriorating Economic Welfare of Immigrants and Possible Causes: Update 2005* (Ottawa: Statistics Canada, 2005), online: Statistics Canada <<http://www.statcan.gc.ca/pub/11f0019m/11f0019m2005262-eng.pdf>>; Garnett Picot, Feng Hou, & Simon Coulombe, *Chronic Low Income and Low Income Dynamics among Recent Immigrants* (Ottawa: Statistics Canada, 2007), online: Statistics Canada <<http://www.statcan.gc.ca/pub/11f0019m/11f0019m2007294-eng.pdf>>.

such as under- or non-recognition of foreign education, credentials, and experience.⁴¹ Despite a superficial plausibility, the observation about the declining economic performance of immigrants does not actually prove the 'need to take concerns about fiscally induced migration seriously.'⁴²

My intuition is that Michael does not actually believe that fiscally induced migration is a serious risk; rather, he accepts that a significant component of the electorate believes it is a problem and a reason to oppose increased levels of immigration. Michael the political economist recognizes that political actors will regard this public perception as an impediment to sensible immigration policy reform. His model is designed to make liberalized migration politically palatable by putting the fiscal fear to the test. If opening the borders attracts fiscally induced migration, then premiums will increase to the point where it is no longer cost-effective for employers to hire foreign workers, family sponsors will no longer be able to afford the insurance, and migration will decrease. If, as Michael expects, immigrants do not draw significantly on income assistance, then premiums will be cheap, immigration will increase, and the insurance scheme will be a more or less harmless gambit for buying political consent to freer migration.

As an exercise in prescriptive political economy, Michael's strategy is perhaps not as pragmatic as it first appears. First, it seems odd to self-consciously devise public policy whose success (as measured by increased immigration) is predicated on repudiation of the foundational proposition upon which it is based. Second, if the fear of fiscal abuse amounts to a recurrent but unsubstantiated objection, it is not obvious why it merits accommodation while other recurrent but unsubstantiated (or illegitimate) objections require and merit only reasoned refutation. A straightforward normative approach to immigration policy would reject untenable objections; a thoroughgoing political economy approach would take seriously the need to accommodate objections or compensate losers to the extent that failure to do so might make policy reform politically impossible. The history recounted in *The Making of the Mosaic* suggests that the fiscal, the economic, and the sociocultural complaints about immigration are braided together by a deep anxiety that proves stubbornly resistant to rebuttal by reasoned argument or by empirical evidence. The lessons of political economy give cause for doubt that the economic and sociocultural objections would succumb any more or less readily to rational argument than does the fiscal concern. Michael does not provide a principled reason for attending to the fiscal concern in particular, or a pragmatic reason to expect that accommodation of the

41 Trebilcock, 'Law and Economics of Immigration,' *supra* note 1 at 282.

42 *Ibid.*

fiscal concern alone will create sufficient political space for policy makers to act.

Indeed, I suspect that the immigration sceptic would react to Michael's proposal by simply reiterating the economic and sociocultural reasons to oppose immigration. The sceptic would also be apt to look at Michael's proposal, which limits the internalization of fiscal costs to the pre-citizenship phase, and grouse that it only delays but does not prevent fiscal abuse. The sceptic will predict that it simply provides a fiscal incentive to naturalize as soon as possible in order to gain eligibility for government benefits. This is precisely what some US commentators cite as the effect of a 1996 federal law that denied US lawful permanent residents (LPRS) access to most federal benefits,⁴³ even though the claim is not borne out by data on the use of public benefits by recently naturalized US citizens.⁴⁴

Another puzzling aspect of Michel's fiscal focus concerns scale. If one believes that aggregate global welfare would be maximized by open borders (as Michael does) but concedes a national calculus for pragmatic reasons (as Michael does), it is not clear why one would insist on a stringent policy that requires each migrant to impose zero fiscal costs during a stipulated period. Instead, why not opt for a less harsh compromise that sets a goal of fiscal neutrality in the aggregate and across subcategories of migrants? This effectively describes the outcome that prevails at present in most advanced economies, and it seems more consistent with Michael's normative and methodological orientation.⁴⁵

III *Michael vs. Michael (Part 2): Will the model work?*

The basic elements of Michael's proposal consist of privatized selection combined with a mandatory private insurance scheme that covers the risk that the immigrant will draw on public assistance. He presents the proposal as follows:

- (1) Employers recruit foreign workers, and the workers enter as permanent residents. The employer is required to enrol in a mandatory private insurance scheme (the cost of which would presumably be

43 Irene Bloemraad, *Becoming a Citizen: Incorporating Immigrants and Refugees in the United States and Canada* (Berkeley: University of California Press, 2006) at 248 [Bloemraad, *Becoming a Citizen*].

44 Michael Fix, Jeffrey S. Passel, & Kenneth Sucher, *Trends in Naturalization, Immigrant Families and Workers* (Washington, DC: Urban Institute Immigration Studies Program, 2003) at 6, online: Urban Institute <http://www.urban.org/UploadedPDF/310847_trends_in_naturalization.pdf>.

45 Robert Rowthorn, 'The Fiscal Impact of Immigration on the Advanced Economies' (2008) 24 *Oxford Rev.Econ.Pol'y* 560.

passed on to the worker in the form of a wage penalty) to cover the risk of claims by the immigrant against social programs. The duration of the insurance obligation would correspond to the minimum eligibility period for citizenship.

- (2) Family member sponsors family member from abroad. The sponsor is required to enrol in the mandatory private insurance scheme under the same terms as #1.
- (3) Private individuals sponsor overseas refugees. The sponsor insures against the risk of the refugee's relying on welfare under the same terms as #1.
- (4) Employers recruit foreign workers, and the employer decides that the transaction costs involved in insuring them are higher than the costs of employing the workers illegally. However, employers could sponsor these workers for temporary worker visas, during which time the workers are ineligible for social programs. The employer need not enrol in the insurance scheme. After a specified period of continuous employment (e.g., three years), the worker automatically transitions to permanent resident status. It is unclear what happens to the insurance requirement for these permanent residents.

The difference between options 1 and 4 seems to turn on the designation of the worker as high or low skill. Michael contemplates option 1 for the former and option 4 for the latter, a distinction to which I will return.

As a preliminary matter, how far does Michael's proposal take us from what currently prevails in Canada and the United States? As long as we take as given (as Michael does) the premise that states are entitled to control borders, migration policy will remain ineluctably public. Even if selection is privatized, the operation of the entire system is warped by the real or anticipated threat of state coercion in the form of deportation. If immigrants perceive their status as precarious, and if they attach significant value to remaining in the country, the character of innumerable private interactions – in the market and elsewhere – will inevitably be distorted by their fear of jeopardizing their immigration status.

It is crucial to recognize that immigration law is only partly about deciding who gets in and who stays out; it is just as much about structuring the vulnerability of those who do enter by assigning them to varying categories of precariousness, ranging from illegality through permanent temporariness, transitional temporariness, and permanent residence to citizenship.⁴⁶ The state may delegate or privatize components of this

46 For further discussion in the Canadian context see Macklin, 'Public Entrance,' *supra* note 9. See also Thomas Spijkerboer, 'A Distributive Approach to Migration Law, Or, The Convergence of Communitarianism, Libertarianism and the Status Quo' in Roland Pierik & Wouter Werner, eds., *Global Justice* (Cambridge: Cambridge University Press [forthcoming in 2010]).

process, but the ultimate coercive authority remains with the state. When greater authority is devolved to the private sector, the state can expend less on inefficient, cumbersome bureaucratic selection processes⁴⁷ but will instead spend more (though never enough) on inflexible, ineffective, and frequently harsh mechanisms for policing those private actors who will inevitably game the system. And the story across all countries is invariably the same: immigration enforcement inevitably prioritizes removing the (disenfranchised) non-citizen worker over deterring or penalizing the rent-seeking recruiter or the citizen employer, even where the employer has exploited the precarious immigration status of the worker to underpay or otherwise violate relevant employment, occupational safety, or labour laws.⁴⁸

On the other side, immigration selection has always and already been significantly privatized in both countries. Indeed, family migration is entirely private, insofar as it depends on an individual's choice to sponsor a relative. The state's role consists of demarcating the boundaries of what constitutes a family, confirming the authenticity of that relationship. In Canada, it also, imposes an obligation on the sponsor to repay the state for welfare expenditures on the sponsored immigrant for three to ten years. As Michael observes, existing policy regarding family reunification already attempts to ensure that fiscal costs are internalized, and so his insurance scheme refines more than reforms.

Similarly, the vast majority of US skilled-worker immigration already operates roughly like option 4 in Michael's model, whereby an employer sponsors the worker on a temporary visa and the worker applies for employer-sponsored adjustment to LPR status at some point. The system is bogged down by Congress-imposed quotas on the number of temporary and permanent visas available per year. In Canada, option 4 more or less describes the Live-In Caregiver Program,⁴⁹ as well as the recent Canada Experience Class for foreign graduates of Canadian universities and high-skill workers on temporary work visas.⁵⁰ Canada, however,

47 For a recent overview of the inadequacies of the Canadian skilled-worker immigration program see Auditor General of Canada, *2009 Report of the Auditor General of Canada* (Ottawa: Office of the Auditor General of Canada, 2009) at c. 2, online: OAG <http://www.oag-bvg.gc.ca/internet/English/parl_oag_200911_02_e_33203.html>.

48 For a fascinating narrative account of *Hoffman Plastic Compounds Inc. v. National Labor Relations Board*, 535 U.S. 137 (2000) (non-status workers not entitled to remedies, including back pay, for violation of right to unionize), see Catherine Fisk & Michael Wishnie, 'The Story of Hoffman Plastic Compounds Inc. vs. NLRB: The Rules of the Workplace for Undocumented Immigrants' in David Martin & Peter Schuck, eds., *Immigration Law Stories* (New York: Foundation Press, 2005) 311.

49 *Immigration and Refugee Protection Regulations*, S.O.R./2002-207, Part 6, Division 3. See also Macklin, 'Public Entrance,' supra note 9.

50 *Immigration and Refugee Protection Regulations*, ibid., s 87.1. For a helpful overview of the system see Naomi Alboim, *Adjusting the Balance: Fixing Canada's Economic Immigration Policies* (Toronto:

relies on a points system for selecting principal applicants in the skilled-worker class. It grants points based on a weighted combination of factors relevant to future labour-market performance and economic integration, including age, education, occupational attainment, job experience, language ability, Canadian job offer, and spousal education/experience. Notably, an offer of employment is only one factor among many, and most entrants do not have one.

Michael rejects a points system as a cumbersome and futile attempt by the state to micromanage the labour market. It is worth noting that the points system has vacillated between a broader 'human capital' approach that attempts to predict general labour-market integration and a narrower one that purports to match applicants with specific occupational niches in demand. While I share Michael's cynicism about the latter version (revived by the present government), I am not persuaded that the more generic 'human capital' model is intrinsically problematic in formulation or application.

On the question of privatizing fiscal burden, Michael has in mind income support, especially welfare. For example, he exempts from the insurance requirement public education and publicly funded health care.⁵¹ Yet he later expresses support for 'more effective public and private resettlement assistance programs and credential equivalency determination mechanisms.'⁵² In Canada, most resettlement programs (general and job-specific language training, work placements, skills upgrading) are publicly funded and, in limited cases, such programs may include a measure of income support to enable participation. The rationale behind the public expenditure on settlement – including income support – is that it represents an upfront short-term public investment that pays off in the long run by optimizing labour-market integration as well as social and political incorporation which, among other things, is fiscally beneficial.⁵³ Indeed, Canadian data suggest that immigrants draw less on income support (welfare and employment insurance) over their lifetime than native-born Canadians do, even though relative

Maytree Foundation, 2009), online: Maytree Foundation <<http://www.maytree.com/policy-papers/adjusting-the-balance-fixing-canadas-economic-immigration-policies.html>> [Alboim, *Adjusting the Balance*].

51 Michael regards both public education and public health care as 'primary goods,' but adds that since immigrants are pre-screened for health, those who might burden the health care system by imposing higher-than-average costs would not be admitted anyway. Trebilcock, 'Law and Economics of Immigration,' supra note 1 at 299.

52 Ibid. at 312.

53 For superb comparative analyses of Canada and the United States on the role of settlement and integration programs see Bloemraad, *Becoming a Citizen*, supra note 43 at 233–52; Jeffrey Reitz, *Warmth of the Welcome: The Social Causes of Economic Success for Immigrants in Different Nations and Cities* (Boulder: Westview Press, 1998).

earnings of immigrants have been dropping and rates of low income increasing.⁵⁴ Should public expenditure on settlement be part of the insurance scheme, or should it be exempted? If the latter, should it be financed by the various fees that the government extracts from migrants or funded out of general revenue? The same question about allocation of fiscal cost applies to workers' compensation and employment insurance. If immigrant workers pay into an employment-insurance scheme on the same terms as native workers, why should they be denied access to it during periods of unemployment if, to pick a hypothetical scenario, the economy tanks within a year of their arrival and their employers lay them off?

I pose these questions not because these apparently technical details matter in and of themselves but because they tug at the underlying assumptions behind the fear of 'fiscal abuse' that animates Michael's insurance proposal. There are sound policy reasons for investing public funds in settlement and integration for new immigrants (whose education and training we did not pay for), just as we invest in educating and training children, our other (secondary) source of future workers and citizens. There may also be good reasons for entitling all workers to access employment insurance or workers' compensation on equal terms, regardless of immigration status. I do not presume Michael's position on either of these questions. The examples are meant only to illustrate the complexity of delimiting and evaluating fiscal costs over time and the problems that arise from reliance on the citizen/foreigner distinction to determine eligibility for income-support schemes that are tied to labour-market participation.

Putting these preliminary concerns aside, I turn to consider Michael's proposal on its own terms. Will it lead to significantly freer migration? For whom? At what cost? Are the costs better than the costs of alternatives? When I speak of alternatives, I am thinking of those policy prescriptions that register approximately the same mix of principle and pragmatism. Also, when one is comparing relatively more public to relatively more privatized models, it only seems fair to take into account the accumulated experience of the real-world deficiencies of each. An idealized private model will always win out over a real-world public model, and vice versa, but comparisons of this sort prove less than they promise. Publicly administered immigration policies tend to be cumbersome and inefficient and they manifest the hubristic delusion that central governments can actually engineer complex social phenomena. Private

54 See Garnett Picot & Feng Hou, *The Rise in Low-Income Rates among Immigrants in Canada* (Ottawa: Statistics Canada, 2003); Daniel Hiebert, *Beyond the Polemics: The Economic Outcomes of Canadian Immigration* (Vancouver: Centre for Excellence, Research on Immigration and Integration in the Metropolis, 2006).

schemes invariably create irresistible moral hazards, and the state's willingness and capacity to police those people who game the system (especially gamers who vote or otherwise exert political power) lags predictably, chronically, and spectacularly.

If quotas were removed from employer-sponsored visas in the United States, one would expect a spike in numbers of foreigners recruited from abroad or from US universities when the economy is growing, and a decline in numbers during recession. I do not think these 'high skill' immigrants are the people that critics have in mind when they complain about fiscal abuse by immigrants. This group of immigrants tends to attract the criticism that they displace native workers and drive down wages, but Michael has already dispensed with this objection. Thus, it is not obvious that Michael's mandatory insurance proposal is either necessary for employer-sponsored workers (because the fiscal concern does not apply to them) or sufficient (because it does not respond to the complaint about job substitution or wage depression).

A system that relies exclusively on private recruitment presumes an economy in which large-scale overseas recruitment is viable for the various sectors of the labour market. It may hold true for an economy of the size and power of the United States; it may also work for certain sectors, such as the resource-extraction industry, the information technology sector, and the health professions. But could it replace the points system in Canada?

A serious shortcoming of the points system is that skilled immigrants are admitted to Canada on the strength of their education, credentials, and experience, only to find that employers do not recognize or value their education, credentials, and experience. The consequent un- or underemployment of skilled immigrants is the subject of much research and, more recently, various public and public/private initiatives to remediate it.⁵⁵

Michael's proposal goes a long way toward obviating the 'brain waste' concern. Immigrants arriving with a job have already surmounted the biggest obstacle to labour-market integration, and they are guaranteed the Canadian experience that will serve them well in the pursuit of future employment. This may support the development or expansion of privatized, or at least decentralized, selection models alongside the publicly administered points system, but it does not demonstrate that the one can fully replace the other. It is not self-evident that the Canadian economy, which is dominated by small and medium-sized enterprises, is situated to recruit as many or more independent applicants as the publicly administered points system. In order to properly assess the

55 See, e.g., Naomi Alboim, Ross Finnie, & Ronald Meng, 'The Discounting of Immigrants' Skills in Canada: Evidence and Policy Recommendations' (2005) 11:2 IRPP Choices 2, online: IRPP <<http://www.irpp.org/choices/archive/vol11no2.pdf>>.

viability of privatized recruitment, one needs more information about how and why certain industries and employers enthusiastically recruit skilled workers from abroad while other employers and sectors seem much more resistant to hiring skilled immigrants who gained their education, training, and experience abroad. It seems unlikely that the explanation lies solely or mainly in a gap between objective job specifications and relevant qualifications among the applicant group. I suspect that there are many factors in play, including the nature of the occupation and the existence of diasporic transnational networks in the relevant industry. I further expect that the answers will be contingent, sector specific, and variable.

If Canada abandoned the points system in favour of one that depends exclusively on job offers, migration would be freer for those who work in certain occupational sectors but less free for highly skilled people from other sectors and for those who lack the social capital or network to secure a job offer from overseas with a Canadian employer. Even if one is indifferent regarding the specific composition of the skilled-worker category, I remain doubtful that the total number of skilled workers would meet, much less exceed, the numbers admitted under the points system. One could imagine how a hybrid regime might alleviate some of the inefficiencies and delays of the public system. That is, indeed, the *raison d'être* of the new Canadian Experience Class (which enables skilled temporary workers to transition to permanent resident status) and of various provincially run programs that expedite the admission of immigrants who undertake to reside in the province that nominates them.⁵⁶ My larger point here is that the economic, political, and institutional setting matters not only for understanding how we got to where we are (and, indeed, how *we* got to *we*) but also for anticipating how policies might operate in different national contexts. I say with some trepidation that this is a point where historical Michael challenge normative Michael's methodology.

To suggest that what could work for the United States might not make sense in Canada is also true in the obverse. US economist George Borjas is a well-known proponent of the points system. He argues that a more highly skilled migrant pool will impose fewer costs and confer greater economic benefits on the United States, that the skill level of immigrants to Canada and Australia exceeds that of US immigrants, and that this discrepancy is attributable to the use of a points system in Canada and Australia.⁵⁷ A study released by the Institute for the Study of Labour indicates that Borjas' empirical claim is accurate with respect to the relative

56 For a useful summary of these programs see Alboim, *Adjusting the Balance*, supra note 50.

57 George Borjas, *Heaven's Door* (Princeton, NJ: Princeton University Press, 1999) at 192–200.

skill levels of immigrants to the United States and immigrants to Canada and Australia. However, if one removes Latin American migrants from the data, the skill level of immigrants to all three countries is roughly the same.⁵⁸ The United States manages to attract 'the best and the brightest' without a points system. The high proportion of Latin American immigrants in the United States is largely due to contingencies of history and geography, and it is unalterable unless one adopts draconian restrictions on family reunification. Again, context matters.

An unresolved ambiguity in Michael's proposal concerns the relationship between market regulation and political membership. Michael initially describes a regime whereby sponsored foreign workers would enter as permanent residents; in other words, individual employers would directly control access to the entry ramp onto the labour market and then into the citizenship lane. Some commentators specifically object to this as an inappropriate delegation of public authority to private decision makers, but I am willing to remain provisionally agnostic.⁵⁹ However, Michael later returns to the question of non-status (illegal) and low-skill workers. Here he recognizes that employers might resist undertaking the transaction costs associated with insuring low-skill workers (though they would presumably pass these costs on to the workers anyway). Rather than simply regularizing non-status workers and binding employers to option 1, Michael offers an alternative program of three- to five-year temporary visas for low-skill workers. During this probationary period, the immigrant is simply ineligible for social assistance. Upon completing the requisite period, the worker transitions into permanent residence. It is a proposal that is repeatedly raised in the United States for dealing with non-status workers, only to be repeatedly crowned in the turbulent and hostile waters of US public opinion. It is as sensible as it is politically unsaleable.⁶⁰

While I certainly support Michael's proposal regarding non-status workers as just, I am not certain what purchase the insurance scheme retains under this scenario. Neither non-status workers nor temporary workers can access social assistance anyway, so the fiscal concern does not arise unless and until they transition into permanent residence. At this

58 Heather Antecol, Deborah A. Cobb-Clark, & Stephen J. Trejo, *Immigration Policy and the Skills of Immigrants to Australia, Canada and the United States* (Bonn: Institute for the Discussion of Labour, 2001).

59 Alboim, *Adjusting the Balance*, supra note 50 at 50–1, cautions that neither employers nor educational institutions are properly equipped to be 'in the business of selecting individuals on the basis of their long term potential to contribute to Canada as citizens.'

60 For a recent scholarly exchange on regularization of non-status migrants in the United States see Joseph H. Carens, 'The Case for Amnesty: Time Evades the State's Right to Deport' *Boston Review Online* (May/June 2009), online: Boston Review <<http://www.bostonreview.net/BR34.3/carens.php>>.

point, Michael is silent about whether the mandatory insurance requirement applies and, if so, who pays for it. Presumably, the same employers who did not want to pay in the first instance (because of transaction costs) would not want to pay three years later. Would Michael require the permanent resident to pay for the insurance, or might he credit the immigrant for the fact that he or she has already participated in the workforce (and paid taxes) for several years while ineligible to access income assistance?

If one lines up option 1 (permanent residence/mandatory insurance) next to option 4 (temporary worker visa with no social assistance/transition to permanent residence), one might ask whether and why employers ought to be able to opt out of the mandatory insurance regime with respect to certain immigrants and not others. Under such an option, employers' self-interested calculus directly determines not only which workers will be admitted into the domestic labour market but also who will be admitted, and on what terms, to political membership. We might then understand permanent resident status as an employment benefit that individual employers could offer to, or withhold from, individual candidates as part of their recruitment and bargaining strategy.

But why would employers not prefer that all non-citizen recruits – high or low skill – enter as temporary workers for three or five years, during which time they will pose no fiscal burden because they will be denied access to social assistance? This is *de facto* how the US system currently operates, insofar as the overwhelming majority of skilled workers initially enter on temporary worker visas and then adjust their status to lawful permanent residence.⁶¹ Of course, because of the quotas on both temporary and permanent visas, the transition to permanent resident status is delayed by mammoth backlogs. But one could plausibly argue for the removal of caps and arrive at a universal system of temporary status that imposes no fiscal costs (because of ineligibility for social assistance), followed by transition to permanent residence.

Prospective immigrants to the United States would probably prefer to arrive with the security of permanent residence, and with spouses legally authorized to work, neither of which obtain under the prevailing system. While the Canadian and Australian points systems offer both advantages to prospective immigrants, the attractions of the United States remain substantial. Countries that compete with the United States have incentives to offer greater security of status to immigrants than the United States does, but it seems difficult to construct an argument from a starting point of domestic welfare maximization about why the United States ought to be more welcoming.

61 Hiroshi Motomura, 'Choosing Immigrants, Making Citizens' (2007) 59 Stan.L.Rev. 857.

The incentives for employers to employ and exploit non-status labour at the low-skill end of the labour market are well known. But it appears to be the case that at the other end of the spectrum of employment, some subset of employers can and do make the relative insecurity of temporary immigration status for higher-skilled workers redound to their economic advantage. During the IT boom of the 1990s and into this century, US firms recruited tens of thousands of foreign professionals from abroad (mainly India) on renewable temporary worker visas (H1B). A former CEO of a high-tech firm recently explained why even the largest and most reputable employers, such as Intel and Microsoft, lobby the US government for more temporary visas, followed by more efficient and timely transition to permanent resident status, but do not advocate for immediate conferral of permanent resident status:

... Perhaps because workers on these visas are desirable, [because] they are less likely to leave their employers during the decade or more they are waiting for permanent residence.

Moreover, I know from my experience as a tech CEO that H-1Bs are cheaper than domestic hires. Technically, these workers are supposed to be paid a 'prevailing wage,' but this mechanism is riddled with loopholes. In the tech world, salaries vary widely based on skill and competence. Yet the prevailing wage concept works on average salaries, so you can hire a superstar for the cost of an average worker. Add to this the inability of an H-1B employee to jump ship and you have a strong incentive to hire workers on these visas ...⁶²

The problem is not simply that employers are able to hire foreign workers at a lower cost than native workers; within Michael's framework, this is not per se objectionable. The concern is that what makes the foreign workers cheaper is their precarious immigration status, which is as much a public distortion of private market forces as a publicly mandated preference for local labour. The difference is that it is a distortion that some employers find efficient.

Like Michael, I strongly favour a regime that minimizes the vulnerability of immigrants by providing the security of immediate permanent residence (option 1). Allowing migrants to enter with temporary status,

62 Vivek Wadhwa, 'America's Other Immigration Crisis' *The American* (1 July 2008), online: SSRN <<http://ssrn.com/abstract=1259154>>. For further discussion of how employers game the H1B visa system see Christopher Fulmer, 'A Critical Look at the H-1B Visa Program and Its Effects on US and Foreign Workers – A Controversial Program Unhinged from Its Original Intent' (2009) 13 *Lewis & Clark L.Rev.* 823–60; Marshall Fitz, *Prosperous Immigrants, Prosperous Americans: How to Welcome the World's Best Educated, Boost Economic Growth, and Create Jobs* (Washington, DC: Center for American Progress, 2009), online: CAP <http://www.americanprogress.org/issues/2009/12/pdf/highskilled_immigrants.pdf>.

followed by a more or less automatic transition to permanent resident status after a stipulated period of time, is a second-best option.⁶³ But Michael's bifurcated model effectively lets employers decide whether to offer option 1 or option 4. Within the normative framework of a national law and economics analysis, in which employer choice governs the immigration status of workers, how often would option 1 prevail? I expect that employers across the spectrum would choose to avoid the transaction costs of insurance and reap the benefits of a more compliant and cheaper workforce. Employers might be persuaded to improve intra-industry visa portability (as Michael proposes), so that holders of temporary work visas are less bound *de jure* and *de facto* to a particular employer. Or they could opt to reserve the permanent residence/insurance option for cases where intra-industry or interstate competition commend it for attracting and retaining foreign workers. But I suspect that the notoriously embedded asymmetries of information and power between employers and non-citizens with precarious immigration status – even highly skilled and sophisticated non-citizens – would incline the rational employer to prefer a temporary scheme as the default option. And, as Kelley and Trebilcock explain in *The Making of the Mosaic*, the historic influence of employers as special-interest group leads one to surmise that their preferences would exert some political influence.

Indeed, lining up options 1 and 4 side by side invites one to question whether the designation of 'high skill' versus 'low skill' actually expresses a meaningful distinction in the occupational attributes of workers or whether it is a proxy for the calculus that is doing the real work, namely an assessment of how much precarious immigration status matters to the worker and how that translates into the volume, quality, and price of the labour the worker will provide. While it may typically be the case that highly skilled workers are less exploitable because they have broader options than their low-skilled counterparts, it is also true that where an occupational niche becomes dominated by non-citizen workers, their vulnerability as a class of non-citizen temporary visa holders may supersede the protections afforded by the significant human capital that individual workers possess.

Having raised this concern about how market forces operate in practice, I emphasize that Michael's model does place the option of perpetual temporary status out of bounds. Under either option 1 or option 4,

63 Alboim, *Adjusting the Balance*, supra note 50 at 49–50. I have explored elsewhere the question of whether transitional schemes offer a normatively defensible trade-off of short-term vulnerability for eventual access to permanent resident status: see Macklin, 'Heft of Citizenship,' supra note 9; Macklin, 'Public Entrance,' supra note 9; Audrey Macklin, 'Foreign Domestic Workers: Surrogate Housewife or Mail Order Servant?' (1992) 37 McGill L.J. 681.

foreign workers will sooner or later be eligible to acquire permanent resident status and, eventually, citizenship. Michael does this for a combination of normative and pragmatic reasons that relate to the injustice of denying political membership to long-term residents and to the recurrent failure of past guest-worker programs in democratic countries at the level of implementation and enforcement.⁶⁴ In these respects, Michael's privatization proposal is more just, realistic, and practical than recently proposed amendments to Canada's Immigration and Refugee Protection Regulations, which would authorize the creation of a class of foreign workers who will be confined to temporary status, forced to depart Canada after four years, and remain barred from returning for six years thereafter.⁶⁵

On the question of family migration, Michael's proposal does not alter the *status quo* regarding the basis for admission. After all, family migration is already privatized to a large extent. Family members select family members, and in Canada they also sign an undertaking to reimburse the state if the sponsored family members draw on welfare within the stipulated period. Michael proposes that instead of allowing family-class sponsors to self-insure, sponsors be obliged to enrol in the insurance scheme. If insurance premiums remain low, one might predict that the insurance regime would have a negligible deterrent effect; if premiums escalate because significant numbers of sponsored family members resort to social assistance, then poorer families would be less able to sponsor in the future. This opens the question of how the risk of resort to social assistance would be assessed – in other words, how would insurers calculate the premiums?

In the course of his critique of current immigration policy, Michael derides public, centralized immigrant-selection practices as bureaucratic, unwieldy, and utterly futile exercises in forecasting the future needs of the domestic labour market. I believe he accurately characterizes the points system that Canada used pre-2001 and reintroduced in 2008. However, from 2001 through 2008, the points system did not attempt to identify specific occupations in demand and assess individual applicants against that list; instead, it relied on indicators of adaptability to a changing economy, such as age, language ability, education, and

64 Trebilcock, 'Law and Economics of Immigration,' *supra* note 1 at 304–6.

65 See Regulatory Impact Analysis Statement, C. Gaz. 2009. I., Vol. 143, No. 41 (*Regulations Amending the Immigration and Refugee Protection Regulations (Temporary Foreign Workers)*), online: Canada Gazette <<http://canadagazette.gc.ca/rp-pr/p1/2009/2009-10-10/html/reg1-eng.html>>. The new regulations have met with widespread criticism. See, e.g., Canadian Council for Refugees, 'Comments on Proposed Changes to the Temporary Foreign Workers Program' (24 November 2009), online: CCR <<http://www.ccrweb.ca/documents/TFWregulationscomments.pdf>>.

experience.⁶⁶ These are among the very criteria Michael lists as 'observable characteristics' relevant to premium calculations.⁶⁷

But I worry that a private insurance scheme would not merely replicate the points system's criteria but do so without the normative constraints imposed by the public version. That is to say, to the extent that the operation of the labour market is tainted by preferences that might be variously described as misguided, excessively cautious, or discriminatory, one has reason to anticipate that these would factor into actuarial calculations that correlate immigrant profiles to the probability of reliance on social assistance.⁶⁸ Highly skilled immigrants who arrive with job offers would presumably fare well, because they are employed. But what about their accompanying spouses, who typically do not arrive with a job waiting? Skilled immigrants who arrive as members of the family class would face the barriers to labour-market entry described earlier under the rubric 'brain waste.' Would sponsors who are members of the 'working poor' be assessed as higher risks for default than wealthier sponsors? If and when premiums reach a level that would prevent a person not presently in receipt of social assistance from sponsoring a spouse or child, or lead to the deportation of a sponsored family member for non-payment of insurance premiums, this model will have exceeded its normative budget.⁶⁹

Michael does hint at an important way in which his insurance scheme might provide a rationale for freeing up family migration. If fiscal impact is what we care about, the state should withdraw from the invasive and tedious exercise of scrutinizing, *ex ante* or *ex post*, the nature of the familial relationship. If what matters is that I demonstrate my willingness to sponsor a person and am prepared and able to pay the insurance premiums, this diminishes the legitimacy of the state's interest in circumscribing eligible relationships to the degree of kinship proximity or in interrogating the motivations animating the formation of the relationship in order to reveal whether it is primarily or merely created for purposes of immigration.⁷⁰

66 Alboim, *Adjusting the Balance*, supra note 50 at 5, 32–3, 46–7.

67 Trebilcock, 'Law and Economics of Immigration,' supra note 1.

68 Of course, Michael's scheme already builds in the requirement that the immigrant have a job offer, and, based on the emphasis employers place on local experience, one might anticipate that the acquisition of domestic labour-market experience would enhance the prospects for subsequent employment.

69 Trebilcock, 'Law and Economics of Immigration,' supra note 1 at 301.

70 The Canadian government commissioned a report which explicitly recommended that the government resile from defining the range of relationships eligible for sponsorship: Immigration Legislative Review, *Not Just Numbers: A Canadian Framework for Future Immigration* (Ottawa: Minister of Public Works and Government Services Canada, 1997). Canada and the United States exhibit interesting differences in approach.

However cogent the law and economics case for diminishing state scrutiny of kinship relations, the argument has not gained any traction in Australia, where the fiscal retrieval system is even more stringent than Michael's proposal: sponsors must post a bond in advance of sponsorship that will be used to indemnify the state for the costs of any social assistance expended on family-class immigrants.⁷¹ This guarantee of reimbursement has not motivated a commensurate easing of the restrictions on family-based immigration, however; the scope of the family class in Australian immigration policy is no broader than elsewhere.

I have difficulty assessing whether Michael's proposal will result in freer family migration. Consistent with my earlier comments on the replication of the points system in actuarial calculations, one must also attend to the risk that interrogation into the nature, proximity, or viability of the kinship relation will simply be displaced from a public determination to a private, discretionary, unaccountable appraisal for purposes of insurance coverage.

If the premiums are low enough, and if the class of eligible family members is widened, perhaps a net increase in family migration will result. Otherwise, I would anticipate a neutral or negative impact on family reunification, especially among the least well off. I certainly believe that Michael's proposal for reform of family-class sponsorship merits sympathetic attention and further investigation. An insurance scheme might, for example, be preferable to the current Canadian system of self-insurance, whereby individual sponsors remain liable for the full sponsorship debt even in circumstances where it might seem unjust not to mitigate or forgive the debt. Government officials' denial that they possess legal authority to exercise discretion in enforcement of the sponsorship debt was successfully challenged before the Ontario Court of Appeal, but it remains to be seen whether the decision will be appealed or implemented.⁷²

The United States sets no ceiling on the admission of immediate family members of citizens but does set quotas for family members of US LPRs; Canada does not discriminate between permanent residents and citizens for purposes of family reunification, nor does it set explicit quotas. The Canadian definition of the family includes same-sex and common law partners but excludes adult siblings, whereas the US definition excludes same-sex and common law partners but does permit citizens to sponsor adult siblings, subject to quota.

71 Trebilcock, 'Law and Economics of Immigration,' *supra* note 1 at 308.

72 The Ontario government's inflexibility has been the subject of litigation. Beginning in about 2004, the Ontario government intensified its efforts to enforce the undertaking against sponsors who had defaulted on their sponsorship debt; it made no provision for partial or total debt forgiveness, except in cases of 'documented extraordinary circumstances (i.e. sponsor is incapacitated)': 'Guiding Principles' for the recovery of sponsorship debt, quoted in *Mavi v. Canada (A.G.)*, 2009 ONCA 794 at para. 67. In *Mavi*, the Court of Appeal ruled that the Ontario government had wrongfully

IV *Conclusion: Family-induced migration*

The impact of Michael's proposal on family migration brings into relief a formidable fact of all migration regimes, even those (like Canada's) that ostensibly prioritize selection of skilled workers: the vast majority of lawful immigrants gain entry not as workers, nor because they have a well-founded fear of persecution, but because of kinship. Historically, family-based migration formed an integral component of the nation-building enterprise of settler societies like Canada and the United States. In most Western European states, family reunification and refugee admissions account for virtually all permanent admissions. Today, two-thirds of US permanent immigration is based on family reunification; only about 15 per cent are selected as 'employment preference' immigrants, and half of this group are accompanying spouses and children.⁷³ In Canada, about 60 per cent of permanent residents admitted in 2008 were designated by government statistics as members of the economic class, while approximately 27 per cent were members of the family class (the remaining 13 per cent were refugees and 'other'). However, this formal allocation masks the fact that statistics for the economic category include accompanying spouses and children of the principal applicant.⁷⁴ Only the principal applicant is assessed against the points system (or the criteria for investors or entrepreneurs), and only about two-fifths of the economic class consists of principal applicants. All this to say that close to 63 per cent of immigrants admitted to Canada in 2008 as permanent residents in the economic- or family-class stream actually gained entry because of their relationship to a person in Canada or to the person accepted for entry to Canada.⁷⁵ The comparable figure for the United States is around 72 per cent.

The conclusion that kinship overwhelms economic criteria as the avenue for entry holds true for both Canada and the United States, as well as for

refused to exercise a case-by-case discretion in deciding whether and how to enforce the debt 'by taking into account a sponsor's submissions concerning the sponsor's circumstances and those of their sponsored relatives' (at para. 185).

73 Jeanne Batalova, 'Spotlight on Legal Immigration to the United States' (June 2009), online: MPI <<http://www.migrationinformation.org/USFocus/display.cfm?ID=730>>; Ramah Mackay, 'Family Reunification' (May 2003), online: Migration Policy Institute <<http://www.migrationinformation.org/USfocus/display.cfm?ID=122>>.

74 It also overestimates the economic class by including live-in caregivers, who are nominally permitted to bring accompanying family members (like other economic immigrants) but in practice precluded from doing so because of the live-in requirement imposed by their immigration status.

75 The percentages are based on the total number of permanent residents landed in Canada in 2008 (247, 243) according to Citizenship and Immigration Canada, 'Facts and Figures 2008: Permanent Residents by Category,' online: Citizenship and Immigration Canada <<http://www.cic.gc.ca/english/resources/statistics/facts2008/permanent/02.asp>>.

most other industrialized states. At this point, refinements to the selection process of non-family-based migration will likely only have a modest and very gradual impact on the overall composition of immigrant populations.⁷⁶

I have described above how the skill composition of the US foreign-born population is skewed by the large proportion of relatively less educated and unskilled immigrants from Mexico and Central and South America. The vast majority enter on the basis of kinship to a US citizen or LPR.⁷⁷ History and geography are immutable.⁷⁸ The impact of past immigration policies ramifies into the future via family migration, just as it does through reproduction. In theory, the United States could alter this course by enacting laws and policies that bar insufficiently educated, skilled, or wealthy citizens (and permanent residents) from reuniting with foreign family members who are insufficiently educated, skilled or wealthy, but only at unacceptable moral and (one hopes) political cost.⁷⁹

Which brings me back to *Life of Pi*, and the reasons people move: for themselves, for their families, for the next generation. And while states might prefer to admit immigrants who will be guaranteed plug-and-play economic actors, settler states like Canada and the United States understand and anticipate that these immigrants will be bringing or having children. It is not only, as Michael rightly insists, that governments are institutionally and structurally incapable of forecasting labour-market

76 See Michel Beine, Frederic Docquier, & Caglar Ozden, *Diasporas* (Washington, DC: World Bank Development Research Group Trade and Integration Team, 2009), online: World Bank <http://www-wds.worldbank.org/external/default/WDSCContentServer/TW3P/IB/2009/07/01/000158349_20090701160446/Rendered/PDF/WPS4984.pdf>.

77 Mexico is the largest source country for annual LPR immigration (17 per cent in 2008). About 27 per cent of the LPR population are Mexican born, and 90 per cent entered on the basis of kinship. Jeanne Batalova, 'Mexican Immigrants in the United States' (April 2008), online: MPI <<http://www.migrationinformation.org/USfocus/display.cfm?ID=679>>.

78 Thus, Douglas Massey observes that North American social and economic integration create ineluctable pressures for Mexico-US labour migration. Opportunities for lawful labour migration from Mexico have been stringently controlled since the mid-1960s, which means only that the flow has been diverted into a massive stream of irregular migration, despite the progressive militarization of the US-Mexico border. Douglas Massey, 'Only By Addressing the Realities of North American Economic Integration Can We Solve the Problem,' *Boston Review Online* (May/June 2009), online: Boston Review <<http://www.bostonreview.net/BR34.3/massey.php>>.

79 Unfortunately, recent efforts expended by the Netherlands (among others) toward preventing insufficiently 'European' sponsors from reuniting with their spouses from abroad counsel against complacency: *Integration Abroad Act*, amending Article 16 of the *Law on Aliens*, Official Gazette Staatsblad 2006, no. 28, Kamerstuk 29 700, 31 January 2006, STB9475, ISSN 0920-2064, online: Eerste Kamer <<http://www.eerstekamer.nl/9324000/1/j9vvggh5ihkk7kof/vh7rf1gymzy5/f=y.pdf>>. See further Human Rights Watch, *The Netherlands: Discrimination in the Name of Integration* (13 April 2009), online: HRW <<http://www.hrw.org/en/node/82373/section/7>>.

gaps and inserting immigrants into them. This exercise in centralized micromanagement exemplifies the 'high modernist' conceit of government planning that James Scott critiques so effectively in *Seeing Like a State*.⁸⁰ The state cannot *plan* people. But the problem goes deeper still, because neither state nor market can *plan* a future generation. The most the state can and should aspire to do (and which is something that the market cannot do) is *plan for* the arrival of that next generation – by creating the frameworks, the institutions, and the conditions that will enable the children of immigrants (like the children of citizens) to grow and flourish.

Of course, this does not mean that states will resist the impulse to predict which applicants will succeed economically and to select (or delegate selection) accordingly. And it may be that a preference for educated and/or skilled immigrants is, coincidentally, one effective way of planning for the next generation, because apart from how parents actually perform in the labour market, they reliably transmit to their children the middle-class values and aspirations that the state endorses for all its members: education, occupational attainment, self-sufficiency, and the importance of family. But even here, one should not overemphasize the education level of the parents or the formal category under which they entered as determinants of their children's attainments. Immigrants generally invest heavily in their children's futures. Children of immigrants in both Canada and the United States are better educated and more skilled than children of native-born parents, even where the immigrant parents are less educated than the host population.⁸¹ At the same time, the data suggest that educational attainments are higher for immigrants from some national origins than for others, and that occupational and financial returns to education also vary. Maybe some immigrant parents do not invest as heavily as others (which is to say that they more closely resemble native-born Canadian parents), or maybe labour markets are less receptive to some groups than to others. The reasons for the variations and the policy implications arising from those reasons remain speculative, and warrant much closer study.⁸²

What does seem plausible is that while economic-class admission policies are formally about choosing the best and the brightest from among prospective immigrants, they are, in functional terms, about selecting the parents of the next generation of citizens. Data about the second generation generally validate the assertion by *Life of Pi*'s narrator about why

80 James Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven, CT: Yale University Press, 1998).

81 Jeffrey Reitz, Heather Zhang, & Naoko Shida, *Comparisons of the Success of Racial Minority Immigrant Offspring in the United States, Canada and Australia* (2009) at 10–1 [unpublished, on file with author].

82 Ibid. at 20; Monica Boyd, 'Variations in Socioeconomic Outcomes of Second Generation Young Adults' (2008) 6:2 Canadian Diversity 20 at 23.

those parents sought to migrate, and suggest that this willingness to trade off present rewards for future benefits is a statistically significant predictor of their children's success.

As much as I share Michael's aspiration toward more open borders and freer migration, the pragmatist in me inclines toward a more modest approach to state-level policy reform. First, the dominance of migration based on ascription (kinship) over audition (labour-market performance) will not and should not be dislodged, as long as migrants have families. Michael's insurance proposal may present a viable alternative to the existing mechanisms for forcing family-class sponsors to internalize fiscal risks; beyond that, however, I remain unpersuaded that the 'one size fits all' model that Michael offers actually fits either Canada or the United States, much less other liberal democratic countries of immigration. Canada has recently embarked on a hybridization of its migration regime: most provinces now operate selection processes for temporary and permanent immigration that supplement the federal program, and the federal government has also delegated increasing authority to employers to recruit temporary workers and expanded programs that enable high-skill temporary workers to transition to permanent resident status. It is too soon to judge the impact of this decentralization and delegation on the efficiency, liberalization, and welfare outcomes of this hybrid migration regime.⁸³ It seems reasonable to suggest, however, that a hybrid model might make more sense for Canada than a thoroughly privatized model, with or without the mandatory insurance proposal.

Apart from reservations expressed earlier with respect to the model's viability in the United States, attention to the specific national context leads me to conclude that the objective of opening up the United States to entry by greater numbers of immigrants must, as a matter of principle and politics, cede priority to the urgency of resolving the situation of the 12 million non-status immigrants already working and residing in the United States. Unlike his detailed policy response to the fiscal objection to legal immigration, Michael's model offers no guidance on how to win policy makers' consent to regularization in the face of intense public controversy and opposition. He simply asserts that this should and must be done. Of course, if it were that easy to get policy makers to do the right thing, one would not need a mandatory insurance scheme either.

Yet with all that said, I still agree more often than I disagree with Michael about basic questions of what the 'right thing' is when it comes to the immigration policies and practices of prosperous liberal states. As a scholar, I spend much of my time consorting with the devil that resides in the details. But I am glad and grateful that Michael soars with a better crowd, and that he and I find occasion to meet somewhere in between.

83 Alboim, *Adjusting the Balance*, supra note 50, provides a critical assessment based on early trends and practices.