

Proceedings of the 2018 ZiF Workshop



Studying Migration Policies at the Interface between Empirical Research and Normative Analysis



Matthias Hoesch & Lena Laube (eds.)

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Contents

Matthias Hoesch & Lena Laube

Introduction: Why Should We Study Migration Policies at the Interface between Empirical Research and Normative Analysis? >> **1**

Joseph Carens

On the Relationship between Normative Claims and Empirical Realities in Immigration >> **13**

Christof Roos

Comment on Joseph Carens: On the Relationship between Normative Claims and Empirical Realities in Immigration >> **31**

David Miller

Our Responsibilities to Refugees >> **37**

Andreas Kewes

The Production of Intersubjective Certainty in the Early West German Refugee Movement >> **51**

Nausikaa Schirilla

Studying Refugee Solidarity as ‘Ethics from Below’ – Some Ideas for Further Research >> **71**

Lukasz Dziejdzic

What Is Owed to Refugees when Attributing Responsibilities to States in Institutionalized Responsibility Sharing Regimes? >> **79**

Matthias Hoesch

Comment on Lukasz Dziejdzic: What Is Owed to Refugees when Attributing Responsibilities to States in Institutionalized Responsibility Sharing Regimes? >> **95**

Verena Risse

(Recent) Deviations in Border Control – Challenges for Normative Strategies of Justification? >> **101**

Matthias Hoesch

Comment on Verena Risse: (Recent) Deviations in Border Control – Challenges for Normative Strategies of Justification? >> **119**

Johannes Servan

‘What Justice Requires’ – a State-Centric Bias in the Ethics of Migration >> **125**

Matthias Hoesch

Comment on Johannes Servan: ‘What Justice Requires’ – a State-Centric Bias in the Ethics of Migration >> **139**

Nicolas Kleinschmidt & Jessica Krüger

The Role of *Entscheider* in the Asylum Procedure. A Legal and Ethical Analysis >> **143**

Veit Bader

Comment on Nicolas Kleinschmidt & Jessica Krüger: The Role of *Entscheider* in the Asylum Procedure >> **157**

William Walters

The Microphysics of Deportation. A Critical Reading of Return Flight Monitoring Reports >> **161**

Derek Denman

Comment on William Walters: The Microphysics of Deportation >> **187**

Rutger Birnie

The Ethics of Resisting Deportation >> **191**

Susanne Ursula Schultz

Comment on Rutger Birnie: The Ethics of Resisting Deportation >> **215**

Introduction: Why Should We Study Migration Policies at the Interface between Empirical Research and Normative Analysis?

Matthias Hoesch & Lena Laube¹

Cluster of Excellence "Religion and Politics", University of Münster /
Forum Internationale Wissenschaft, University of Bonn

Abstract

The text introduces the concept behind the *Proceedings of the 2018 ZiF Workshop "Studying Migration Policies at the Interface between Empirical Research and Normative Analysis"*. It explains why there is a need to study migration policies across disciplines, includes a short note on the current literature, and provides a look back at the workshop.

Keywords

Ethics of migration; migration studies; migration policy; refugee protection; critical migration studies

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Migration and its regulation by nation states is undoubtedly a complex empirical phenomenon. It includes many different actors, several localities and mostly lacks traditional social routines. At the same time, it is a highly controversial issue: normative questions surrounding migration are heatedly debated in moral, political and academic discourses. Whoever conducts research on migration policies must somehow address both these aspects: the complexity of migration and the normative controversies that surround it.

¹ Email: matthias.hoesch@uni-muenster.de, llaube@uni-bonn.de.

The way academic disciplines are structured and organized at most universities promotes approaching these aspects via something like a division of labour that results in two separated academic discourses: On the one hand, there are sociologists, economists and political scientists that try to capture migration policies as the object of their empirical research, describing and explaining single developments and reforms, or theorizing about the more general tendencies of migration policies. On the other hand, philosophers and political theorists address normative issues related to migration: what would a just world look like in regard to migration policies? Are migration restrictions justified, and what are the moral claims of those who are excluded?

Of course, there cannot be any *strict* line between empirical and normative approaches to studying migration policies. And yet, generally speaking, the division of labour between empirical and normatively oriented scholars is largely what can be observed in reality.² Most of those who are educated in sociology and the empirical branch of political science do not attempt to reflect on normative foundations, and they are not familiar with normative theorizing. On the other hand, philosophers are largely used to discussing relations between very general normative claims; they set aside problems arising from the complexity of realities and proceed from normative questions that only apply to idealized conditions.³ Thus, they do not usually incorporate current empirical findings.⁴

To be sure, there are good reasons to maintain that division of labour to a certain degree. In order to achieve clarity on normative claims, it seems appropriate to focus on simple cases, setting aside the complexity we are faced with in reality. Moreover, grasping the complex phenomena of migration and migration policies is likely to fail if academics always follow a normative approach instead of concentrating on the observation and description of the empirical phenomena first. Nevertheless, we are convinced that academic research could gain enormously from interdisciplinary approaches that consciously and thoughtfully cross the line between empirical and normative research.

So, why is it important for empirical researchers to become familiar with normative reasoning? As we mentioned, scholars cannot simply put aside the normative relevance of their research objects; they have to deal in some way with the

² However, as we will highlight later, some of the leading writers in the field do include insights from both the empirical and normative debate.

³ See, e.g., the assessment of the current philosophical literature in Brezger, Cassee, & Goppel, 2016.

⁴ See, e.g., Wellman, 2015; Dietrich, 2017.

fact that they address questions that deeply touch peoples' suffering, human rights, life prospects, fears, hopes, and animosities. Indeed, it is no exaggeration to say that most scholars in migration studies, by doing empirical research, try, in one way or another, to send a normative message – a message that is often neither explicitly expressed nor justified by normative theorizing, but nevertheless can be read, as it were, between the lines.

As we see it, scholars currently address the great normative import of migration studies in at least four different ways. Firstly, it is quite common to describe policies as objectively as possible to begin with, but then to switch to a more *emotional* level as soon as normativity becomes central. Thus, many empirical scholars mention that the findings of their studies are 'questionable', 'shocking' or 'worrying', without explaining the normative basis for these statements (Boes, 2000; Natter, 2016; van Houtum & van Naerssen, 2002). Secondly, scholars formulate criticisms by referring to apparent *paradoxes* in how migration policies are adopted. Thus, many political scientists apply the widely used frameworks known as the "liberal paradox" (Hollifield, 2003; Joppke, 1998) or the "gap hypothesis" (Cornelius, Tsuda, Martin, & Hollifield, 2004). This strand of literature aims to identify fundamental contradictions between what states *claim* to be their normative and legal foundations and their *actual* migration and asylum policies. Thirdly, others take an explicitly *critical* stance towards border regimes, often drawing on Foucauldian theories of governmentality. According to them, border policies are important manifestations of a state power that so often hinders individuals to flourish. A focus on control mechanisms and security issues recurs in this strand of literature (Bigo, 2002; Pallitto & Heyman, 2008; Salter, 2007; Tsianos & Karakayali, 2010; Walters, 2006). Less prominent is the fourth approach: some sociologists adopt a normative understanding of the concept of inequality and they highlight the fact that migration policies reproduce existing social inequalities at a global level, or even intensify them by distributing individual life prospects unequally (Lessenich, 2016; Mau, Brabandt, Laube, & Roos, 2012).

What all four approaches have in common is the reluctance to say *explicitly* what their normative conclusions are. For example, why is the difference between the political claims that states make in public to justify coercive power and the way that they act problematic at all – does that constitute a legitimacy problem, or is it only due to the requirements of the language of politics? Are unequal opportunities that result from the national regulation of human mobility indeed unjust, or do societies have a moral claim to maintain some of the advantages they have acquired? Why should we share a critical attitude towards state coercion, instead of highlighting the empowering features of states?

This silence about one's normative convictions, however, is unsatisfactory: we are convinced that assuming that others agree with our unspoken normative assumptions, instead of stating them explicitly, often hampers discussions and leads to polarizations within the academic community. If, for example, a scholar implicitly assumes that living in a refugee camp is unacceptable under any condition, while another scholar is concerned with the question of how to design camps in order to make them acceptable, then there is the risk that each might hastily condemn the other's position as ideological or biased, instead of identifying the actual reason for disagreement. In consequence, social scientists who work empirically would benefit enormously from becoming more familiar with normative approaches, with how to defend them, and with how to deal with normative disagreements. Doing so would enable them to express moral scruples in a much more suitable way.

On the other hand, it is no less important that philosophers take notice of empirical literature on migration much more than they do. The first and obvious reason is that philosophers normally start from a common-sense impression of what migration phenomena are and which social problems are linked to immigration. Following that impression, they single out supposedly relevant normative questions. However, this common-sense picture largely derives from news stories and images in the media – and it is therefore a picture that often does not tell the whole story. In contrast, gaining academic insights can lead to a more balanced view on what actually constitutes migration and migration policies.

The second reason is that, as we see it, philosophers fail to ask many important application-oriented questions on migration issues that presuppose knowledge of how migration policies work in reality. The ethics of migration is quite a young discipline, and philosophers were right to begin with general questions on the justification of immigration restrictions. However, asking these general questions often leads to approaches that only apply to an ideal world, as we have already pointed out. But, how should immigration restrictions operate in an ethically appropriate way in a world like ours? To be sure, we should not expect philosophical ethics to give us clear answers to *all* questions in a non-ideal world. However, we are convinced that ethics can provide helpful reflections at least in many cases – and also in cases that, at first sight, seem to be hopelessly disputed. There is, for example, a controversy in philosophy on the extent to which Western states are obliged to admit refugees.⁵ However, if we also consider by which *means* states are allowed to reduce the number of refugees they admit, there could be a greater prospect of agreement between

⁵ See Gibney, 2004; Miller, 2016; Owen, 2016; Hoesch, 2018.

philosophers: if we take a closer look at those numerous policies intended to reduce the number of asylum seekers who reach European territory, we will certainly be able to identify some that should without question be condemned from a moral perspective. Nevertheless, we will also find others that are probably admissible.⁶ It is only by collaborating with empirical scientists that philosophers can address such issues adequately.

Many philosophers indeed consider their claims to be relevant to practical questions and the evaluation of concrete border policies, as we can see, for example, in many conclusions to journal articles. In Germany, some philosophers have also contributed to public debates on concrete issues concerning refugee policy, especially commenting on Angela Merkel's decision not to close the borders in 2015. However, some of the positions that have attracted public attention are, in our view, unconvincing – perhaps just because they may not have drawn sufficiently on empirical knowledge about what given policies would mean for those directly affected.

All in all, these remarks might suggest that an interdisciplinary approach to migration studies could contribute to policy-making: ethical reflection on possible political measures and their foreseeable consequences seems to be an appropriate basis for political advice. Of course, that is an important aim. However, in our view, the interface(s) between empirical research and normative analysis need to be addressed first of all within *academic research*. Academics have to reflect on how they can improve how they engage with realities and normativity when studying migration policies, while political advice could then constitute a possible, second step.

Crossing the line between empirical and normative research: a short note on the current literature

Of course, this collection is not the first to call for more interdisciplinary approaches in migration studies. There have been several recent acknowledgments that there is a need to overcome the gap between empirical and normative approaches. A prominent example is the *Oxford Handbook of Refugee and Forced Migration Studies* that points out in its 'Introduction' that there should be more mixed normative-empirical research in that field (Fiddian-Qasmiyeh, Loescher, Long, & Sigona, 2014). Nevertheless, the few normative entries of the handbook contain purely normative arguments without substantial attempts to overcome the gap. Similarly, Celikates (2016) demands that

⁶ A first (and still unsatisfactory) step towards that direction is Hoesch, 2017.

philosophers should take notice of (critical) empirical migration studies, without sufficiently pointing out what philosophers could learn from that literature.

Thus those acknowledgments have not been followed by sufficient efforts to develop productive ways of working together in practice, or incorporating other disciplines in one's own work. Even though there is an appreciable literature dedicated to issues that, by their nature, are situated at the intersection of empirical and normative migration research, only few authors themselves combine empirical and normative approaches. Those integrative approaches exist, and we should highlight the great work of scholars like Ayelet Shachar, Rainer Bauböck, Joseph Carens, Matthew Gibney and David Miller here.⁷ Still, given the large extent of migration studies, normatively inspired work is rare.

Even more strikingly, fundamental methodological reflections have been more or less non-existent in the international debate on migration policies. Something that comes close to our idea of methodological reflection is perhaps elaborated in "critical" migration studies. In Germany, for example, the founding of the journal "movements. Journal für kritische Migrations- und Grenzregimeforschung" (Journal for Critical Migration and Border Regime Research) aims to stimulate migration research towards an interdisciplinary examination of normative issues. Representatives of critical migration research in particular address the relationship between research and political commitment;⁸ these publications explicitly promote a responsibility of research to stand up for the concerns of migrants.⁹

However, from the perspective of contemporary political philosophy, the ethical foundations of that 'critical' approach seem to be underdeveloped. One of the few examples of an explicit discussion of such a foundation is Mecheril et al. (2013). The authors propose the idea of human dignity as the normative basis of critical migration studies. However, they show little attention to how this principle can be used to make normative assessments of border policies possible. It is not only that the content of the idea of human dignity is controversial in philosophical debates, with most philosophers attributing only limited normative implications to it. What is more, in the case of migration processes, it is often an open question as to which state can be held responsible when specific people cannot lead a life corresponding to

⁷ For combining normative and empirical approaches in studying global inequality, see especially Anja Weiß, 2017; and for the issue of deportation and repatriation, see the recent work by Mollie Gerver, 2018.

⁸ De Genova et al., 2015; Jacobsen & Landau, 2003.

⁹ On the political orientation of critical migration research, see also Hess & Kasparek, 2010; Hess, 2009; Walters, 2006, 2015; and Transit Migration Research Group, 2007.

human dignity. So the idea of human dignity alone is not sufficient for criticizing Western states for their supposedly over-restrictive immigration policies, and much more theorizing is needed – which is not to say that many of the assumptions of the critical approach will not withstand further elaboration.

The Proceedings of the 2018 ZiF Workshop “Studying Migration Policies at the Interface Between Empirical Research and Normative Analysis”

In the light of these ideas and considerations, in September 2018 we invited more than 40 scholars from Law, Political Sciences, Sociology, Education, Philosophy and Political Theory to meet at the Center for Interdisciplinary Research at Bielefeld University. The workshop bore the title “Studying Migration Policies at the Interface between Empirical Research and Normative Analysis” and included five keynote lectures and twenty panel talks; each talk was followed by a comment, cutting across disciplines. Much to our delight, some of the most influential authors on migration policies worldwide accepted our invitation, amongst them Veit Bader, Joseph Carens, Sandra Lavenex, David Miller, Ayelet Shachar, and William Walters.

The keynotes by Joseph Carens and Sandra Lavenex and two of the panels were dedicated to methodological issues. How to define the role of norms in empirical research and the role of empirical knowledge in normative work? The speakers, coming from political science and philosophy respectively, reflected on how to use empirical material when elaborating moral arguments on migration policies and how to take into consideration ethical questions when designing and conducting empirical research projects; they discussed the possible gap between critical migration studies and social philosophy on the one hand and liberal thinking on the other hand; and they asked how to empirically study the references of political actors to moral norms. The keynotes by Ayelet Shachar, William Walters and David Miller, as well as four other panels, addressed central issues from specific research areas, namely citizenship, inequality, deportation, and refugees. The research questions addressed in these papers most often involved issues of (global) justice and the proportionality of certain policies and their implementation, such as the promotion of voluntary return, deportation practices, and the process of decision-making about asylum applications.

Participants enthusiastically shared our intuition on the necessity of crossing the line between empirical and normative work, and despite the omnipresent risk of getting lost in translation between the codes of the different disciplines, we experienced remarkably lively discussions. Let us just mention one example here:

following Ayelet Shachar's persuasive talk on 'Global inequalities in access to territory and membership'¹⁰, the audience accepted Ayelet's claim that there is something morally problematic in the tendency for European states to 'sell' their citizenship in return for real-estate investments. However, the comment by Anja Weiß initiated a lively debate on what exactly might be problematic: Is the main problem, as Ayelet understands it, that citizenship is viewed in economic terms as something that can be traded with? Or is it the case that those practices are only possible as long as few states pursue them, so that those few states gain an unfair advantage from being an exception of the general rule not to sell citizenship? Or is the real moral problem that those practices reinforce, as a side-effect, the global inequality in life prospects?

We believe that the most important outcome of the workshop is beyond what can be published here: it is the growing sensitivity for how to deal with empirical complexity and normativity in the field of migration policies. However, the present open-access collection of papers assembles some important pieces that stimulated the productive interdisciplinary discussions we enjoyed so much during the workshop. These *Proceedings* aim to share our general concern and present some possible research strategies in order to promote further interdisciplinary research on migration policies in the future. We are delighted that many participants agreed to publish their talks or their comments in an open-access form, amongst them three of the five keynote talks. Besides Joe Carens' and Christof Roos' methodological contributions, the collection of papers mainly includes work from the broad area of refugee studies and on deportation. From our point of view, this is an important part of migration studies, since its normative relevance and the responsibility of academics to provide the public discourse with diligent work and reliable research results on all its normatively relevant aspects is beyond question. However, there may well still be a long way to go to reach the ideal of normatively informed empirical studies and empirically informed normative discourse. With this online publication, we aim to make a difference by carrying the interdisciplinary debate on migration policies forward.

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¹⁰ Ayelet Shachar's talk is not included in this volume, but an extensive version of it can be found in *The Oxford Handbook of Citizenship* (see Shachar, 2017).

with the opportunity to pursue our common interdisciplinary approach and autonomously follow our own research interests, which is rather unique at the level of postdoc researchers. Furthermore, we would like to thank Luicy Pedroza, Christof Roos and Anja Weiß for their contributions to conceiving of the event; Veit Bader for filling in for Joe Carens's keynote at such short notice; Trixi Valentin and Marc Schalenberg from the ZiF for all their help in organizing the event at Bielefeld; and our student assistants Joanna Comendant, Jeremias Düring, Anna Kahmen and Ariane Kovac for their commitment to the preparation of the workshop as well as this publication. Last but not least, we are grateful to all the speakers, chairs, and commentators at the workshop, and to those who submitted their texts for publication in the present collection of papers.

References

- Bigo, D. (2002). Security and Immigration: Toward a Critique of the Governmentality of Unease. *Alternatives: Global, Local, Political*, 27(1), 63-92.
- Boes, M. (2000). *Migration als Problem offener Gesellschaften. Globalisierung und sozialer Wandel in Westeuropa und in Nordamerika*. Opladen: Leske + Budrich.
- Brezger, J., Cassee, A., & Goppel, A. (2016). The Ethics of Immigration in a Non-Ideal World: Introduction. *Moral Philosophy & Politics*, 3(2), 135-140.
- Celikates, R. (2016). Migration. Normative und sozialtheoretische Perspektiven. In: R. Kreide & A. Niederberger (Eds.), *Internationale Politische Theorie* (pp. 229-244), Stuttgart: Metzler.
- Cornelius, W., Tsuda, T., Martin, P. L., & Hollifield, J. F. (Eds.). (2004). *Controlling Immigration. A Global Perspective*. Stanford: Stanford University Press.
- De Genova, N., Mezzadra, S., & Pickles, J. (2015). New Keywords: Migration and Borders. *Cultural Studies*, 29(1), 1-33.
- Dietrich, F. (2017). Einleitung. In: F. Dietrich (Ed.). *Ethik der Migration. Philosophische Schlüsseltexte* (pp. 9-27), Berlin: Suhrkamp.
- Fiddian-Qasmiyeh, E., Loescher, G., Long, K., & Sigona, N. (2014). *The Oxford Handbook of Refugee and Forced Migration Studies*, Oxford: Oxford University Press.
- Gerver, M. (2018). *The Ethics and Practice of Refugee Repatriation*, Edinburgh: Edinburgh University Press.
- Gibney, M. (2004). *The Ethics and Politics of Asylum. Liberal Democracy and the Response to Refugees*, Cambridge: Cambridge University Press.
- Hess, S., Binder, J., & Moser, J. (Eds.) (2009). *No integration?! Kulturwissenschaftliche Beiträge zur Integrationsdebatte in Europa*, Bielefeld: transcript.
- Hess, S. & Kasperek, B. (Eds.) (2010). *Grenzregime - Diskurse, Praktiken, Institutionen in Europa*, Berlin/Hamburg: Assoziation A.

- Hoesch, M. (2017). Grenzpolitiken und Flüchtlingsschutz: Von der deskriptiven Analyse zur normativen Bewertung. *Zeitschrift für Rechtssoziologie* 37, 313-336.
- Hoesch, M. (2018). 'Taking up the Slack' in the Context of Refugee Protection. Remarks on David Owen. *Zeitschrift für Ethik und Moralphilosophie* 1, 163-175.
- Hollifield, J. F. (2003). Offene Weltwirtschaft und nationales Bürgerrecht: Das liberale Paradox. In D. Thränhardt & U. Hunger (Eds.), *Migration im Spannungsfeld von Globalisierung und Nationalstaat* (pp. 35-57). Wiesbaden: Westdeutscher Verlag.
- Jacobsen, K., & Landau, L. B. (2003). The dual imperative in refugee research: some methodological and ethical considerations in social science research on forced migration. *Disasters* 27(3), 185-206.
- Joppke, C. (1998). Why Liberal States Accept Unwanted Immigration. *World Politics*, 50(2), 266-293.
- Lessenich, S. (2016). *Neben uns die Sintflut. Die Externalisierungsgesellschaft und ihr Preis*. München: Carl Hanser Verlag.
- Mau, S., Brabandt, H., Laube, L., & Roos, C. (2012). *Liberal States and the Freedom of Movement. Selective Borders, Unequal Mobility*. Houndmills: Palgrave Macmillan.
- Miller, D. (2016). *Strangers in Our Midst. The Political Philosophy of Immigration*, Cambridge (Mass.): Harvard University Press.
- Mecheril, P. et al. (2013). Migrationsforschung als Kritik? Erkundung eines epistemischen Anliegens in 57 Schritten. In: Mecheril, P. et al. (Eds.). *Migrationsforschung als Kritik? Konturen einer Forschungsperspektive* (pp. 7-55), Wiesbaden: Springer.
- Natter, K. (2016). Mehr als nur Herkunftsländer: Migrationsmuster in Algerien, Marokko und Tunesien. *Studie der Friedrich-Ebert-Stiftung*.
- Owen, D. (2016). Refugees, Fairness and Taking up the Slack: On Justice and the International Refugee Regime. *Moral Philosophy and Politics* 3, 141-164.
- Pallitto, R., & Heyman, J. (2008). Theorizing Cross-Border Mobility: Surveillance, Security, and Identity. *Surveillance & Society*, 5(3), 235-333.
- Salter, M. B. (2007). Governmentalities of an Airport: Heterotopia and Confession. *International Political Sociology*, 1, 49-66.
- Shachar, A. (2017). Citizenship for Sale? In A. Shachar, R. Bauböck, I. Bloemraad, & M. Vink (Eds.), *The Oxford Handbook of Citizenship* (pp. 798-816). Oxford: Oxford UP.
- Transit Migration Forschungsgruppe (Ed.) (2007). *Turbulente Ränder: Neue Perspektiven auf Migration an den Grenzen Europas*, Bielefeld: transcript.
- Tsianos, V., & Karakayali, S. (2010). Transnational Migration and the Emergence of the European Border Regime: An Ethnographic Analysis. *European Journal of Social Theory*, 13(3), 373-387.
- van Houtum, H., & van Naerssen, T. (2002). Bordering, Ordering and Othering. *Tijdschrift voor Economische en Sociale Geografie*, 93(2), 125-136.
- Walters, W. (2006). Border/Control. *European Journal of Social Theory*, 9(2), 187-203.
- Walters, W. (2015). Migration, Vehicles, and Politics: Three Theses on Viapolitics. *European Journal of Social Theory* 18(4), 469-488.

Weiß, A. (2017). *Soziologie globaler Ungleichheiten*, Berlin: Suhrkamp.

Wellman, Ch. H. (2015). Immigration. *The Stanford Encyclopedia of Philosophy* (Summer 2015 Edition), ed. Edward N. Zalta. URL = <https://plato.stanford.edu/archives/sum2015/entries/immigration/>.

On the Relationship between Normative Claims and Empirical Realities in Immigration

Joseph H. Carens¹

Department of Political Science, University of Toronto

Abstract

What is and what ought to be the relationship between empirical research and normative analysis with respect to migration policies? The paper addresses this question from the perspective of political theory, asking about the place of empirical research in philosophical discussions of migration, and, for the most part, leaving to others questions about what role, if any, normative considerations do and should play in empirical research on migration. At the outset the paper also takes note of one important way in which empirical research can and should contribute to normative discussions of migration, quite apart from its role in contributing to political philosophy.

Keywords

Ethics of migration; migration studies; political theory; political philosophy

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What is and what ought to be the relationship between empirical research and normative analysis with respect to migration policies? I am a political theorist, and so I want to address this question from that intellectual perspective, asking about the place of empirical research in philosophical discussions of migration, and, for the most part, leaving to others questions about what role, if any, normative considerations do and should play in empirical research on migration. But I want to take note at the outset of one important way in which empirical research can and

¹ Email: jcarens@chass.utoronto.ca.

should contribute to normative discussions of migration, quite apart from its role in contributing to political philosophy.

Political theorists tend to focus on questions of principle. They make arguments about what ought to be done, usually (though not always) in contexts where there is some disagreement about what ought to be done. In many areas of public life, however, the most important intellectual task from a moral perspective is not to clarify what ought to be done but rather to bring into view the gap, and sometimes even the contradiction, between what is publicly announced as the normative principle or goal of some policy and how that policy actually works in practice.

Sometimes this gap/contradiction is relatively easy to see. For example, the Trump administration's policy of separating children from parents in families seeking asylum was clearly intended to discourage people from seeking asylum even though the putative justification of the policy appealed to the requirements of legal procedures.

Often, however, there are policies that seem more plausible on the surface. The gap/contradiction between the ostensible goal of the policy and the way it actually works in practice can only be seen when careful empirical research brings it to light. A lot of the empirical research on migration performs this important unmasking function. Think, for example, of some of the empirical work on how immigration detention works in practice and how far removed that is from the ostensible purposes of and justifications for detaining immigrants. I do not do this sort of critical empirical research myself, but I applaud it. I think it performs a crucial normative task (even though some of the people who do it do not like the language of normativity).

So, to my main task. To what extent and in what ways should political theorists use empirical claims and/or draw upon empirical research in their reflections on immigration?

My first inclination is simply to say, "That depends both on what questions the theorist is asking and on how the theorist chooses to address those questions." That undoubtedly sounds like a cop-out, but in some ways this initial answer draws attention to an important general point, a cautionary note about this sort of discussion.

When it comes to political theory, I'm a pluralist. There are many different ways to do political philosophy and many different ways to approach any given question, and they all – or almost all – have the potential to teach us something important. As I see it, political philosophy is ultimately concerned with the question of how we ought to live, individually and collectively. I think this is the sort of question for which

there is never a single right answer or a simple one. That is true even when one focuses only on one small aspect of this big question, as one does in discussing immigration. There can be right and wrong answers to particular questions about immigration, especially in the context of particular debates about particular issues, but there are many different ways to think about immigration as a general topic, and every one of those ways is bound to be limited, partial and incomplete. Indeed, the most illuminating accounts often cast the deepest shadows, making it hard to see aspects of a topic that do not fit within the intellectual framework and presuppositions of the illuminating account.

In this paper therefore, I'm not going to try to say how every political theorist ought to use empirical claims and/or draw upon empirical research in thinking about immigration. Instead, I'll just say something about how I have tried to do that in my own work and my reasons for taking my approach. I will also say something about my worries about the dangers of certain alternatives, including alternatives pursued by other political philosophers, and how I have tried to avoid those dangers. At the same time, however, I want readers to recognize, at least in the backs of their minds, that I am not offering universal guidelines for theorists. Other theorists may have good reasons for engaging with empirical research differently from the ways I have done so, or indeed, good reasons for not engaging with it at all.

Overall, the approach that I have taken is this. In thinking about immigration as a political theorist, I find it helpful to try to be aware of the ways in which my arguments presuppose certain background facts about social institutions and practices. I try to pay attention to the ways in which changes in those background facts would or would not affect my arguments. Some normative claims about immigration are more context-sensitive and more fact-sensitive than others, but there are few that are completely independent of an understanding of how things work in the world now or how things might plausibly work in the world under different conditions. So, I am aware that when I write about immigration I do rely upon empirical claims.

At the same time, like most political philosophers, I am not a skilled empirical researcher or deeply knowledgeable about empirical research. There are a few theorists who are also skilled at empirical research, like Veit Bader, who has contributed to this conversation, and Rainer Bauböck, who did not, but such scholars are few and far between. Political philosophers like me who read empirical research on immigration but who are not really competent to assess it critically ought to be cautious in the ways in which we use empirical research in our normative analyses. The biggest danger is cherry-picking, i.e., citing empirical research that we think

supports a position that we have arrived at on other grounds without considering whether these empirical findings are widely accepted, contested by other researchers, etc. But I would go further and say that there are good reasons to construct normative analyses in ways that make them as fact-*ins*sensitive as possible, at least with respect to empirical claims that are highly contested or highly vulnerable to new research findings.

Sometimes there may be a particular argument that just does rest ultimately on contestable claims about how things work in the world. So, to pursue that argument one must simply try to assess the empirical literature in as thorough and as fair-minded a way as one can. I think that an article on immigration and global poverty reduction by Kieran Oberman a few years ago (Oberman 2015) is an admirable example of this sort of responsible attention to the empirical literature, although Oberman's analysis in the second half of that article shows why empirical findings alone are rarely decisive in normative debates. But one can often construct normative arguments so that they reveal the relevance of empirical claims without actually making any (highly contestable) empirical claims oneself or at least without making such claims central to one's argument. That is in fact the way in which I tried to organize my own analysis in the book on the ethics of immigration that I published a few years ago. (Carens 2013)

In sum, my own aim is to steer between the Scylla of excessively abstract principles and the Charybdis of highly contestable empirical claims. My account so far has itself been pretty abstract, so let me steer away from Scylla a bit by providing some concrete examples of the ways in which the normative discussion of immigration in my recent book does and does not rely upon empirical claims and why I think that approach is justifiable.

Let's start with the issue of access to citizenship for immigrants and their descendants. In discussing this topic in my book, I simply presuppose certain familiar features of citizenship today and of the background social institutions and practices in which citizenship is situated. The current international order divides the world into different states and prescribes that every individual should have legal membership status in (at least) one state. This legal membership status is defined as nationality in international law, but so far as I know citizenship status and nationality status are identical in international law. (I might be missing some technicality here, but the two are certainly functionally equivalent.) Certain rights are attached to nationality in international law, most notably, the right not to be deported from a state in which one holds nationality status and the right to enter and live in that state if one is currently abroad. Nationals are also entitled to diplomatic assistance while abroad.

These facts about what citizenship entails today are just that – facts. I offer no argument about why things should be organized in this way. Indeed, there might be good reasons to think that the way in which the world is organized today is problematic from a normative perspective, but if you try to tackle the overall question of how the world ought to be organized, you may find that you do not spend much time discussing immigration. If you try to talk about everything at once, you wind up saying very little about anything. Empirical researchers have to find ways to limit the scope of any particular study, and so do normative theorists. To keep the focus on immigration, you have to accept certain background constraints, not in a fundamental way but for purposes of discussion. So, in my book I say explicitly that at the outset I will simply presuppose the existing international order and its institutional arrangements and conduct my normative analysis within those constraints. In the last few chapters of the book, I do move away from this a bit in considering the argument for open borders, but even there I limit my inquiry by keeping the presupposition of a world divided into relatively independent states rather than, for example, assessing the merits and demerits of world government.

Another (related) fact about citizenship today is that certain political rights are usually attached to citizenship. Within democratic states, holding citizenship status normally entitles an adult to participate in the democratic decisionmaking process by voting in national elections if they live within the state.² A few states (e.g., New Zealand) extend voting rights to residents who are not citizens. Nevertheless, the basic pattern is that you must be a citizen to vote. If New Zealand's practice were typical, normative discussions of access to citizenship might look quite different (although the legal consequences of citizenship apart from voting would still matter). Indeed, some people have argued that the right to vote should be detached from legal citizenship. There is nothing wrong in principle with pursuing that line of argument, but again no one can talk about everything at once. So, in my own discussion, I simply assumed this fact about the link between voting and citizenship as a background constraint in my normative analysis. In part because the right to vote is attached to citizenship, I argued, immigrants who have settled in a state (and, even more so, their descendants who are born and raised in the state) should have easy or even automatic access to citizenship. That follows from the way in which we understand the requirements of democratic legitimacy today. Notice that while my argument about

² I add the qualifier “normally” because some states disenfranchise people convicted of serious crimes while they are in prison and, in a few cases, even afterwards. This is a particularly serious problem from a democratic and egalitarian perspective in the United States. I add the qualifier “if they live within the state” because some states limit the voting rights of citizens living abroad, although many extend voting rights to them.

access to citizenship in democratic states today rests upon certain empirical claims about the rights attached to citizenship, the facts upon which my normative arguments rest are themselves not in dispute, even by people who might reject my interpretation of the normative requirements of democracy. In claiming that normally voting in national elections is attached to citizenship, I am making an empirical claim, but it is not a contested empirical claim or one that needs to draw upon scholarly empirical research on immigration in any significant way.

In sum, the way the modern world is organized affects the human interests at stake in access to citizenship and that in turn affects the normative arguments about who should have access. Conceptually, there is no reason in principle why the rights currently attached to nationality (and thus citizenship) could not be eliminated entirely or assigned on some other basis altogether. If this were the case, the normative discussion of access to citizenship might look quite different, because the interests at stake in access to citizenship would be quite different. But while my normative arguments thus rest on empirical claims about the way the world is organized, these are not contested empirical claims. I did not feel the need to cite any scholarly literature in identifying these features of citizenship in the modern world because they are so familiar and commonplace.

I have been citing examples of the ways in which my arguments about migration sometimes depend upon empirical claims but not upon empirical research. So, when do I draw upon empirical research and when do I try to avoid it?

One important kind of empirical research that I draw upon in my book is historical research into the evolution of practices and policies in the area of immigration. Let me mention a few examples of how I use historical research in my book, drawing attention at times to the way this use of history differs from what some other political philosophers do in their own analyses.

Take the issue of whether it is morally acceptable to transmit citizenship at birth to the children of current citizens, a legal practice normally described as *ius sanguinis*. Some people reject this practice in principle, arguing that it reflects a conception of the political community as something based on blood ties. My own view is a little different. I argue that the way birthright citizenship works in the modern world is unjust because it is intimately linked to the exclusion of immigrants and to a way of organizing the world that generates vast differences in one's life chances on the basis of birth. But I don't think it follows that birthright citizenship is inherently unjust or that it is inappropriate to think of human beings as born into communities of various sorts.

In my view, one can distinguish between morally defensible and morally indefensible practices of transmitting citizenship, while setting aside (for these purposes) more basic questions like whether the world should be divided into independent states and, if it is, whether those states should be able to control immigration. In that context (i.e., focussing on the question of transmission if one assumes the existence of states with the right to control immigration), I argue that it is morally appropriate to grant citizenship at birth (1) to the children of current citizens who are living in the territory where they are citizens, (2) to the children of citizens now living abroad so long as the citizen parents had previously lived in the country, and (3) to the children of immigrants who have settled in the country. One component of my overall argument draws upon historical research on the origins of *ius sanguinis*. Patrick Weil has shown that *ius sanguinis* emerged in France after the Revolution as a way of affirming a republican rather than monarchical or medieval conception of the polity. (Weil 2008) So, if Weil is right (and I think he is), the meaning of *ius sanguinis* depends upon context. There may be places where this way of transmitting citizenship draws upon an objectionable form of ethnic nationalism, but that is not an intrinsic characteristic of the practice. Thus, the historical research weakens a possible normative objection to the use of *ius sanguinis*.

Later in my discussion of dual citizenship, I draw upon the research of historians to show that in the past limitations on dual citizenship were closely tied to the subordination of women. When a child had parents of different nationalities, it was normally the father's nationality that was transmitted at birth, not the mother's. Recognizing this history does not prove that prohibitions on dual citizenship are wrong. After all, it is possible to construct gender neutral rules regarding the transmission of citizenship that still exclude dual citizenship. Nevertheless, this historical association tends to delegitimize restrictions on dual citizenship, making such restrictions appear at the least as less than benign and natural.

A third place in the book where I rely explicitly upon historical research is in my discussion of the rights of residents. At the beginning of the twentieth century, there were considerable differences between the legal rights of citizens and the legal rights of residents. Over the course of the century, these differences narrowed substantially. There are a few important differences that remain, but only a few. In the empirical literature on this topic, there is considerable disagreement about the causes of this evolution, but none that I can see about the evolution itself.

I think that some philosophers would probably say, "so what?" in response to this recitation of historical developments. The fact that something has happened provides no grounds for thinking that it ought to have happened. The fact that the

difference between the rights of citizens and residents has narrowed does not prove that it ought to have narrowed. Sometimes history moves in the wrong direction from a normative perspective. And so, one might argue, the historical evolution that I have described is irrelevant to the normative argument.

I understand that view, but I think it relies on too narrow an understanding of how we gain moral insights. In my opinion, the fact that the practice of so many democratic states has developed in this way matters. It's not a decisive consideration, and it plays no explicit role in the normative argument itself, but I do think it shifts the burden of proof somewhat. It makes it harder for anyone who wants to argue for creating a sharp difference between the rights of residents and the rights of citizens. And in fact, even in the current anti-immigrant climate, this feature of contemporary democratic practice has not drawn much critical attention. Here and there one hears complaints about immigrants relying disproportionately on social welfare programs provided by the state, but even in those cases, the argument is generally advanced as a reason for restricting the number of immigrants who are admitted rather than for radically reducing their rights. This is one of those cases where I think it is plausible to argue that the evolving practice reflects an implicit but now widely accepted, moral view, even if one does not think that the moral view was what caused the change.

One implication of this approach that may worry some, however, is that it implies a bit of a conservative bias. The approach seems to entail that if one wants to challenge existing arrangements (as I do at many points, especially in my discussions of refugees and open borders), then one should have a stronger case than if one simply accepts a status quo that makes intuitive moral sense to most people. I am not myself troubled by this implication so long as it is not exaggerated. I think that it is appropriate for those arguing for significant change to have stronger and more explicit reasons for their demands than those who want to keep things as they are. It is reasonable to ask that an argument for admitting many more refugees, and especially an argument for open borders, be stronger and more persuasive than an argument that defends the conventional view. I also think that my arguments for admitting more refugees and for opening borders satisfy that requirement.

The final example of reliance upon historical research that I want to cite concerns criteria for the selection and exclusion of immigrants. In my chapter on what I call "ordinary admissions," i.e., the kinds of choices states may make about admissions on the assumption that they have considerable discretion in this area, I examine the idea that democratic states should exclude potential immigrants who do not accept democratic norms and values. It is an idea that one hears a lot in the contemporary context, and I criticize the idea from a number of perspectives. One

important element in that criticism relies on the historical argument that we can clearly see today that previous attempts to screen immigrants on this sort of basis reflected unjustifiable religious and ethnic prejudices disguised as a concern for democratic institutions. There is a lot of good historical literature on the opposition to Catholic and Jewish immigration to the United States in the nineteenth century, much of it expressed in terms almost identical to the opposition to Muslim immigration that we hear today in both Europe and North America. The historical literature shows how unjustifiable that earlier opposition was, how often it was simply a form of religious prejudice. This negative historical experience and its similarity to what is going on today provide one reason among others for resisting efforts to use those sorts of screens today. Again, this is not a decisive consideration, but in my view, it adds weight to the principled reasons that we have for resisting this sort of discrimination.

The examples I have cited so far are ones in which I use historical research to supplement or support the basic argument I am making about some topic. In all of these cases, however, the historical component of my argument is not a decisive consideration. So, even if new historical evidence were to emerge that reversed the findings upon which I have drawn, that development would not fatally weaken the basic argument.

There are a few points in my book where I do rely fairly directly upon empirical claims based on research that others have done and where I would change my view of what was morally required if that research turned out to be fundamentally flawed. For example, in discussing dual citizenship, I identify some of the objections that have been posed to permitting dual citizenship and say that those who have studied the actual effects of dual citizenship have found that it does not have the negative consequences that its opponents fear. If subsequent research showed that dual citizenship was indeed creating significant conflicts of loyalty, allegiance, commitment, and emotional attachment, unfair inequalities of opportunity, or undue burdens on states or on dual citizens themselves, then I would have to modify my view of the desirability of dual citizenship, at least to some extent.

At a number of points in my book, I argue that often what matters most morally is how things work in practice rather than whether or not a policy fits well formally with what principle demands. The implications of that sort of argument for any particular issue clearly rest upon empirical claims about how things work, although the argument itself (i.e., that from a moral perspective what actually happens as the result of a policy is often more important than the validity of the principle that is offered to justify the policy) is not dependent upon empirical claims.

Here is one example of the way practice matters morally. In my view, requiring long settled immigrants to pass a test in order to obtain citizenship is wrong in principle, an impermissible means to the desirable goal of providing immigrants with the information and training they need to participate well in the democratic process. At the same time, if the tests people have to take in order to obtain citizenship are relatively easy to pass, can be taken more than once, and are free or very inexpensive, then requiring such tests for access to citizenship is not a serious problem in my view. I think that some states (e.g., Canada and the United States) have citizenship tests that meet this requirement of not being too demanding and others (e.g., the Netherlands) do not. That specific claim depends both upon empirical information about the particular cases (costs, failure rates, etc.) and upon the evaluative standard of what counts as excessively demanding. The latter is more a normative and interpretive question than an empirical one.

Some people might find the view that I have just articulated deeply objectionable. They might say that if citizenship tests are wrong in principle (as I claim they are), one should oppose them. But a word like “oppose” can conceal important distinctions about the reasons for action and relative priorities. I do think that it is appropriate in a philosophical work like my book which aims to tell the truth as I understand it to explain why citizenship tests are wrong in principle, but I also think that it is morally appropriate to pay attention to the relative importance of the harms caused by practices or rules that one regards as wrong in principle. In my view, it makes moral sense to concentrate one’s critical and political fire on rules and practices that are not only wrong in principle but that also cause significant harm. Moreover, if one is more likely to succeed in eliminating most of the harm with a policy approach that does not challenge the underlying principle directly, that may sometimes be a preferable approach. Whether this is appropriate in a particular case is the sort of question that requires judgment and appreciation of context.

Here is another example of that issue. In my view, as a matter of liberal democratic principle, children who have been raised in a society in which they were not born or did not acquire citizenship at birth should acquire citizenship automatically when they become adults. In contrast to this, under French policy, children born and raised in France have a legal right to acquire French citizenship at age 18, but they must consent to the acquisition of citizenship in order to receive it. So, there is a theoretical conflict between the principle I defend (automatic acquisition) and French policy (acquisition by consent).

As it turns out, what most affects the proportion of such children who become citizens is the default rule used to determine the interpretation of consent. Under some French governments, consent has been interpreted as the right to refuse. So, under that policy, children born and raised in France become French citizens automatically unless they refuse French citizenship. Their non-refusal is interpreted as consent. As an empirical matter, very few people entitled to French citizenship refuse it. So, while there is a formal conflict between the principle I defend and the French practice that I just described, I argue that the French practice is an acceptable policy, or, more precisely, not the sort of thing one should try to challenge because the way it works in practice leads to almost the same outcome as what I think is required as a matter of principle. By contrast, under other French governments, consent has been interpreted as requiring an affirmative expression of a desire to acquire French citizenship. At age 18, the person has to make a formal request for French citizenship in order to receive it. Under that policy, significant numbers of children born and raised in France do not become French citizens. I am highly critical of that policy.

In both these cases, my own assessment of the policy depends upon its consequences for the acquisition of citizenship because I think that all of these children should be French citizens. If the former policy led to many of these children failing to acquire citizenship, I would be highly critical of it, and if the latter policy did not lead to many children failing to acquire citizenship, I would be much less critical of it. What matters most from my perspective, therefore, at least in this case, is not whether a policy formally recognizes the moral principle that I want to defend but the extent to which it generates the outcomes required by that principle, and that is an empirical question.

These examples show that there are places in my normative discussion of immigration where the information provided by empirical research can play an important role in the conclusions one reaches about particular issues, but they also show some of the ways in which my arguments about principle are, to some extent, shielded from empirical challenges. There are other points at which I deliberately choose not to tie my argument too closely to empirical claims that I thought could be reasonably contested, even though, if the empirical claims are true, they strengthen my overall argument. Here are two examples.

In considering the question of whether or not irregular migrants should be granted legal authorization to stay in the states where they have settled, some people

have argued that they should be authorized to stay because the receiving state has actually covertly encouraged the migrants to arrive and settle while officially denying them entry. This covert approach appeases certain domestic constituencies, but it also renders the migrants more vulnerable to exploitation, which the critics argue is one of the intentions of this way of dealing with irregular migration. The critics argue that this covert approach to admissions is morally indefensible, and that, in pursuing it, the state has forfeited its moral claim to be entitled later to exclude these irregular migrants, even if it was originally entitled to regulate immigration. The state owes legal status to people whom it has covertly admitted and invited to stay.

I think that this is a good argument in principle, and that it applies to some cases or at least has applied to some cases in the past. I am not persuaded, however, that this description of what states are doing applies to every case in which we find irregular migrants present in a state or even that it applies today to some states, like the United States, where there is good evidence that it applied in the past.

In making the case for granting legal status to irregular migrants, I do not want to tie my own argument too tightly to a line of reasoning which seems to me to be constrained by contestable empirical claims about particular histories and which is thus potentially vulnerable to new empirical findings. My own argument is that the longer one stays in a state, the stronger one's moral claim to remain, regardless of the reasons why one arrived in the first place. In this argument, facts still matter to particular claims because the strength of one's claim depends upon the factual question of how long one has been present (at least up to some threshold), but the principle behind the argument (the longer one is present, the stronger is one's claim to remain) does not depend upon any empirical claims about what particular states have done at any given moment in time.

Here is a second example. In discussions of the contemporary refugee crisis, one sometimes encounters the argument that because the difficult circumstances that lead so many people to flee their home states are themselves the legacy of European colonialism, former colonial powers in Europe have a special moral responsibility to admit refugees. Again, I do not reject this argument, but I do try to avoid tying my own discussion of the responsibility of rich democratic states for refugees too tightly to it because the empirical claim is both contestable and limited in its reach. How many of the problems in the global south are rightly understood as the legacy of colonialism is highly contested. Beyond that, some European states were much more deeply involved in colonialism than others. It seems to me that it is preferable not to make the moral argument for admitting refugees depend heavily on this assertion of a causal connection when there are other arguments for admitting refugees that are

just as powerful or more powerful and that are not tightly tied to such a contestable claim.

In my book, therefore, I argue that the moral responsibility to admit refugees is overdetermined. There are two sorts of arguments – the humanitarian obligation to help those in desperate need and the obligation that emerges from participation in the state system itself to help those whom that system clearly fails to serve – that do not depend upon any sort of specific claim about the ongoing consequences of colonialism.

As I said, I do not reject the argument itself. On the contrary, I say that a third argument for admitting refugees is that one has a special responsibility to admit refugees when one's state is somehow responsible for their plight, as most Americans recognized in the wake of Vietnam. The argument about the legacy of colonialism can certainly be advanced under the rubric of this more general argument that a state that bears causal responsibility for the difficulties faced by a particular group of refugees has a stronger moral responsibility to assist and admit those refugees, but the more general argument does not depend upon the validity of the particular claim about colonialism, and that in turn makes the overall argument more robust.

Finally, let me offer a few words about the connections between empirical work and my argument for open borders. As some readers will know, I have long argued that justice ultimately requires open borders among all states, at least for the most part and with some modest qualifications. I do not present this argument as a policy proposal about what particular states ought to do here and now, either unilaterally or in combination, precisely because the open borders argument itself is not just an argument about the freedom to move from one place to another but also an argument about the sorts of social arrangements that best meet the requirements of respect for human moral equality. My view is that open borders would be one component of a just world order. I do not say that it is the only essential ingredient. There are many reasonable questions to ask about what the best way is to move in the direction of this broader goal of a just world. Even so, my argument for open borders remains relevant, and it is not entirely detached from empirical inquiry.

When I first made this argument, many years ago now, I often heard people say that it was impossible even to imagine open borders among sovereign states; that open borders would be incompatible with democratic self-determination; that open borders would inevitably disrupt social cohesion, undermining social welfare arrangements at the very least and in all likelihood generating social chaos; and so on.

I have offered a number of responses to these sorts of challenges over the years, but one of them is to appeal to the actual experience of the European Union. Here is a set of political communities that fought wars against each other for hundreds of years, with different antagonists at different times. Their populations speak different languages and have different histories and cultures. Many of the violent conflicts were rooted in differences of religious identity. Nevertheless, at least until recently, the states of the European Union had maintained a regime of open borders among themselves for decades without the disastrous consequences that people often asserted would inevitably follow from open borders between states.

De esse, posse. From the fact that something has actually happened, we can conclude that it is possible. Of course, the free movement regime within Europe is now under considerable strain, and people often point out, quite rightly, that the differences between the economic, social, and political regimes within the various EU states are small compared with the differences among other political communities in the world. These are fair and relevant observations, but from my perspective, they are reasons for investigating more carefully the empirical conditions under which freedom of movement among states works well, the conditions under which it gives rise to problems, and the reasons why it creates problems when it does. I suspect that most of those who declare global freedom to be impossible would be opposed to free movement even if it did not have the deleterious consequences that they project as its inevitable outcome. More careful empirical inquiry of the sort I have just mentioned might make it possible to distinguish what is inevitable from what can be done here and now.

This leads to two final points. First, as the discussion of open borders illustrates, lots of arguments about immigration (and many other topics) invoke claims about the consequences that will follow if one does or does not adopt a particular course of action. In other words, the arguments rest, or at least appear to rest, upon claims about *facts* about how the world works. But as I said at the outset, we know that one of the dangers that we all face in our reflections is that we would like to think that the world will work the way we want it to work and we are tempted to find evidence to support that view. As political theorists, we want facts (if not God) on our side, and so it is always tempting to claim that the facts are on our side.

One way to resist this temptation – and in the process to clarify just how fact-sensitive a particular normative claim is – is to assume the opposite of what we hope will be the truth, and then see whether that affects our sense of what is the right thing to do, of what justice requires and so on. Of course, factual questions are rarely binary in nature. So, it can be even more helpful to adopt a range of different assumptions

about what appear to be the key factual questions in order to see whether a different set of facts will lead to a different normative conclusion. If all of the participants in a debate were to take this approach, it might help to clarify the nature of the disagreement between them and the extent to which that disagreement might be affected by careful empirical inquiries.

Second, one occasionally hears the claim that political theory is intended to guide practice. That is certainly one of the goals of some sorts of political theory, but it is not the only possible legitimate goal for a normative inquiry. The goal of guiding practice should not be used as an excuse for foreclosing fundamental challenges to the status quo.

What it means to guide practice can be interpreted in different ways. At one end, it might mean that someone wants to give advice about how to act in the world in which we live today. Of course, that still leaves open the question of who is to be the recipient of this advice. What is appropriate advice for an office holder may be different from appropriate advice for an insurgent activist. Nevertheless, I take it to be a fundamental requirement of political ethics that when engaging in political action and making political choices, we should always (or almost always) take into account the risks, probabilities, and consequences both of what we are recommending and of the likely alternatives. In actual politics, it is almost never enough to focus only on the intrinsic merit of a particular course of action.

Giving advice about how to act in the here and now is not the only way to guide practice, however. In fact, focusing on the intrinsic merits of particular courses of action is precisely what I do in most of my book. There are occasional places where I draw attention to other considerations, as in my discussion of citizenship tests and French policies regarding the acquisition of citizenship. For the most part, however, I focus on the question of what principles should guide policy without spelling out what this implies concretely for particular times and places, precisely because these other considerations of risks, probabilities, and consequences vary in particular contexts and need to be taken into account in deciding what to do here and now. I think the approach I have taken is not just an exercise in philosophical reflection – although it is that – but also a way of guiding practice. It can be important to enter the fray, but it can be equally important to stand back from it in order to gain some perspective.

Let me repeat that I am not suggesting that every political theorist should adopt my approach. It would be entirely reasonable, in my view, for theorists to take giving advice as their primary aim and responsibility rather than exploring the implications

of principle. Theorists who take that sort of approach might frame their questions quite differently from mine. The key normative question might then be not ‘what is right in principle?’, but rather ‘what is the best we can realistically hope for under this particular set of circumstances?’ If one is interested in influencing public policy, it certainly makes sense to focus on the policies that are on the table (or at least on the side cupboard), not on ones that have no chance of adoption (regardless of why they are not feasible). And one may want to shape one’s criticisms to foster the best possible outcome rather than to draw attention to the ways in which the best possible in a given context falls far short of the best possible in principle. Focus on the latter may be demoralizing for those trying to work within the limits of the currently possible. I hope that articulating some of the requirements of an approach like this also reveals some of its limitations, however.

Some people insist that “ought implies can” and that whatever we advocate must be feasible. Not everyone accepts this constraint upon their theoretical reflection, but I do accept it as a constraint upon mine, so long as it is not interpreted too narrowly. One should recognize that “feasibility” can mean different things in different contexts, however. To say something is feasible with respect to immigration might mean that there is a policy or practice that has a good chance of becoming being passed into law in a particular time and place or it might mean that some idea about immigration could be adopted at some point in time given the right context and circumstances or it might mean something in between. There can be good intellectual reasons for adopting a very narrow conception of feasibility in some contexts, but there are also good intellectual reasons for adopting a very broad conception of feasibility in other contexts, and something in between in still other contexts. We are more likely to make progress in our reflections if we do not try to insist that everyone else should adopt a single conception of feasibility or a single model of what it means for theory to guide practice but rather try to understand what conception of feasibility or what relationship between theory and practice is being invoked, either explicitly or implicitly, in a particular discussion. We can then perhaps reflect upon the advantages and disadvantages of adopting that conception in the particular context in which the discussion is situated.

In my own reflections, I have deliberately and explicitly tried to vary the weight given to different understandings of feasibility. Sometimes I have offered reasons for accepting existing practices or modifying them only slightly. Those discussions fit well with the idea of the need to think about what to do here and now. But sometimes focusing on the question of what to do in the here and now has limitations as a way of guiding practice broadly understood. It can prevent us from even noticing the

deepest problems and the most profound injustices, precisely because they are so intractable, so little open to immediate political challenge. Sometimes simply bringing such constraints into view may be the best way of challenging them, the best way of guiding practice, and I have tried to do that as well.

References

- Carens, Joseph H. 2015. *The Ethics of Immigration* New York: Oxford University Press.
- Oberman, Kieran. 2015. Poverty and immigration policy. *American Political Science Review*, Volume 109, Issue 2: 239–251.
- Weil, Patrick. 2008. *How to Be French: Nationality in the Making since 1789*. trans. Catherine Porter. Durham: Duke University Press.

Comment on Joseph Carens: On the Relationship between Normative Claims and Empirical Realities in Immigration

Christof Roos¹

Department of Politics, Institute of Social Sciences and Theology, University of
Flensburg

Abstract

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The relationship between normative analysis and empirical research in studying migration policy, so far, has been uncharted terrain. Joseph Carens addresses this theoretical gap by drawing a conceptual map by asking how this relationship is defined and how it ought to be defined. Specifically, he looks at debates in political philosophy, or, to be more precise, normative debates on migration policy, and the place that empirical findings have in these discussions. He identifies three meta-perspectives on how normative political theorists engage with empirical research or become politically active: first, he endorses empirical research delivering context to

¹ Email: christof.roos@uni-flensburg.de.

normative theorization; second, he indicates potential problems that may arise if moral arguments depend on empirical claims; and finally, he reflects on what it means for the political theorist to engage in political activism. This comment deals with each perspective critically and considers the effect of Carens' arguments for normative political theory. In addition, it debates Carens' arguments at backdrop of a societal debate on migration and policy that is infused more by arguments of the moral rather than pragmatic kind.

I.

Carens' first perspective is an advice for the political theorist, it calls for caution concerning the taken for granted knowledge on social institutions and practices. Theorists may take those as a given in their analysis, however their thinking should be sensitive for the fact that context and respective knowledge on context is subject to change. He illustrates the importance for context sensitive theorization by taking examples from his seminal publication *The Ethics of Immigration* (2013). Among others, he drew on findings from historical research on the evolution of different forms of citizenship regimes or residence rights which helped him to avoid certain false conclusions. Historical accounts, in particular, may also be used as a reminder of past experiences that provide reason for resisting some of today's practices. Thus, normative arguments based on historical experience can be used as a reference point for claiming societal change. For an empirical researcher this claim could be understood as a trivial reminder for context sensitivity and critique of overgeneralizations based on small scale findings. However, the claim is much more fundamental than a call for context sensitivity. From the perspective of the commentator, current normative and political debates on immigration and asylum might indeed build on false assumptions, such as an outdated understanding of statehood and citizenship. In terms of asylum seekers, access to the refugee status is often justified on the distinction between refuge from state led persecution in the country of origin and general economic and societal misery. For the latter, dysfunctional societies and respective dysfunctional societal norms are considered to be the reason (cf. Collier 2013). As a consequence, state failure rather than state led persecution can be observed in ever more countries that produce asylum seekers. Within this illustrative example, Carens' remark on context sensitivity reminds the normative theorist to consider whether it is actually sound to theorize decisions on access to territory on the premise that every person, in principle, holds the citizenship of a state that provides for a place to be. Without looking into the empirical reality of

statehood and citizenship in countries of origin, theorizations on in- and exclusion from the refugee status in countries of destination seem to be fundamentally flawed.

II.

The second perspective that Carens elaborates somehow compromises his first claim: he calls for caution if normative principles are dependent on contested empirical premises: “But while my normative arguments thus rest on empirical claims about the way the world is organized, these are not contested empirical claims.” In the latter case, the derived principle is vulnerable to new empirical findings or risks validity altogether, if it rests on findings that are incorrect. Thus, he suggests adopting a range of different assumptions about what appear to be the key factual questions in order to see whether a different set of facts will lead to a different normative conclusion. His answer on the level of engagement that theorists should seek with empirical research is not necessarily clear. Theorists should be careful about empirics but should not ignore them either since ‘*de esse, posse*’ and thus has normative implications: “From the fact that something has actually happened, we can conclude that it is possible.”

Carens is a practical philosopher, he derives principles from empirical observations. Likewise he is concerned with the validity of any moral principle and its applicability in practice. In this vein, any moral principle calls for an assessment of its effectiveness in the empirical world. This claim for effectiveness, however, needs a qualification in terms of conditions that must be met for the principle to be able to take effect. The translation of this threshold on how migration policy should be theorized has serious implications for the political theorist. Usually, they are exempt from acting on their principles, seeing towards their applicability in practice. If they had to be concerned with what might work in practice or not, it would add a layer of justification and constrain on the philosophers’ work, inhibiting their potential impact on theory development. As described above, the call for practicality of philosophical principles avoids detachment of political theory from real world experiences and developments. This also holds for the open border hypothesis where he suggests to model an ideal situation within the regional setting of the European Union or globally, in terms of a ‘just world order’ in which the principle could take effect. However, Carens does not consider whether a more radical detachment could also be a condition for the articulation of alternatives and avantgarde ideas. Ideas seem to populate a theoretical space that find their applicability one day or never, depending on the circumstance, that cannot be imagined at the time of thought creation.

As much as the empirical researcher, writing this comment, sympathizes with Carens' two perspectives of context sensitivity and applicability, a debate on what is lost by applying these principles would have been appreciated. The comfortable middle ground of a 'yes and no' recommendation, in terms of the political philosopher's engagement with empirical research begs for another perspective that dares to theorize on migration and policy unbound from empirical research.

III.

In his third perspective, sort of a synthesis between perspective one and two, Carens promotes his principles as a guide for engagement with political activism. This, traditionally, is the stronghold of normative political theorists, the ability to guide practice by devising normative alternatives and their moral implications. He suggests to take into account the risks, probabilities, and consequences both of the recommendation and its alternatives. Further, theorists should decide whether they give advice for the best possible in principle or the best possible in a given context. Broadening this discussion with reflections on feasibility, Carens takes the stance that political change is more likely if the theorist dares to challenge the constraints of context by being aware of them. Again, this recommendation on the theorist's engagement with political activism is a compromise, a reflection of perspective one and two, the applicability of moral principles within their specific contexts and conditions.

However, the activist theorist is a highly controversial figure. Scholars working within the framework of critical migration studies, for example, promote positions that are more and more based on doctrines rather than research findings. In this school of thought the starting point for researching and theorizing borders is a 'no-border' perspective which is highly critical of the legitimacy of migration control. Founding empirical research on an explicit normative standpoint introduces a bias that does not only inhibit conversation among scholars but also undermines the voice that researchers could have in political and public debate. In a polarized public discourse, such as the migration issue, scholarship that does not aim at informing the debate with objective knowledge becomes a partisan.

Western societies currently see a public debate in which moral claims and doctrines instead of pragmatic arguments dominate the discourse on migration. In applied political liberalism such polarization puts constraints on liberal democracy which depends on actors trying to find compromise. This condition calls for actors with contrasting positions to act in good faith trying to find compromise among each other and by engaging into a kind of rational dialogue that excludes what Rawls called

‘comprehensive doctrines’ (Rawls 1993). These days it seems hardly possible to find a rational debate on migration policy that is of a pragmatic rather than moral and doctrinal nature. From this background, it seems wise to first identify the place and role of the activist theorist in this contentious environment before giving advice on how to engage. Carens does not specify enough how the normative theorist can engage with public and political discourse without making apodictic moral and doctrinal claims. The application of perspective one and two leads to the activist theorist; however, now more than ever, we might have to ask the question whether or under which conditions the normative theorist should rather remain in the world of ideas, not necessarily aiming for the infusion of the polarized political with more positions of the moral kind.

References

- Carens, J. H. (2013). *The Ethics of Immigration*. Oxford: Oxford University Press.
- Collier, P. (2013). *Exodous. Immigration and Multiculturalism in the 21st Century*. London: Allen Lane.
- Rawls, J. (1993). *Political Liberalism*. New York: Columbia University Press.

Our Responsibilities to Refugees

David Miller¹

Department of Politics and International Relations, Nuffield College, Oxford

Abstract

The paper explores the basis of the responsibilities we owe to refugees. That we have such responsibilities is a very widely shared intuition: the need of those fleeing from persecution seems to call out for a response on our part. But what exactly are our obligations to such people? Who are they owed to and why do we have them? The paper argues in favour of a human rights approach to refugee protection that includes the requirement of the implementation of a burden sharing scheme.

Keywords

Ethics of migration; refugee protection; human rights; burden sharing

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My aim in this paper is to explore the basis of the responsibilities we owe to refugees – responsibilities that we discharge primarily through our governments, though sometimes more directly when we decide to join a refugee support group, for example, or contribute to a charity. That we have such responsibilities is a very widely shared intuition. The picture we are likely to have of refugees, as desperate people trapped in miserable encampments or squashed together in unseaworthy boats trying to cross the Mediterranean, seems to call out for a response on our part. But what exactly are our obligations to such people? Who are they owed to and why do we have them? These are the questions I want to investigate here.

Notice to begin with that the legal obligations that states have towards refugees leaving other states are quite narrow, and mostly negative in character – at least until

¹ Email: david.miller@nuffield.ox.ac.uk. The paper is a lecture given to the conference on Studying Migration Policies at the Interface between Empirical Research and Normative Analysis, Center for Interdisciplinary Research (ZiF), University of Bielefeld, September 10-12, 2018.

the refugee succeeds in entering the state's territory, at which point a number of human-rights-related obligations cut in.² There is no legal obligation to help refugees leave their home country, or to support them once they have crossed the border and are living in temporary accommodation. There is no legal obligation to ensure their safety during passage or to make it easy for them to lodge asylum applications. There is no legal obligation to offer refugees permanent resettlement. States and international organizations often do provide assistance of all these kinds, but on a voluntary basis. Those that decline to do so may be criticized, but they are never sanctioned. Yet many of us think that states and their citizens have moral obligations that are considerably more demanding than this – obligations to take in refugees and therefore to open up safe avenues through which they can make asylum applications, obligations to mount rescue missions on behalf of refugees who are making hazardous journeys, obligations to provide financial and other forms of support for those who are currently living in poor conditions in third countries. The question, though, is why we think this. Why does being a refugee give a person such a strong moral claim on us? What is the source of their special rights and the obligations we owe in return?

Refugees are needy people – that much is obvious. By fleeing from their home states, they make themselves vulnerable to various kinds of harms. But that alone does not distinguish them from millions of other people who are not refugees, but towards whom we appear not to have the same moral responsibilities, such as those living under repressive regimes or in severe poverty. Is it just that refugees are more visibly in need, that they press themselves upon our attention by trying to enter our societies (though of course only a small minority actually take that step)? But that surely could not justify a special obligation towards them, even though it might explain why we believe we have one. We should look for a firmer basis for responsibilities to refugees.

Nevertheless, the first path that I want to explore says that our obligations to refugees are essentially humanitarian in nature. They are people in great need, and we have the resources to meet those needs at modest cost to ourselves. The analogy that is often drawn here is with the individual duty of rescue. The duty of rescue is the duty each of us has to save a fellow-human being from death or serious harm when one can do so at relatively small cost to oneself. The classic example, introduced by Peter Singer and much-discussed since, involves a passer-by pulling a drowning child

² I have discussed these more fully in D. Miller, 'Border Regimes and Human Rights', *Law and Ethics of Human Rights*, 7 (2013), 1-23.

out of a shallow pond at the cost of ruining the expensive suit he is wearing.³ Confronted with the example, almost everyone agrees that the passer-by has a duty to save the child, that it would be seriously wrong for him to carry on walking just because he is going to miss an appointment or doesn't want to spoil his suit. Since refugees, likewise, are facing an imminent threat of death or serious harm, it is very tempting to model our obligations towards them on the duty of rescue. Indeed, in the case of those trapped on sinking boats half way across the Mediterranean, the analogy seems particularly close. The ongoing refugee crisis looks like Singer's pond multiplied many times over.

Tempting though the rescue model is, I am going to argue that that it should be rejected. Let's begin by noticing some special features of the pond case as described by Singer that make the conclusion that the passer-by has a duty to rescue the child so compelling.⁴ There is only one adult walking past the pond, so there is no question where the responsibility to carry out the rescue falls. The child is just a child, and therefore not responsible for having got herself into difficulties. The rescue will have no further consequences beyond the saved child and the ruined suit: there are no other children around, so no danger that any of them will be tempted to jump into the pond in anticipation of being rescued. And the child herself, we would naturally assume, will be returned to her anxious parents and live a happy life thereafter. The cost of the rescue is very small compared to the expected benefit.

If we were to change some of these features, for instance by introducing multiple possible rescuers, or by turning the child into a teenager who has ignored a large warning sign advising him not to swim, then we might begin to wonder whether the man in the fancy suit still has a duty, as opposed merely to a reason, to plunge into the pond. In other words, we may begin to ask exactly how the duty to rescue arises, who bears it, what its outer limits are, and so forth.

To see what implications this has for our duties towards refugees, consider European experience over the last few years. The first and most obvious feature is that we are looking at several million refugees trying to move to Europe, and at least 28 states with some capacity to offer them refuge. So at once the question arises: how does any particular state acquire an obligation towards a particular refugee? It looks immediately as though we are facing a problem of distribution: if refugees are going to be admitted or resettled, how many is each state required to take? How is that question to be decided?

³ P. Singer, 'Famine, Affluence and Morality', *Philosophy and Public Affairs*, 1 (1972), 229-43.

⁴ I draw here on D. Miller, 'The Nature and Limits of the Duty of Rescue' (under review).

The second factor that differentiates the refugee case from the pond case is that the refugees are exercising agency in order to put themselves into the position where European states are forced to respond by rescuing and/or admitting them, while the child, we assume, just fell into the pond by accident. Typically refugees from countries such as Syria have to decide whether to sit out their period of exile in refugee camps, or by scratching a living in one of the nearby host states like Lebanon, in the hope that they will in due course be able to return home, or alternatively to bet what is often their lifetime's savings on buying a passage to Europe in the hope of being admitted there. Now this is far from being a voluntary choice in the full sense: it is a choice made under very difficult circumstances. So by pointing to the agency of the refugees, I am not trying to suggest that they are to be held fully responsible for their later predicament. Nonetheless it is important to see that because agency is involved, the behaviour of refugees is going to be influenced by the policy decisions that receiving states make, once these become known. If refugees can expect to be rescued and then granted asylum, they are more likely to embark on the journey in the first place.

The third factor that bears upon the question whether refugees are owed a humanitarian duty of rescue is the potential cost of doing so, particularly if rescue takes the form of admitting them on a temporary or permanent basis to a Western state. There is of course an argument about whether over the long term these states will derive a net benefit from admitting refugees once they are allowed to become fully participating members of society. But in the short term there are quite heavy processing and support costs, plus the possible costs to social cohesion if the numbers being taken in are large. This makes the case very different from the individual duty of rescue where the costs that need to be taken into account are only the immediate costs involved in the act of rescue itself.

The question, then, is what guidance a humanitarian approach will give us in the case of refugees, assuming that the resources we are willing to deploy are limited – humanitarian aid has to compete with all the other objectives that governments and individuals want to pursue. In such circumstances – and here thinking about the analogy with the allocation of scarce medical resources can be instructive – we would normally want to consider two criteria. First, who are the people most in need of our help? Second, how effectively can they be helped given the resources at our disposal? These two factors have to be traded off against each other, since unfortunately it is sometimes impossible to do much to help the very worst cases. Applying this to the case of refugees, our first observation must be that there is nothing from a humanitarian perspective to single out refugees as especially deserving of help. There

is no reason to think, for example, that they are more vulnerable overall than those who have stayed behind in the countries they have left, and therefore remain subject to the persecution or generalized violence that caused the refugees to leave. Nor are they necessarily worse off in absolute terms than the millions of people worldwide who fall below the UN's poverty line, regardless of whether they are oppressed in other ways.

Are refugees special because they can be helped more effectively with limited resources than other needy people? This might be the case for those sheltering in refugee camps. Refugee camps are much maligned nowadays in the academic literature, but remain popular with governments, presumably because people are visibly being helped at relatively small per capita cost, so it is easy to justify allocating money for this purpose. There are also no obvious incentive effects or unintended consequences to take into account as there often are with other forms of aid. So from a humanitarian perspective, refugees who stay in camps might merit our special attention. This will not carry over, however, to those who apply for resettlement or attempt to enter directly into Western states. Taking them in is not an efficient use of resources, and they are also unlikely to be among the neediest cases, as has often been pointed out with reference to those who pay smugglers extortionate sums to transport them by land or sea.

What I am trying to do here is draw attention to the limitations of a humanitarian way of understanding our responsibilities to refugees. If we start from humanitarian premises, refugees won't in general register as special cases. I am hardly the first to notice this. Peter Singer, who as we saw was responsible for popularizing the drowning child analogy, was certainly sympathetic to the plight of refugees, but could see no reason to distinguish between those fleeing persecution and those fleeing drought, or between those applying for asylum and those remaining in camps. As he put it 'immigration policy in general, and refugee intake in particular, should be based on the interests of all those affected, either directly or indirectly, whether as an immediate result of the policy, or in the long run'.⁵ Singer's approach, which allows no special weight to be given to the interests of fellow-citizens, would certainly produce radical policy conclusions as far as admitting immigrants is concerned, but offers no special protection to refugees.

⁵ P. Singer and R. Singer, 'The ethics of refugee policy' in M. Gibney (ed.) *Open Borders? Closed Societies?: the ethical and political issues* (New York: Greenwood Press, 1988), p. 121.

So, let's consider a very different way of thinking about responsibilities to refugees, what's sometimes called the political approach.⁶ Here we begin by contemplating the entire system of states in its current form, and consider the refugee's position in relation to that. What is distinctive about a refugee, from this perspective, is that the bond that would normally link her to her home state has broken down. She is forced to leave because that state is either unable or unwilling to protect her basic rights. But where is she to move to? States now claim jurisdiction over the entire habitable surface of the earth, so she can only escape from her own state by entering another. What, then, gives any state the right to exclude her? By claiming jurisdiction over its territory, along with other states, doesn't it simultaneously acquire the obligation to admit those who are in need of refuge and have no other recourse?

This approach portrays our obligations to refugees as remedial in nature. Taken together, states have grabbed all the available land and fenced it in, so human beings can no longer exercise their natural right to wander freely over the earth's surface. There may be good arguments in favour of territorial rights, but these rights come with a cost, and in the case of refugees the cost takes the form of having nowhere to escape to unless another state is willing to provide refuge. So, the argument concludes, states must compensate refugees for the loss of freedom they have suffered by granting them rights of entry. This doesn't imply that a refugee can demand entry to any state that she chooses, since the reparative obligation lies with the system of states as a whole. But it does mean that if a state is going to deny entry to a refugee, it must prove that there is some other acceptable state willing to take her in.

Does this political approach do a good job of explaining our responsibilities to refugees? As I've said, it has the virtue of explaining what makes refugees distinctive – their loss of a normal political relationship with their home state. It explains why the paradigm case of a refugee is a Convention refugee who faces a threat of persecution, though it need not limit the class of refugees so narrowly as this, since a comparable loss is suffered who suffer from generalized violence in a collapsed state like Syria or Somalia, for example. It also promises to deliver a stronger obligation to remedy the harm that refugees have borne. This is because reparative obligations are not subject to limitations of cost in the way that humanitarian obligations are. For

⁶ For a good statement of this view, see D. Owen, 'In Loco Civitatis: On the Normative Basis of the Institution of Refugeehood and Responsibilities for Refugees' in S. Fine and L. Ypi (eds.), *Migration in Political Theory: The Ethics of Movement and Membership* (Oxford: Oxford University Press, 2016).

example, if I carelessly damage one of your possessions – a Ming vase, say – I have to make good the damage even if it costs me a lot to do so. In contrast, where an obligation to prevent harm is simply humanitarian in nature, it is subject to a reasonable cost limitation. This is widely recognized in the literature on the duty of rescue, and equally in the law of states that impose such a duty via so-called Bad Samaritan laws. The duty applies only where the victim faces death or serious injury, and the rescuer can carry out the rescue at relatively minor cost to herself, judged by some standard of what can be reasonably asked of them (as we saw, Singer's example involves ruining your suit to save a child). Applying this now to the case of refugees, a humanitarian approach will limit our responsibilities to what can be done without incurring significant economic or social costs, whereas the political approach imposes no such limitation.

These are important advantages of the political approach. But it faces at least two challenges. The first is to explain why loss of political membership should be so important as compared to other harms that a person might suffer. Of course in many cases loss of political membership will bring with it vulnerability in other dimensions too – lack of access to food, education, health care, etc. But suppose for a moment that these can be provided in a secure zone outside of the state, would it matter so much that people were deprived of effective citizenship? Would this be their main concern, as opposed, for example, to finding work? In our thinking we may be influenced by an Arendtian conception of active engagement in politics as central to the good life for human beings, but even if Arendt is right that political action is the highest form of human activity, it's not so clear that our primary goal in responding to people in need, such as refugees, should be to restore them to full political agency.⁷

The second challenge is to show why the very existence of refugees puts in question the legitimacy of all existing states, even when they have played no direct part in creating the refugee crisis. The assumption is that a legitimate state must be able to justify its existence to everyone outside its borders, in the sense that if challenged to justify its right to exclude it can point to the fact that those excluded have states of their own to accommodate them. It's the failure of this last condition in the case of refugees that is said to give rise to an obligation to grant them asylum. The question is whether this doesn't set the justificatory bar too high. Why isn't it sufficient, to justify a claim to exercise jurisdiction over a territory, to show that those who are excluded had adequate opportunities to establish their own rights-protecting

⁷ For the Arendtian view see H. Arendt, *The Human Condition* (Chicago, University of Chicago Press, 1958).

states? The fact that they have not succeeded in doing so – that they are now living under a dictatorship or in failed states – does not impugn our own successful creation of a rights-respecting political order.

In response, defenders of the political approach may argue that the states who are now being asked to admit refugees have indeed played some part in creating the circumstances that turned them into refugees in the first place. In some cases this will of course be true. But their responsibility does not reside in the mere fact of having established exclusive territorial jurisdiction. Instead what matters is having engaged in policies such as selling dictators weapons that are then turned on their own subjects, or intervening militarily, perhaps in a good cause, but in a way that causes massive social dislocation, and therefore later on a refugee crisis. So the danger here is that the political approach may give us strong obligations to a minority of refugees, namely those who can demonstrate that the state they are trying to enter bears some fairly direct responsibility for their being refugees, but fail to explain why we have responsibilities to those who don't qualify on these grounds.

So let me now turn to a third way of understanding our responsibilities to refugees. This is to see them as one component of the wider responsibility on the part of all states to protect human rights. Of course, such a responsibility is primarily discharged by each state fulfilling the human rights of its own citizens. But in the international order that has grown up in the last fifty or so years, states have increasingly come to acknowledge a reciprocal responsibility to protect the human rights of people outside their borders when their own states either cannot or will not do so. In the extreme case this may justify armed intervention to protect people from ethnic cleansing or genocide; this is what the so-called 'Responsibility to Protect' mandates. But we can interpret refugee protection as forming part of the same general responsibility, whether this takes the form of granting refugees asylum or supporting them while they remain in third countries.

This argument for a responsibility to protect refugees is less foundational than the other two approaches I've discussed. It grounds protection in the emerging state practice of protecting human rights. In other words, it points to the fact that liberal democracies, especially, have signed up to human rights protection by endorsing various international covenants and charters and also by embedding human rights in their own domestic constitutions. The message, in other words, is 'you've committed yourselves to these principles by signing these documents; now act on them'. The corresponding drawback, however, is that the human rights approach has no purchase against a state that simply refuses to recognize these rights even in the case of its own citizens.

Despite this weakness, I think that the human rights approach provides the best way to think about responsibilities to refugees. First, it gives us a way of identifying and prioritising refugees in terms of the nature and extent of the human rights violations from which they are suffering. It explains why the prime candidates for support should be those refugees who fit the strict Geneva Convention definition⁸ – they face a serious threat of persecution – since in these case the rights violation is deliberate; whereas, as we saw, a humanitarian approach focussing simply on how badly off people are in general has difficulty in explaining why refugees have special claims. Second, it highlights the fact that responsibilities to refugees are shared between all of the states that have committed themselves to the general practice of human rights protection. Of course, a refugee will normally make an application for asylum to a particular state, and that state will have an immediate responsibility to respond to his request. But since the underlying responsibility is shared, and the weight of applications may fall much more heavily on some states than on others, this points directly towards a burden-sharing scheme. Since processing asylum applications in a way that itself meets human rights standards is both time-consuming and costly, burden-sharing should apply not only with respect to the final destinations to which refugees are admitted but also to the application process. So in circumstances such as we've experienced in Europe in recent years, where for reasons of geography a few states have to process a vastly disproportionate number of applications, either they must be compensated by financial transfers from less burdened states, or a central system for assessing asylum requests has to be set up.

This is what should happen, but as experience tells us, it is difficult in practice to get even nominally rights-respecting states to agree on a burden-sharing scheme.⁹

⁸ According to the 1951 Geneva Convention, a refugee is defined as 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' (cited in J. Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005), pp. 96-7. This does not of course cover all the cases in which a person can only protect his human rights by crossing a border. I have discussed the relative merits of wider and narrower definitions of 'refugee' in D. Miller, *Strangers in our Midst: The Political Philosophy of Immigration* (Cambridge, MA: Harvard University Press, 2016), ch. 5.

⁹ For discussion of such schemes, and the criteria that might be used to determine what each state's refugee quota should be, see P Schuck, 'Refugee Burden-Sharing: A Modest Proposal', *Yale Journal of International Law*, 22 (1997), 243-97; J. Hathaway and R. Neve, 'Making Internal Refugee Law Relevant Again: A Proposal for Collectivised and Solution-Oriented Protection', *Harvard Human Rights Journal*, 10 (1997), 115-211; A. Hans and A. Suhrke, 'Responsibility Sharing' in J. Hathaway (ed.), *Reconceiving International Refugee Law* (The Hague: Martinus Nijhoff, 1997), pp. 83-109; A. Suhrke, 'Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action', *Journal of Refugee Studies*,

One reason is that there can be legitimate disagreement over how many refugees should be admitted directly or offered resettlement and how many should be supported financially in third countries. Disagreement on this question seems to have been one of the main reasons why the EU has proved unable to come up with a scheme that commands consensus across all member-states. But suppose we set this issue to one side and assume for the moment that the number of refugees who require admission is known. What principles should we use to distribute them among the states who have agreed to take part in the scheme? The one that is likely to strike us as immediately salient is the equal sharing of cost: the citizens of each participating country should be asked to bear the same per capita cost. This way of framing the problem as a cost-sharing question is sometimes challenged by pointing out that when refugees are resettled they usually make a significant economic contribution to the society they join, so they should be considered as an asset rather than a burden. But although this may be true in the long run, in the short term the financial costs of admitting and integrating refugees is significant (in the German case the total cost for 2016, obviously a peak year, was put at €20 billion). Moreover the real societal cost of admitting a refugee will vary considerably, depending on society-specific factors such as the costs of supporting asylum-seekers while their cases are adjudicated, the rules governing their access to the labour market, whether the job-related skills they bring complement those of existing workers or compete with them, the social costs of integration, and so forth. An additional problem is that the costs are likely to be lower in the case of states that already have a long history of admitting immigrants and have developed multicultural and other policies whose aim is to make it easier for immigrants to integrate successfully. Thus for a state like Canada the marginal cost of taking in additional refugees will be lower than in the case of a non-immigrant society such as Japan. It might, however, seem anomalous that a country that has a good record of receiving refugees should for that reason be asked to take relatively more under a burden-sharing scheme.

So finding an agreed solution to the burden-sharing problem is going to be difficult. Equal cost-sharing is attractive in principle, but difficult to apply, and insensitive to historical factors that affect relative costs but don't seem relevant to the number that should now be taken in. But let's suppose these difficulties could be resolved and we could come up with an assignment of responsibility for refugees between states that is widely agreed to be fair. How should we characterise the responsibility that each state bears in the presence of such a scheme? I shall argue

11 (1998), 396-415; T. Kritzman-Amir, 'Not in My Backyard: On the Morality of Responsibility Sharing in Refugee Law', *Brooklyn Journal of International Law*, 34 (2009), 355-93.

that it becomes a matter of justice that each state should carry out the obligations that it has under the scheme. It is a matter of justice, first, because the human rights of the refugees are under threat if they are not aided, and there is a group of agents with the collective capacity to provide the aid; and second because the corresponding responsibility has been divided up in such a way that each member of the relevant collective has a defined obligation – namely to grant temporary or permanent admission to N refugees, where N will typically vary from one state to the next.

Why does it matter that under the stated conditions our responsibilities to refugees crystallise into duties of justice? It matters because duties of justice are normally enforceable, and are certainly enforceable when basic human rights are under threat if the duties are not carried out. So this means that both the refugees themselves and third parties can take steps to ensure that the refugees get what they are owed, including applying sanctions to states that are unwilling to comply.

But suppose that these measures do not succeed, and some states who are party to the scheme refuse to take in their share of the refugees who need sanctuary. What then is the position of the states that have already discharged their responsibility? Are they obliged to take up the slack that's been left by the non-compliant states? The general issue this raises – whether justice requires us not only to discharge our share of a collective responsibility but also to take up the slack in the event that others fail to discharge theirs – has become a point of controversy in the philosophical literature.¹⁰ Those who argue that compliant states are obliged to accept more refugees than their quota requires claim that the unprotected human rights of the refugees coupled with the capacity of these states to offer them shelter decides the issue.¹¹ That is, there might indeed be an upper limit where taking in yet more refugees would pose a serious threat to social order, but until that limit is reached states are obliged to accept surplus refugees that other states had a duty of justice to accommodate.

¹⁰ See, for example L. J. Cohen, 'Who is Starving Whom?', *Theoria*, 47 (1981), 65-81; L. Murphy, *Moral Demands in Nonideal Theory* (New York: Oxford University Press, 2000), ch. 7; D. Miller, 'Taking Up the Slack: Responsibility and Justice in Situations of Partial Compliance' in C. Knight and Z. Stemplowska (eds.), *Responsibility and Distributive Justice* (Oxford: Oxford University Press, 2011), reprinted in D. Miller, *Justice for Earthlings* (Cambridge: Cambridge University Press, 2013); A. Karnein, 'Putting Fairness in its Place: Why there is a Duty to Take up the Slack', *Journal of Philosophy*, 111 (2014), 593-607; Z. Stemplowska, 'Doing More than One's Fair Share', *Critical Review of International Social and Political Philosophy*, 19 (2016), 591-608.

¹¹ See, for example, D. Owen, 'Refugees, fairness and taking up the slack: On justice and the International Refugee Regime', *Moral Philosophy and Politics*, 3(2016), 141-64, and the discussion of Owen's view in M. Hoesch, "'Taking up the Slack" in the Context of Refugee Protection: Remarks on David Owen', *Zeitschrift für Ethik und Moralphilosophie*, 1 (2018), 163-75.

In my view this argument fails to take seriously the idea of acquiring duties of justice by virtue of a division of responsibility. It begs the question by assuming that each state has an open-ended obligation to protect the human rights of refugees, despite forming part of group of states who share a collective responsibility to provide that protection. But justice couldn't require us to bear obligations of that kind. If ten of us together owe a debt to Brown, what justice requires is that I should pay my share of the debt. If I can afford to do so, I might generously agree to cover the debts of the other members of the group, or there might be circumstances in which each of us agrees to discharge the liability on one another's behalf. But those special circumstances aside, discharging other people's duties of justice for them isn't something that justice requires. And it would generally be very hazardous to make an agreement to do so, because it amounts to an open invitation to default in the knowledge that someone else will take up the slack on your behalf.

Why is it so important to be clear about what justice requires and what it doesn't in circumstances of collective responsibility? Shouldn't debates like this be set aside given the often desperate plight of the refugees who are trying to be admitted? I think it does matter to know what justice demands and what it doesn't, even in circumstances such as these. If something indeed required by justice, then it is mandatory and, as I noted earlier, it can be enforced by third parties. So a state that has complied with its obligations under a burden-sharing scheme is entitled to use reasonable means to force other states to comply with *their* obligations. Suppose, though that this does not succeed: what then? My view is that further responsibilities to refugees on the part of the compliant state would be humanitarian in nature only. In other words, the general humanitarian reasons we have to help people in need that I discussed earlier would still apply in these circumstances; but there would be no special responsibilities to refugees as such. The additional refugees could not claim a right to be admitted to a state that had done its share of admissions under a burden-sharing scheme, and the state in question would have no enforceable obligation to admit them.

The state in question might nonetheless decide to do more, for humanitarian reasons, and this would be admirable. But in a democracy, this requires the consent of the people who are going to bear the costs of admitting refugees over and above the burden-sharing quota. For consent to be obtained, there needs to be widespread democratic debate, among political representatives and civil society groups, and perhaps even a popular vote, before a decision of this kind is taken. Hostility towards refugees, and towards immigrants more generally, is often a response by citizens to a sense that that they are being imposed upon, that they have lost control of the process

whereby migrants are selected and admitted. Conversely, where they feel that they are able to make choices, they are often remarkably generous, as we see in the case of those volunteering to assist refugees or engaging in resettlement programmes. One might hope that this generosity would also be shown when a democratic decision on taking in more refugees than fairness demands was being made.

To conclude, I've been looking at three ways of understanding the responsibilities that we, as citizens, bears towards refugees. I argued that that the humanitarian approach, although initially appealing, fails to explain what is special about refugees as opposed to other people who are also in dire need. The political approach does a good job on this front, but it overstates the intrinsic importance of political membership, and relies on a contestable theory of political legitimacy. I therefore favoured what I have called the human rights approach, while admitting that it relies on the contingent fact that many states today have officially committed themselves to human rights protection. I then explored what this would mean in practice, arguing that responsibilities towards refugees should be fairly divided between the states by setting up a burden-sharing scheme.

So what, then, are our responsibilities to refugees? As a matter of justice, to urge our governments to help establish and then comply with an international scheme of refugee protection. As a matter of humanity, to consider volunteering to help refugee charities, and to contemplate voting in support of taking up the slack if other countries fail in their duties of aid towards refugees.

The Production of Intersubjective Certainty in the Early West German Refugee Movement

Andreas Kewes¹

Department of Education and Psychology, University of Siegen

Abstract

The following text analyses the emerging West German refugee movement of the early 1980s. The thesis is that the movement of that time successfully responded to an only recently established narrative – that refugees were a threat to the German social security system – with a strong counter-narrative. The text emphasises the role that events organised by civil society in Hamburg, Hanover, Berlin and southern Germany play in the production of certainty for this counter-narrative. Society's approach to forced migration is understood in this text as one that is constantly being renegotiated and re-created. This paper therefore takes a cultural sociological perspective and gives specific consideration to social movements and local migration regimes. The main finding of the paper is that the establishment of the counter-narrative was successful because of the local nature of the protests. The paper is based on an empirical study of grey literature of social movements and relevant specialist literature.

Keywords

Asylum; Empirical Research; Germany; Refugee Movement

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There are two popular interpretations of recent German refugee policy, both of which work on the basis of unquestioned self-evidence. The first interpretation assumes that the German chancellor, as head of the government, initiated the acceptance of a large number of Syrian refugees in the late summer of 2015 in accordance with a position of 'ultimate end' ethics widely held in Germany. Ethics of ultimate end means that the actor does not consider possible consequences of his or her action, but rather sees

¹ Email: andreas.kewes@uni-siegen.de.

that action as unquestionably right in itself.² Interpretation two assumes that the Federal Republic of Germany advocated the suspension of Dublin III deportations of Syrian refugees because of a German folk narrative born of an effort to make amends for the past (this is, for example, implied by Betts and Collier 2017, p. 83 ff.). Both interpretations assume a high level of consensus in Germany on normative questions of migration and asylum; that the need to help is self-evident to the majority – and has been since 1945. This hypothesis may seem plausible considering that the German constitution since 1949, the Basic Law, contains a fundamental right to political asylum that was formulated by the Law’s authors precisely with reference to the experience of Second World War/ Holocaust/ etc. An examination of the entitlement to this fundamental right enables many refugees to stay in Germany at least temporarily and represents an additional protection alongside that of international refugee law, albeit one that is now rarely granted.

One could counter these interpretations empirically by addressing the heterogeneous German “scene” of supporters for asylum seekers (for example Schiffauer et al. 2017) that is composed of very different groups. The sociologist Albert Scherr cites for example a) assistance provided in specific cases, b) legal positivist positions and c) advocates of a right to freedom of movement (cf. Scherr 2016, p. 396). We can also take this hypothesis as the starting point to ask whether liberal migration policies have always been part of the folk narrative, how the migration movement in the Federal Republic of Germany actually came into being, and what its core demands were and possibly still are today. These are the broad lines of the following paper. It takes a fairly narrow approach to fleeing exploring only the perception of or discourse about forced migration to Germany. This focus is justified in the light of the current national, European and international debate on German refugee policy. The scope is also restricted in time: as an analysis of the German refugee movement overall would have to cover a considerable period, I focus on the late 1970s and early 1980s. I consider this phase to be constitutive for current debates and organisational contexts, as I will explain below. I ask what normativity the activists in the refugee (protection) movement have articulated and how this position appeared self-evident to them.³

² The term *ethics of ultimate end* is the opposite of *ethics of responsibility* and comes from Max Weber's essay “Politics as a Vocation”.

³ To be clear: Compared to the present situation in Germany, the refugee movement at that time was dominated by white, middle class Germans with leftist political positions. Up to date, a lot of activists are, or have been, refugees to Germany themselves. Therefore, I differentiate between the terms ‘refugee movement’ and ‘refugee (protection) movement’ to draw the line cleanly. To me, it seems obvious that a refugee movement as we witness it today would not be the same without the refugee

The thesis of the paper is that organised support for refugees in the Federal Republic of Germany originated in the German civil liberties movement of the late 1970s and early 1980s against changes in West German law on aliens.⁴ It would appear useful to reconstruct precisely this dispute over better migration policy, its actors, and their (protest) mobilisation and institutionalisation. I develop the thesis over the course of the following pages: 1. A change in refugee numbers is rapidly noticeable following the first intake of refugees in the Federal Republic of Germany in the 1970s. This becomes a controversial political issue, resulting in the increasing decentralisation of accommodation provision/asylum procedures. 2. As the number of asylum seekers increases, a right-wing populist discourse on bogus asylum seekers, economic migrants and asylum tourism also develops.⁵ This discourse goes hand-in-hand with restrictions on the right to asylum; some voices speak openly of a policy of deterrence (Ausländerkomitee Berlin (West) e. V. 1981; Zepf 1986). The reconstruction of both types of political framing is necessary if we are to show the context in which the action of the movement is articulated, for despite the policy of deterrence, a social movement in support of refugees also developed, as I explain in more detail in 3. Using contemporary material, I seek to demonstrate, that the basis of this movement is the creation of intersubjective certainty on state wrongdoing towards refugees and migrants.

It is important to make this idea of a self-evident injustice clear, not because I wish to develop my own argument against state migration control, but because I wish to demonstrate how (inter-) subjective certainty has become important in the establishment of moral judgements. The forms of action taken by the refugee movements of the time focused very specifically on local issues and problems. Politicisation was thus not on the basis of abstract demands or philosophical justifications, but of clearly identifiable personal stories. I therefore seek to show empirically how sections of the refugee protection movement in the Federal Republic

(protection) movement of the 1970s and 1980s. It was this movement that institutionalised resources (money, organisational structures, ...) that are still in use by the organisations that ensued afterwards.

⁴ For reasons of limitations, we cannot explore here how the change in the fundamental right to asylum in the German Basic Law was prepared and implemented in 1993. Although this change in asylum law represents a black day for the refugee (protection) movement and fundamentally changed German asylum law, my theory, which I will not elaborate further at this point, is, that it neither represents a major change in the relevant group of actors, nor is, or was, the cause of contemporary asylum law in Germany a subject of dispute.

⁵ These terms were already being used in the late 1970s, not only “down the pub”, but also in the German Bundestag. cf. Simone Klausmeier’s discourse theory and political science study (Klausmeier 1984, p. 41 ff.).

of Germany resulted from a criticism of state provision for migrants, but not from abstract reference to the Nazi dictatorship.

Theory, data and method

The following text is an attempt to understand a long-standing dynamic in German asylum policy on the basis of the conflict between the political establishment and an emerging social movement. To the extent that the following pages describe not only the actions of actors in the movement, but also those of other civil society actors, and also consider the challenging and challenged legislator, I follow a contentious politics approach (McAdam et al. 2001). This theoretical approach does not simply consider structural conditions for the emergence of protest, but also makes us aware of mechanisms and processes in the development of certain policy fields, and is currently being adopted both in social movement (e.g. in Ataç et al. 2017) and in migration research (Cinalli 2016). The contentious politics approach takes account of the agency of both civil society and state actors. More specifically, I apply the idea of transgressive contention (McAdam et al. 2001, p. 7 ff.): I am interested in how new actors take to the political stage, making innovative demands or using unconventional forms of mobilisation. This theoretical setting is useful, as it does not limit the perspective to the microsocial perception of opportunities and strategic use of frames, but also takes into account the establishment and effect of interpretation patterns and frames at the macro level.

With regard to the questions of morality and normativity, I pursue to draw on reflections by the German social philosopher Hans Joas⁶ in his ‘Genealogy of Human Rights’ (Joas 2013) and by his student Andreas Pettenkofer in a study on the emergence of the environmental movement in Germany (Pettenkofer 2014). Following the tradition of American pragmatism, they argue that political action is based on subjective certainty: certain values or convictions subjectively appear to actors to be obvious, even in the face of supposed opportunity structures, and are therefore of immense importance to their actions. In the view of Joas and Pettenkofer, what can guide and drive action is not the rational argumentation for the better argument such as Joas against Jürgen Habermas, which ultimately remains unspecific in terms of practical action, but rather an orientation that is highly affective and therefore appears self-evident even in the face of contradictions. This orientation can be re-articulated in certain situations; otherwise, its effect is that of an established

⁶ I should note here that Hans Joas has been a critic of German refugee policy since 2015. cf. <https://www.zeit.de/2016/24/fluechtlinge-willkommenskultur-susan-neiman-hans-joas/komplettansicht> (last accessed: 26 August 2018).

routine. Thus, if we want to build on such an action theory in social theory terms, we need to examine the collective, shared, subjective certainties and, if necessary, the context in which they have been proclaimed as apparently self-evident. Like proponents of the theory of social movements mentioned above, Joas and Pettenkofer do not assume that social changes are simply the result of structural tensions. Instead, both theoretical approaches advocate to take seriously even non-rational mechanisms of framing and interpretation during a protest, and to look at the situation from the perspective of the action itself. With these two theories in mind, we can also ask how this movement emerged, a movement that was, and still is, in apparent conflict with state institutions.

The data presented in this paper are taken from a review of contemporary asylum law and research literature. Fritz Franz, a lawyer specialising in law relating to non-residents, reported a flood of asylum law literature in the early 1980s in Germany as well as a series of major international conferences with leading speakers. Most of these conferences were organised in cooperation with the Otto Benecke foundation (Franz 1981), and the papers as well as the findings were subsequently published. Whilst I have not carried out a complete review of this literature here, I have evaluated the relevant key literature that was widely accepted within the social movement. As this paper seeks to reconstruct certainties in the social movement, a slight imbalance in the literature used towards literature closely related to the movement has been deemed acceptable. The published sources have been supplemented in my paper by archive material, for example publications by actors in the movement, items from private collections and publicly accessible grey literature.

For the evaluation of the material, I draw on discourse analysis from the field of the sociology of knowledge (Keller 2011): The aim of this analysis is

[...] to reconstruct processes of social construction, objectification, communication and legitimation of structures of meaning i.e. of interpretation and action at the level of institutions, organisations or social (collective) actors, and to analyse the social implications of those processes. (Keller 2011, p. 59)

A discourse analysis drawing on Keller (and indirectly also on Michel Foucault) reconstructs a specific set of knowledge that shapes contribution as a discourse. In this paper, however, this reconstruction necessarily needs to be rough. Nonetheless, I believe the discourse reconstruction provided here together with the *contentious politics* and *subjective certainty* approaches provides relevant insights.

The Question of Housing

A subject that is now discussed relatively rarely is the changing German practice of housing for refugees in the 1970s. This is remarkable inasmuch as the decentralisation of accommodation provision brought about lasting changes in the power structure and actors involved in German refugee policy, and a closer look at the question brings into sharp focus relations between sections of host society in the country of refuge and the refugees.

A former *gendarmarie* barrack in Zirndorf, Franconia, was for a long time the nationwide holding centre for refugees and also the site of the *Bundesamt für die Anerkennung ausländischer Flüchtlinge* [Federal Office for the Recognition of Foreign Refugees], the predecessor of today's *Bundesamt für Migration und Flüchtlinge* [Federal Office for Migration and Refugees]. Refugees were housed in this centre upon reaching the Federal Republic of Germany, ideally until the end of their asylum procedure. This meant that the Ansbach Administrative Court was originally the only competent court for appeals against asylum decisions.

Looking back today at the way the question of housing was discussed at the time, what is particularly striking is how dramatic a picture was painted: the centre was apparently already overcrowded in the early 1970s and no further refugees were being admitted (Spaich 1982, p. 43 f.).⁷ Local newspaper reports seemingly denounced untenable conditions on the ground, and there was talk of fear on the part of the local population and of civil defence organisations (*ibid.*). Current reconstructions focus on the instrumental nature of these pictures, suggesting that the out-of-control accommodation situation in Zirndorf gave the impression that forced migration was an insurmountable social challenge that brought unrest and danger (Poutrus 2016, p. 885). Politicians, it is argued, wanted such an impression inasmuch as there had already been discussions in the 1960s about expanding the centre or opening an additional site (*ibid.*).

In 1974, it was decided to send some asylum seekers to other federal states before their applications had been processed; dispersal of successful asylum seekers among the federal states had already been implemented in previous years on the basis of a set allocation ratio (Theis 1981). Two issues seen as problematic at the time were those of finding sites for such holding centres and of how the centres were to be financed – by the Federal Government or by the federal states (*ibid.*) or by local

⁷ The number of asylum seekers had fallen in the early 1970s from 11,664 (1969) to 5289 (1972). It then rose, first moderately and then more steeply to peak at 107,818 (1980). The numbers subsequently fell to 19,737 (1983) before rising again (Zepf 1986, p. 57).

authorities (Klausmeier 1984, p. 97 ff.). In this context, there was also a discussion of whether the federal states should restrict the employment of asylum seekers, or whether refugees could in fact finance their own accommodation from the free housing market by working (Zepf 1986, p. 73).

One consequence of this policy was that, suddenly, most districts in the Federal Republic – the local social security providers – were now confronted with the need to cater for asylum seekers. As a result, calls for a change in the asylum procedure were now coming not just from Bavaria but from all parts of West Germany (Münch 1992, p. 73). The Free State of Bavaria had thus to some extent lost its “special institutional role” in refugee and asylum policy, which was organised on a federal basis (Poutrus 2016, p. 888).

If we now try to reconstruct the images and certainties on this subject that were being discussed by the German public, we notice one aspect that deviates significantly from the thesis of a German folk narrative or the ethics of ultimate end cited above, namely clear connotations in connection with the housing question: refugees are reviled as “pollution” and politicians want to keep their constituencies “clean” (Spaich 1982, p. 52).

It would therefore appear that an image of the refugee was created at this time that had multiple negative connotations, and that this image seemed self-evident to sections of society. Refugees were held responsible for unrest and disruption; they were seen as a source of problems and therefore to be avoided. The example of accommodation illustrates how societal knowledge, a certainty, develops and spreads in sections of the population.

The Policy of Deterrence

In addition to the decentralisation of accommodation provision, asylum law was also tightened in a number of ways in the late 1970s and 1980s. The new measures targeted specifically the application procedure itself. One aim was to speed up asylum procedures. Asylum procedures were genuinely lengthy, taking more than six years when all legal remedies were used (Münch 1992, p. 72), and this created legal uncertainty on the right of the asylum seekers to remain. However, this was not the only reason for speeding up the process. Pressure was also coming from the federal states and local authorities, which by now had to take in refugees, but wanted to avoid integration into German life (ibid., p. 73). The initial legal consequences of this pressure were the first and second acts accelerating the asylum procedure, the *Erstes Beschleunigungsgesetz* of 1978 and the *Zweites Beschleunigungsgesetz* of 1980. The first act

abolished the right of appeal against administrative decisions in the appeal committees of the Federal Office, but still allowed cases to be brought before the administrative court. Appeals against administrative court decisions before higher administrative courts were abolished for those cases in which the asylum application had been rejected as “manifestly unfounded”. In accordance with the nationwide dispersal of asylum seekers, the administrative court procedure was decentralised and it became possible to launch proceedings before administrative courts other than the one in Ansbach. As the new legislation did not shorten asylum procedures, but in fact placed a greater strain on the administrative courts, the second *Beschleunigungsgesetz* came into force on 23 August 1980. This act provided for the replacement of the three-person asylum committees at the Federal Office by individual decision-makers who were not answerable to the Federal Office.⁸

As an immediate measure to accompany the second *Beschleunigungsgesetz* (Münch 1992, p. 83), a visa requirement was introduced for the main countries of origin in Asia and Africa in June 1980. This applied to Afghanistan, Ethiopia, Sri Lanka, India, Bangladesh and Turkey. People from those countries had to apply for an entry visa for the Federal Republic of Germany from their local West German embassy in their home country, and could not enter Germany without that visa. The Federal Government was quite aware that it was making entry into Germany impossible for those suffering political persecution, but justified the move by stating that political refugees could not be granted unlimited access (Klausmeier 1984, p. 58). The only way to circumvent this visa requirement was to enter the country via East Berlin, as there was no visa requirement between East and West Berlin. The measure initially led to a drop in the number of asylum seekers, but by making access to German territory more difficult, it also led to illegal entry (*ibid.*).

As early as 1977, an administrative regulation (*Verwaltungsvorschrift*) authorised border officials to carry out a preliminary evaluation of asylum applications. They were to assess an applicant’s chances of success and, if applicable, to deny entry on that basis (Spaich 1982). Churches, Amnesty International, immigrant associations, youth associations and judges protested against this provision, which they saw as

⁸ For an assessment of the regulations at that time, which included asylum decisions being taken at the border and decentralised administrative jurisdiction, see the critical response of Franz (1981, p. 797 f.), who criticised the fact that the preliminary examination of asylum applications by the border and aliens departments had simply unnecessarily prolonged the procedure. Dispersing refugees and allowing them to enter the labour market before processing their applications was in his view also problematic, as such a system could be abused by job-seekers. Such a view is still taken by Münch (2014, p. 79). From today’s perspective, Poutrus (2016, p. 890) notes that the procedural changes did not prevent the exercise of asylum rights in general, but merely shifted the problems.

potentially undermining the right to asylum. The regulation was not declared unconstitutional by the Federal Constitutional Court and was repealed only in 1981 (Poutrus 2016, p. 889). When the Asylum Procedure Act (*Asylverfahrensgesetz*, AsylVfG) came into force in 1982, the idea was taken up once again. This time, different categories of asylum application were now to be identified, and these had different legal implications (Münch 1992, p. 92). As all applications had to be submitted to the aliens department in charge, it could, for example, classify repeat applications as irrelevant or manifestly unfounded. Furthermore, the AsylVfG regulated forced placement in asylum centres, the further curtailment of the right of appeal, and the use of single judges instead of a panel (ibid., p. 93 f.). Restrictions such as the two-year ban on working were also introduced by the AsylVfG (a one-year ban had been in place since 1980), as was the obligation to stay in the district of the aliens department in charge.

Using the example of the tightening of asylum law, we can reconstruct three types of societal knowledge or constructions of reality on the basis of discourse theory. The first is the construct of the refugee as a potential fraudster and lawbreaker, whose asylum application is so obviously unfounded that this can be proven at the border or in any given office. By seeking to create an image of refugees as migrant workers in search of economic advancement rather than victims of political persecution, the Federal Government of that time and the opposition led by the Christian Democratic Party undermined from the outset any support for those individuals as potential holders of legal rights.

At the same time, by indicating that there was too great a strain on the Federal Office and administrative courts, the two *Beschleunigungsgesetz* acts broadened the picture that had already been painted in relation to accommodation: that of refugees as a strain on state order. This has remained an established topos right up to the present day.

A third construction of reality concerns the supposed motives for refugees' migration. Working on the basis of the image of asylum seekers as merely economic migrants in search of a way out of their economic misery, restricting all economic incentives and any financial support such as social security appears logical.⁹ This was the approach chosen by the Federal Government of that time, which for example banned asylum seekers from working and stipulated that social security was to be

⁹ The fact that a very simple approach in social sciences terms was used to explain migration, namely that of a push and pull model, will not be discussed further here. cf. Castles and Miller (2009, p. 21 ff.) for a discussion of the limits of such an approach.

awarded primarily in the form of benefits in kind. As a result of these restrictions, the UNHCR (Münch 1992, p. 99 f.), non-governmental organisations (Hennig and Wießner 1982, p. 56 f.) and academics (Wipfler 1986, p. 68 ff.) took up the question of economic marginalisation as advocates for the refugees. In the process, these actors developed a conflicting set of images and topoi: in publications and at public events, pro-immigration groups and individuals also shaped a narrative about refugees in which the latter appeared as poor, needy and impoverished (for an example cf. Ausländerkomitee Berlin (West) e.V. 1981). Broken sanitary facilities and overcrowded rooms are just two of many widely reproduced images that must have fuelled the impression that refugees were the Others of the West German affluent society.

Civil Society Perspectives

So far, we have seen what kind of a negative response came from almost all parties in the Federal Republic of that time to the rising numbers of refugees. The images dominating the public opinion were critical of further refugee movement to Germany. The image of the refugee as a burden and potential fraudster seemed to appear self-evident to large sections of the population and the political elite. Yet the era of stricter asylum laws and debates on abuse of the system is not shaped solely by illiberal migration policies. This period also saw the emergence of refugee policy and refugee social work structures that still exist in Germany today. Worth mentioning here are publication forums such as the *Informationsdienst zur Ausländerarbeit* (now the journal *Migration und Soziale Arbeit*), the journal *Zeitschrift für Ausländerrecht und Ausländerpolitik* and later also *Informationsdienst Asyl (ID Asyl)* and the journal *Die Brücke*. On 22 January 1980, the documentation centre *Zentrale Dokumentationsstelle der freien Wohlfahrtspflege für Flüchtlinge e.V.* was founded: in response to a decision by the Federal Government on the provision of advice and support, the welfare associations set up a service providing information on relevant legislative procedures and judgments and situations in countries of origin (Bueren 1990).¹⁰ This example shows how welfare associations were involved in the Federal Government's policy of deterrence, for the *Dokumentationsstelle* not only works/worked to provide legal support for refugees, but also helped and still helps today to legitimise a potentially exclusionary policy by providing advice and information to refugees (Münch 1992, p. 193). Numerous local initiatives were also set up. Alongside the Amnesty International asylum teams, which saw support to those threatened by deportation and the fight for their right to remain

¹⁰ The service has been provided by the *Informationsverbund Asyl und Migration* since 1999; the information is published at www.asyl.net and in *Asylmagazin*.

in Germany as preventive human rights work, there were initially also countless local initiatives. Grey literature from the state of North Rhine-Westphalia from 1986 lists 25 asylum support groups (*Asylarbeitskreise*) in that state alone, many run by churches (Asboe et al. 1986). 1986 saw the establishment of *Pro Asyl* at a national level, which is still the main non-governmental organisation in this field in Germany today. The launch of *Pro Asyl* as a platform for exchange between different representatives of churches, trade unions, welfare associations and human rights organisations happened largely on a top-down basis. However, *Pro Asyl* is now also an indispensable resource for many local initiatives.

We can therefore see that new actors and new identities emerged in the late 1970s and early 1980s. Following the thesis in the introduction, we can assume that a failure to handle migration properly in West Germany on both the part of the state (and in particular the local aliens departments) and – even if to a lesser degree – welfare associations was self-evident to these new actors. Such a development can also be understood on the basis of the *contentious politics* approach and the heuristics of *subjective certainty*. I would like to reconstruct a typical pattern that I call *organised indictment*. This pattern was followed in civil society contexts between 1982 and 1984 at various places in the Federal Republic of Germany. There are similarities in the manner of its application in terms of orchestrated seriousness and references to local experiences in each case.

In November 1982, a delegation from the *European Committee for the Defence of Refugees and Immigrants* (C.E.D.R.I.) – an international non-governmental organisation founded shortly before in Switzerland – travelled round the Federal Republic to assess the situation in asylum centres. Its concluding report (C.E.D.R.I. 1982) documents its observations at three accommodation centres in southern Germany and seeks to interpret those observations in political terms. It links them to contemporary political debates in West Germany, such as the tightening of asylum laws and a widely read publication by conservative intellectuals in a major German daily newspaper (the “Heidelberg Manifesto”). The C.E.D.R.I. interprets both – the right of asylum and the proffered interpretation by the intellectuals – as an expression of a far-reaching hostility to immigration in West German society. To support this picture, the NGO quotes politicians from the CDU and CSU in words that document negative attitudes to refugees (centres should simply be fenced-in barracks with guards, *ibid.*, p. 23). The report also features statements from refugees about paternalism in social welfare services (restrictions on provision of cash, cramped living quarters, inedible food, *ibid.*, p. 25 ff.), and presents staff at asylum centres who complain about refugees rather than being in any way committed to supporting them (*ibid.*, p. 29 ff.). In its

conclusion, the C.E.D.R.I. finds that there is a policy of intimidation (ibid., p. 51). It reports that refugees are interned, with all the psychosomatic problems that this causes (ibid., p. 52). The organisation also accuses the Federal Government of violating Article 16 of the Basic Law and failing to respect the Geneva Refugee Convention in its asylum practice.¹¹

It is not only the tone of the indictment that makes this document so remarkable, it is also the situation itself: an international group visits the Federal Republic of Germany as if it were an unjust state and then proclaims its verdict – as if it were from a neutral outside perspective. Two otherwise separate and unrelated tribunals against local immigration policy in Hamburg (cf. Deutsch-Ausländisches Aktionsbündnis 1983b) and Hanover (cf. Koordinierungsausschuss für das Tribunal 1984) are comparable in terms of the creation of the role of a spokesperson and the speech act of the indictment. Here, too, we see the creation of a certainty about asylum policy in the Federal Republic of Germany, intended to mobilise actors in the movement. Both tribunals arose out of civil society networks; they were not part of the judiciary, but rather attempts at a trial “from below” to implement alternative interpretations and judgements. The two tribunals indicted the federal states in question for their immigration practices – asylum law was only one point; others included work permits, residence rights and the political participation of migrants. Through the tribunals, both networks revived a form of mobilisation of the new social movements that had already been used in the 1970s against the Federal Republic (cf. März 2012). In 1977-1979 a Russell Tribunal had taken a critical look at the human rights situation in the Federal Republic of Germany.

Tribunals on immigration policy in the 1980s called witnesses – sometimes accompanied or represented by lawyers – who described their problems with current immigration policy. At each of these events, which were publicly advertised and therefore well attended, a jury then pronounced a form of guilty verdict. The main argument was that the state was not acting in accordance with the law and was withholding fundamental rights from foreigners (such as the protection of the family, the right to work, the right to asylum and the right to political participation). In Hamburg, for example, the tribunal outlined the case of *Hüseym Inci*, who had first been granted refugee status, and was then threatened with deportation to Turkey because of alleged involvement in a criminal offence there. The Turkish state had filed an extradition request that was being examined by the German authorities. *Inci*

¹¹ The UNHCR also reached similar findings, and this led to a crisis in relations between the Federal Republic of Germany and the UNHCR in the early 1980s, cf. Milzow (2008).

accused the Turkish state, at that point a military dictatorship, of criminalising him in order to get him back. The German state and, in particular, German public prosecution services were accused of cooperating with the military. This case is important in the light of the fact that the increase in asylum applications up until 1980 was in large part due to people fleeing the military dictatorship in Turkey.¹² In Hanover, detention on the grounds of alleged illegal entry into the country, social security benefits for refugees and the housing situation were also explored. This tribunal was also directed at the Lower Saxony district authorities, which had apparently instructed asylum centre managers to report any asylum seekers who “scorned, through their inappropriate behaviour, the right to hospitality granted to them” to the Federal Office in Zirndorf; this was to allow steps to be taken to terminate the asylum procedure in question. From the tribunal report, it is clear that those in charge of the tribunal considered these instructions constitutionally questionable on the grounds that they opened the door to arbitrary action: refugees had to correspond to the moral beliefs or preconceptions of individual case workers or asylum centre managers (cf. Koordinierungsausschuss für das Tribunal 1984, p. 35).

The civil society narrative thus emphasised an illiberal, aggressive state that took action against refugees and also cooperated with unjust systems. Criticisms of restrictions on residence, bans on work and threats of deportation were presented as substantive, personalised through the witnesses and more or less confirmed by the authorities.¹³ These processes were therefore designed to create and consolidate intersubjective certainty. The main subject of the indictment was not the situation of those who were outside the country’s borders, but the way in which state agencies were dealing with migrants within those borders.¹⁴

¹² The best-known case is that of Turkish refugee *Cemal Altun*. *Altun* killed himself on 30 August 1983 by jumping from the sixth floor of a courtroom in Berlin Moabit, where his extradition to Turkey was being debated before the administrative court. The case subsequently received enormous attention. cf. Arendt-Rojahn (1983).

¹³ McAdam et al. cite certification as a key mechanism in endorsing or supporting actors and their actions (2001, p. 121 ff.). Certification means that an external authority is needed that, for example, vindicates protesters and their concerns. Trade unionists, teachers, pastors and academics, most of whom have no immigration experience, provide this certification in the above mentioned tribunals in Hamburg and Hanover. In other words, certification apparently came from people who were supposedly not affected by immigration policy, who were respected, and who were considered to have good judgement because of their social position.

¹⁴ In addition to subjective certainty, Joas also attaches great importance to affective intensity in his theory. Tribunals could therefore also be understood as moments of collective indignation, as well as moments of collective joy about the community in the movement and mutual reassurance in one's own political position. Joas argues that intersubjective certainty is created by the narrative transmission of values. Formats such as tribunals, hearings and documented official visits with

A hearing on the social and legal position of refugees in West Berlin was the third major civil society initiative alongside the human rights report and tribunals (cf. Hofmann 1984). The event was initiated by the NGOs *Gesellschaft für bedrohte Völker* and *Flüchtlingsrat Berlin*, which are still active today, and its name is reminiscent of a parliamentary procedure. It was held in January 1984 by a Protestant church and had no relation to other parliamentary activities. The event and its report were designed to provide a summary of individual measures and restrictions that, it was claimed, were creating an atmosphere in Berlin that left refugees in despair (ibid., p. 10). The hearing criticised deportations and custody pending deportation; the implementation of the law on aliens by the local aliens departments and the Federal Office; social security provision for refugees, including the accommodation situation, benefits in kind and the ban on work. Like the tribunals, this hearing was also followed by an international jury, which picked up on these points in its concluding statement and demanded improvements on the part of the Berlin authorities. The jury statement also included the socio-political observation that German society in general, and the population of Berlin in particular, would benefit from “new blood”. Moreover, the jury reasoned, a key duty of all state agencies – and in particular the Berlin Senate – should be clearly and unequivocally to speak out against prejudices against foreigners (ibid., p. 190). The jury's verdict thus went beyond the asylum question to touch on other discourses, for example that on population and workforce development.

If we look at the civil society formats described, we can see that these were largely events run by members of the educated, white middle classes and that there were no major events organised by migrants themselves. The formats therefore reflect the knowledge of this group of people, their images, slogans and forms of protest. We see no in-depth discussions of racism or capitalism as in current immigration debates (e.g. Yufanyi Movuh 2009). In terms of discourse analysis, these protests are significant because, on the one hand, they collect and articulate a body of knowledge that suggests that fundamental rights are under threat in Germany.¹⁵ Instead of presenting asylum seekers as a danger or a burden, they present state action – especially the action of the federal states and the local aliens department – as a threat:

extensive verbal reflection therefore also seem to me ideally suited to produce intersubjective certainty on certain normative convictions.

¹⁵ Also worth noting are the titles of the publications at that time, which similarly construct a threat scenario and therefore certainly pursue a pattern of interpretation used within left-wing movements of the 1970s and 1980s: *No asylum from the Germans: a fundamental freedom under attack* (Kauffmann 1986), *Right of asylum without asylum seekers* (Zepf 1986) and *Are mass deportations imminent?* (Deutsch-Ausländisches Aktionsbündnis 1983a).

regulations such as accommodation provision, social security benefits and a ban on work are having an extremely negative impact on the life of the individual.

On the basis of the historical material, we can identify the following conviction of the activists: a state that no longer respects its own constitution or international treaties appears in this reality to be the real problem; a problem in the face of which both subjective and fundamental humanitarian rights must be protected.

On the other hand, this legitimises a practice of reaction, of obligatory objection to state immigration policy, which is the first step to taking a completely different approach to migration processes than that of local, state or federal governments up until that point. However, often the result was not a radical rejection of the state, but an attempt to exert greater influence – whether through targeted lobbying; meetings with the authorities at a state level, in other words the creation of forums for exchange between the social movement, refugee social work organisations and immigration authority representatives; or close networking at a municipal level.

Conclusions

As we have seen, asylum policy in the Federal Republic of Germany has long been controversial and remains so today. Scepticism towards practical state migration control and support, embodied in the work of local and regional authorities, has been identified here as a central, shared assumption within the refugee (protection) movement in the Federal Republic of Germany. That scepticism manifested itself primarily in the aforementioned forums and subsequently also in associations and through actors in refugee social work organisations, that focused on providing legal advice and practical assistance for refugees and on working to combat racism.

Recently, the early German refugee movement and its most visible actor, the association *Pro Asyl*, have been criticised by younger activists in this field for taking a positivist approach, in other words for calling for a correct implementation of existing law instead of raising the political question of open borders (cf. Oulios 2013, p. 323ff.). The recent immigration policy groups campaign in a more radical manner. The movement thus continues to develop, and is becoming more diverse in its demands and goals and in the images of flight and migration that it disseminates.

In terms of discourse theory, we can conclude that antagonistic systems of knowledge and certainties have developed since the 1970s in particular, with a perspective on flight that links refugees to danger, disorder, abuse of the law and inadequate control on the one hand, and on the other a perspective that criticises marginalisation and unjust treatment, and commits to far-reaching solidarity with

refugees. These two systems of knowledge constitute a fundamental dispute, which is why the theoretical approach of *contentious politics* appears useful here. For both systems of knowledge, however, moments of production of certainty are also central. This is precisely what the analysis of the civil society forums of the 1980s has shown.

Consequently, at least two empirical questions remain. The first question to look at would be the extent of continuity and discontinuity in the refugee (protection) movement in Germany since the 1990s. Certain types of events have remained: tribunals were once again held in 1994 and 1996 against European (1994; cf. Basso-Sekretariat Berlin 1995) and Hamburg (1996) refugee policy. However, new initiatives organised by refugees themselves such as *The Voice*, the *Karawane für die Rechte von Flüchtlingen und MigrantInnen* and *Jugendliche ohne Grenzen* (cf. Kewes 2016) are rooted much more firmly in the idea of an autonomy of migration (cf. Mezzadra 2010). The most recent cultural initiatives in Germany though are rather hard to place within these traditional lines. Nonetheless – as should have become clear in the course of this paper – they are not merely an expression of a German folk narrative, as Betts and Collier suggest, but first and foremost of a subjectively experienced obligation to help.

The second question concerns the scope of the thesis in this paper: Is the development of the early refugee movement in Germany maybe an exception? How was the situation in other European countries at that time? The answer to such questions will also enlarge our understanding of the historical and social contexts, the political struggles, and the constellations of stakeholders in which normative claims for more liberal migration policies gain acceptance and support.

References

- Arendt-Rojahn, Veronika (1983): *Ausgeliefert*. Cemal Altun und andere. Reinbek bei Hamburg: Rowohlt Taschenbuch Verlag.
- Asboe, Karin; Just, Ingrid; Milk, Hans-Martin (1986): *Flüchtlingshilfe*. Asylarbeitskreise stellen sich vor. 2nd edition. Diakonisches Werk der evangelischen Kirche im Rheinland. Mönchengladbach.
- Ataç, Ilker; Rygiel, Kim; Stierl, Maurice (eds.) (2017): *The contentious politics of refugee and migrant protest and solidarity movements. Remaking citizenship from the margins*. London, New York: Routledge.
- Ausländerkomitee Berlin (West) e.V. (1981): *Gast oder Last? Berichte zur Lage der Asylbewerber*. Berlin: EXpress Edition.

- Basso-Sekretariat Berlin (ed.) (1995): Festung Europa auf der Anklagebank. Dokumentation des Basso-Tribunals zum Asylrecht in Europa. Münster: Westfälisches Dampfboot.
- Betts, Alexander; Collier, Paul (2017): *Refuge. Rethinking Refugee Policy in a Changing World*. Oxford: Oxford University Press.
- Bueren, Ilse (1990): Information und Dokumentation zu Flüchtlingsfragen: Die Zentrale Dokumentationsstelle der freien Wohlfahrtspflege für Flüchtlinge e.V. (ZDWF). In: Wolfgang G. Beitz (ed.): *Vierzig Jahre Asylgrundrecht - Verhältnis zur Genfer Flüchtlingskonvention*. Viertes Expertengespräch für Asylrichter, 25.-27. September 1989 in Bonn. Baden-Baden: Nomos, p. 95–100.
- C.E.D.R.I. (1982): *Asylrecht und Asylpraxis in der Bundesrepublik Deutschland*. Bericht einer internationalen Delegation des Europäischen Komitees zur Verteidigung der Flüchtlinge und Gastarbeiter. Basel.
- Castles, Stephen; Miller, Mark J. (2009): *The age of migration. International population movements in the modern world*. 4th edition. Basingstoke: Palgrave Macmillan.
- Cinalli, Manlio (2016): *Fields of Contentious Politics. Migration and Ethnic Relations*. In: Olivier Fillieule and Guya Accornero (eds.): *Social movement studies in Europe. The state of the art*. New York, Oxford: Berghahn, p. 86–99.
- Deutsch-Ausländisches Aktionsbündnis (1983a): *Stehen Massenausweisungen bevor? Die geplanten Verschärfungen des Ausländergesetzes. Auswertung der Berichte der Bund-Länder-Kommission Ausländerpolitik*. Hamburg.
- Deutsch-Ausländisches Aktionsbündnis (1983b): *Wir klagen an: Tribunal zur Hamburger Ausländerpolitik*. Archiv der Sozialen Bewegungen Hamburg, BRD - 04.143. Dokumentation.
- Franz, Fritz (1981): *Die Krise des Asylrechts - Wege zu ihrer Überwindung*. In: Wolfgang G. Beitz and Michael Wollenschläger (eds.): *Handbuch des Asylrechts. Unter Einschluß des Rechts der Kontingentflüchtlinge*. Band 2 Verfahren, Rechtstellung und Reformen. Baden-Baden: Nomos, p. 775–810.
- Hennig, Claudius; Wießner, Siegfried (eds.) (1982): *Lager und menschliche Würde. Die psychische und rechtliche Situation der Asylsuchenden im Sammellager Tübingen*. Tübingen: AS-Verl.
- Hofmann, Tessa (ed.) (1984): *Abgelehnt, ausgewiesen, ausgeliefert. Dokumentation zum Hearing über die soziale und rechtliche Lage der Asylbewerber in West-Berlin (20. - 22.1.1984)*. Göttingen [u.a.]: Gesellschaft für bedrohte Völker.

- Joas, Hans (2013): *The Sacredness of the Person. A new Genealogy of Human Rights*. Washington, D.C: Georgetown University Press.
- Kauffmann, Heiko (ed.) (1986): *Kein Asyl bei den Deutschen. Anschlag auf ein Grundrecht*. Reinbek bei Hamburg: Rowohlt.
- Keller, Reiner (2011): *Diskursforschung. Eine Einführung für SozialwissenschaftlerInnen*. 4th edition. Wiesbaden: VS Verlag für Sozialwissenschaften.
- Kewes, Andreas (2016): *Soziale Bewegungen von Geflüchteten in Deutschland. Entwicklungen und Erfolge*. In: *Migration und Soziale Arbeit* 38 (3), p. 261–267.
- Klausmeier, Simone (1984): *Vom Asylbewerber zum ‘Scheinasylanten’*. Asylrecht und Asylpolitik in der Bundesrepublik seit 1973. Berlin: EXpress Edition.
- Koordinierungsausschuss für das Tribunal (1984): *Tribunal zur Ausländerpolitik in Niedersachsen*. Archiv der Sozialen Bewegungen Hamburg, BRD-04.143. Dokumentation, Berichte, Analysen.
- März, Michael (2012): *Linker Protest nach dem Deutschen Herbst. Eine Geschichte des linken Spektrums im Schatten des ‘starken Staates’, 1977-1979*. Bielefeld: Transcript.
- McAdam, Doug; Tarrow, Sidney; Tilly, Charles (2001): *Dynamics of contention*. Cambridge [u.a.]: Cambridge Univ. Press.
- Mezzadra, Sandro (2010): *Autonomie der Migration – Kritik und Ausblick. Eine Zwischenbilanz*.
http://www.grundrisse.net/grundrisse34/Autonomie_der_Migration.htm.
- Milzow, Katrin (2008): *Anatomy of a crisis. Relations between the United Nations High Commissioner for Refugees and the Federal Republic of Germany from the 1970s to the 1980s*. In: *Refugee Survey Quarterly* 27 (1), p. 74–88.
- Münch, Ursula (1992): *Asylpolitik in der Bundesrepublik Deutschland. Entwicklung und Alternativen*. Opladen: Leske & Budrich.
- Münch, Ursula (2014): *Asylpolitik in Deutschland. Akteure, Interessen, Strategien*. In: Stefan Luft and Peter Schimany (eds.): *20 Jahre Asylkompromiss. Bilanz und Perspektiven*. Bielefeld: Transcript, p. 69–86.
- Oulios, Miltiadis (2013): *Blackbox Abschiebung. Geschichten und Bilder von Leuten, die gerne geblieben wären*. Berlin: Suhrkamp.
- Pettenkofer, Andreas (2014): *Die Entstehung der grünen Politik. Kultursoziologie der westdeutschen Umweltbewegung*. Frankfurt am Main: Campus.
- Poutrus, Patrice G. (2016): *Zuflucht im Nachkriegsdeutschland. Politik und Praxis der Flüchtlingsaufnahme in Bundesrepublik und DDR von den späten 1940er Jahren bis zur Grundgesetzänderung im vereinten Deutschland von*

1993. In: Jochen Oltmer (ed.): Handbuch Staat und Migration in Deutschland seit dem 17. Jahrhundert. Berlin, Boston: De Gruyter Oldenbourg, p. 853–893.
- Scherr, Albert (2016): Across Borders? Flüchtlinge, soziale Bewegungen und Soziale Arbeit. In: Soziale Passagen 8 (2), p. 395–403. DOI: 10.1007/s12592-016-0240-3.
- Schiffauer, Werner; Eilert, Anne; Rudloff, Marlene (2017): So schaffen wir das - eine Zivilgesellschaft im Aufbruch. 90 wegweisende Projekte mit Geflüchteten. Bielefeld: Transcript.
- Spaich, Herbert (1982): Demontage eines Grundrechts. Eine Dokumentation. In: Herbert Spaich (ed.): Asyl bei den Deutschen. Beiträge zu einem gefährdeten Grundrecht. Reinbek bei Hamburg: Rowohlt, p. 40–75.
- Theis, Horst (1981): Probleme bei der Verteilung ausländischer Flüchtlinge. In: Zeitschrift für Ausländerrecht 1 (1), p. 29–32.
- Wipfler, Richard (1986): Asyl Konkret. Lageralltag als kritisches Lebensereignis. Berlin: EXpress Edition.
- Yufanyi Movuh, Mbolu (2009): “Die Stimme” der Toten und derjenigen, die noch sterben werden. In: Komitee für Grundrechte und Demokratie (ed.): Jahrbuch 2009. Jenseits der Menschenrechte. Die europäische Flüchtlings- und Migrationspolitik. Münster: Westfälisches Dampfboot, p. 133–146.
- Zepf, Bernhard (1986): Asylrecht ohne „Asylanten“? Flüchtlingshilfe im Spannungsfeld von Weltflüchtlingsproblem und Abschreckungspolitik. Frankfurt am Main: Verlag für interkulturelle Kommunikation.

Studying Refugee Solidarity as 'Ethics from Below' – Some Ideas for Further Research

Nausikaa Schirilla¹

Soziale Arbeit mit Schwerpunkt Migration und interkulturelle Kompetenz,
Katholische Hochschule, Freiburg

Abstract

Since the years 2014/15, there has been a decisive and continuous rise in civil society's commitment for asylum seekers and refugees in Germany. Some studies were conducted on the demographic structure of volunteers, the fields of commitment and on motivations; furthermore, integration policies take into account these civil societies activities on different levels of politics. But up to now there is no link to ethical theories. This paper argues that empirical research on normative attitudes in refugee solidarity might lead to complementary insights concerning migration ethics. I ask if we can conceive refugee solidarity as "ethics from below".

Keywords

Volunteering, Migration Ethics, Refugees

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Many ethical theories on freedom of migration refer to a human rights' approach, as the right to ask for asylum is laid down in the Universal Declaration of Human rights (§14) and it is specified in the Geneva Convention on Refugees from 1954. Whereas positions arguing for free borders in general are strongly contested, there is a consensus in migration ethics that refugees (persons being threatened by religious, political, ethnic or social persecution) should be allowed – at least to a certain extent – to enter a foreign country and to look for protection (Schlothfeld 2012). But the

¹ Email: nausikaa.schirilla@kh-freiburg.de.

right to ask for asylum is not a right to be granted asylum, so the refugee status is “given” by certain authorities and problems of narrow and wider definitions of refugees arise. That means that many persons regarding themselves as refugees either do not succeed to reach a safe country or, if they do, they might not get the refugee status and face extradition or living illegally in the country of their choice (Khosravi 2010). Thus, new ethical questions arise again concerning their rights, access to work and healthcare, their right to stay, etc.

Further ethical debates concerning free borders are to be found within the framework of egalitarian liberalism and they refer to human rights, human dignity, global rights, global equality and global justice (Carens 2013). The controversial position that is to be found at the core of these debates is whether the sovereignty of national states (or any other given communities) implies “the right to exclude”, as Cassee puts it (2016), to strongly restrict access to a country which means a restriction of the global scope of basic rights and values. Anna Goppel challenged these positions by arguing that there is a certain bias in these approaches as states’ claims to decide on immigration only from the perspectives of their “own citizens“ is taken for granted without giving any grounds or reasoning in public debates (Goppel 2015). On the one hand, some authors take a cosmopolitan stand and argue that the core of the ethical problem of migration is an understanding of global civil society and that “[...] as civilians we are obliged to regard all other civilians as having a fundamental right to freedom of movement” (Frost 2003: 114). On the other hand authors argue against freedom of immigration on the ground of human rights, referring to undemocratic or repressive cultures of certain groups of migrants, or to clashes in society, threats for the welfare states or for societies’ or communities’ identity to be preserved (see the contributions in Cassee/ Goppel 2012). Many of these debates refer to empirical questions that are not well researched yet and are connected to presumptions and arguments shaped by media coverage.

These controversies have to be taken further and claims and presuppositions that are related to social practices, political claims or dominant discourses have to be questioned. Whereas ethical debates on freedom of migration as roughly outlined above aim at grounding decisions on norms and values, people act according to norms and values and they also act in the field of migration. Apart from professionals like social workers or doctors, there is strong movement in civil society in Germany that supports refugees irrespectively of what their legal status is. Human rights`based NGOs and civil societies groups like “Pro Asyl” fight for their rights as equal citizens.

In order to open up new perspectives on normative debates it is interesting, I suggest, to look at how normative controversies are dealt with by agents in the field.

That means to ask how ethical questions are represented in social practices. Some anthropologists take up this perspective and call it the “ethic turn“ in anthropology. Social anthropologists like Veena Das, Didier Fassin and Michael Lambek carried out manifold research on how ethical questions are embedded within certain societal contexts and how ethics is entangled with everyday life (Lambek et al. 2015). Didier Fassin for example argues that there are two strands of anthropological research on ethics. First, some authors are asking what the social constraints of morality are, how norms imposed by society or communities can be perceived in social practices and how moral values are related to the social order (Lambek et al. 2015: 176). The second strand focuses on the individual dimensions of ethical orientations and on the freedom of each person to act according to norms, as well as their experiences and inner conflicts in relation to these norms. According to Fassin, an application of ethical theories to the social sciences and politics raise questions on moral and ethical aspects of human action that are “empirically and normatively impure” (Lambek et al. 2015: 177). The notion of impurity implies that ethical questions cannot be answered in general, they are intertwined with personal or collective interests and different contexts, and might be answered differently depending on the situation. “Morality and ethics are, indeed, always embedded in historical contexts, cultural universes, and social practices.” (Lambek et al. 2015: 178). Referring to the question of whether it was legitimate from an ethical point of view to publish the highly contested Mohamed caricatures in solidarity with the magazine “Charly Hebdo” after the terrorist assault in 2015, Fassin claims that no ethical theory leads to a clear answer due to the “impurity”, e.g. the political and social embeddedness of all possible alternatives. Thus Fassin argues, that in order to think ethically it is not sufficient to base decisions or attitudes on norms and values alone . Therefore, he does not elaborate on ethics, but rather on ethical orientations and realities.

The idea of Fassin does not intend to criticize abstract ethical argumentations and to argue for contextual ethics, nor does it favor applied ethics. The intention of these authors is to see how ethical questions are posed and shaped in various contexts. The focus is on what Michael Lambek calls “the ethical”: “[...] how our lives are deeply and fundamentally ethically informed” or at “an ethical dimension of living” (Lambek et al. 2015: 6). For Lambek, living ethically is to be understood as “a hermeneutic process of interpretation and self-interpretation as people make their way in the world, with the human capacities, cultural resources, and historical circumstances given them.” (Lambek et al. 2015: 6)

Empirical research on ethics carried out by these anthropologists is focused on subjects, and this is different from applied ethics. Research is dealing with ethical

practices, orientations and with internal conflicts of “the ethical”. It is looking at fields of social life where ethical questions (e.g. what is justice) arise and on how subjects and politics deal with these questions. In this perspective ethical orientations in the action of subjects, the way, they theorize their claims of justice, defend the legitimacy of their claims come to the fore.

To give an example I will refer to the study on “Humanitarian Reason” by Fassin (2015). Fassin carried out an analysis of fields of humanitarian commitment and protection of vulnerable groups worldwide. He was looking at legal documents, at motivations and arguments of researchers, activists and NGOs on a(n) (inter-)national level using the methods of document analysis and qualitative interviews with stakeholders and activists. An important outcome of his study on humanitarian commitment is to show that there is a contradiction of values in the field. On the one hand, there are ethical orientations to be observed that aim at a recognition of others as human and equal beings, grounded in an unconditional human solidarity. On the other hand, Fassin depicts attitudes or practices he names “humanitarian governance”, which is based on a particularly deep, unequal relationship between donors and receivers. In this discourse, receivers of help have to be grateful or they have to present their suffering, and this means that there is no reciprocity between helpers and subjects of help. The different moral orientations Fassin describes are interrelated with inequalities in the global world and the working of humanitarian organizations.

Studying Refugee Solidarity in Germany

I suggest it would be interesting to apply this perspective of “the ethical” to volunteering with refugees in Germany. Studying the emerging “welcoming culture” or civil society’s movement (Schiffauer 2018) in order to see if, and how, ethical orientations are working in refugee solidarity could lead to interesting insights. Many tensions described above will certainly reappear – e.g. unequal positioning of refugees and helpers, embeddedness of refugee solidarity in political discourses, the role of egalitarian conceptions of human rights, etc.

In fact, there has been an interesting development in Germany concerning voluntary work with refugees. Since 2014, and mostly in the years 2015 and 2016, between 6% - 11 % of the population were active in either helping newly arrived asylum seekers on a charity basis or supporting them through a more continuous commitment (SI 2017: 59). In the year 2015, when nearly a million asylum seekers entered Germany, many persons were active in mediation with authorities, interpreting, providing accommodation and clothing, organizing social encounters

and exchange, legal help, German courses and many other kinds of help to support the newcomers to settle down in their new environment (SI 2017, Karakayali/ Kleist 2015, 2016, Schiffauer 2018). As a study financed by the Protestant Church of Germany suggests, the figures are quite impressive in relation to other fields of voluntary activities in Germany (SI 2017:59).

As Olaf Kleist and Serhat Karakayali have shown in two studies based on quantitative research and qualitative interviews (Karakayali, Kleist 2015, 2016), the motivation of those solidarity workers is manifold. Their findings suggest that some volunteers are active because of a humanitarian or Samaritan attitude and mostly wanted to “help”. Furthermore, their findings show that motivations that are generally relevant for voluntary work in Germany, mostly personal development, development of competences and social exchange, also play an important role for volunteering with refugees. Besides, the authors state that for certain activists political motivations – mostly to resist rightist movements – were decisive, and this also implied the wish to work for a just society, to contribute to global justice and to realize equal chances of all citizens of the globe. But it would be interesting to see if these motivations change, are interrelated or develop further in course of time.

I do not want to go deeper into the literature on volunteering, but I want to suggest these phenomena are comparable with what Lambek calls “the ethical”, and migration ethics should also take these aspects into account. In order to get deeper insights into the ethical dimensions of the work of civil society’s groups in the field of refugee solidarity, it would be necessary to do research with different methodological approaches and focus on normative orientations and relate them to ethical approaches. It would be interesting to look at ways how volunteers deal with ambivalences and contradictions and how activists view their subjects. Researching their motivation, how they conceive their work, how they relate themselves to the subjects of their work, and what ethical grounds they give for their work might help to explore how normative orientations change and develop in the course of their activities.

Taken from recent literature, three approaches concerning normative orientations of refugee solidarity work could be analyzed: a religious, Samaritan attitude (Collier 2014), orientation towards equal rights and global justice (Carens 2013), or a radical orientation towards the presence of the other, inspired by asymmetric ethical approaches following Levinas, Butler and others (Kelz 2015).

In order to see how these different approaches are interrelated, I will give a speculative example and present a case study from a training course I conducted. A

student presented the case of a volunteer who had always argued in favor of the existing legal order and who was rather apolitical concerning migration and just wanted to help. He became the mentor of a family from Albania. For one and a half years, he supported the family and guided them very closely. In the end, all their children went to school and did fairly well, the father attended German classes and even found work. But the asylum application of the family was rejected, their appeal at court was turned down, their petition rejected and they were facing deportation. Although this volunteer had never questioned the state's right to extradite in general he started to question extraditions starting from this particular case. According to the student who presented the case he said: "This cannot be, that a person like him is deported to [...]. They were doing so well, they did their best to integrate [...]. It is unjust to make them leave our country [...]". Analyzing the normative orientations of that case, I would argue (in a slightly speculative way), that the person involved started from a Samaritan attitude, moved to an orientation towards the presence of the other, because of the closeness of the relation established, and from there developed a stand on global equal rights.

Giving this example, I wanted to show the empirical richness of motivations, experiences and moral orientations that are to be found in this field. Furthermore, I want to hint at developments, social and political practices entangled with ethical questions that are worthwhile to be studied further. There is a field of "the ethical" concerning volunteering with refugees that has to be made visible and to be taken into account.

What do these outlines for further research mean for "studying migration policies at the interface between empirical research and normative analysis" as the guiding question of the conference? First, it is important to note that in research on normative orientations, what subjects express in their daily actions does not replace an ethical theory. But research findings on ethical orientations of volunteers are located at an interface between empirical research and normative theories. So I would like to ask if ethical orientations of volunteers analyzed by in such research might lead to an "ethics from below". As far as I can see this term is not used by Fassin and his colleagues. "Ethics from below" does not replace theoretical considerations on ethical concepts, but it might be used as a complementary approach in further discussions on migration ethics.

References

- Carens, Joseph (2013). *The Ethics of Immigration*. Oxford New York: OUP.
- Cassee, Andeas/ Goppel, Anna (eds.) (2012). *Migration und Ethik*. Münster, Mentis.
- Cassee, Andeas (2016). *Globale Bewegungsfreiheit. Ein philosophisches Plädoyer für offene Grenzen*. Berlin: Suhrkamp.
- Collier, Elisabeth/ Strain, C.R. (eds.) (2014). *Religious and Ethical Perspectives on Global Migration*. Lanham, Boulder, New York, Toronto, Plymouth U.K.: Lexington Books.
- Fassin, Didier (2012). *Humanitarian Reason. A Moral History of the Present*. Berkeley Los Angeles, University of California Press.
- Frost, Merwyn (2003): 'Thinking ethically about refugees: A case for the transformation of global governance, in: Newman, Edward/ van Selm, Joanne (eds.): *Refugees and forced displacement: International security, human vulnerability, and the state*. Tokio, New York, Paris: United Nations University Press, 109-129.
- Goppel, Anna (2015). Was derzeit falsch läuft: Zur öffentlichen Migrationsdebatte und einem möglichen Beitrag der politischen Philosophie. in: *Zeitschrift für Praktische Philosophie* 2 (2), 2015, 339-348.
- Karakayali, Serhat/ Kleist, Olav (2015). *Strukturen und Motive der ehrenamtlichen Flüchtlingsarbeit (EFA) in Deutschland*. Berlin: BIM, <https://www.bim.hu-berlin.de/de/publikationen/2015/strukturen-und-motive-der-ehrenamtlichen-fluechtlingsarbeit-efa-in-deutschland/>.
- Karakayali, Serhat / Kleist, Olav (2016). *EFA Studie 2. Strukturen und Motive der ehrenamtlichen Flüchtlingsarbeit (EFA) in Deutschland*. Berlin: BIM, http://www.fluechtlingsrat-brandenburg.de/wp-content/uploads/2016/08/Studie_EFA2_BIM_11082016_VOE.pdf.
- Kelz, Rosina (2015). Political Theory and Migration. Concepts of non-sovereignty and solidarity. in: *movements. Journal für kritische Migrations- und Grenzregimeforschung* 2015, 1 (2), 1-18.
- Khosravi, Shahram (2010). *Illegal Traveller: An Auto-Ethnography of Borders*, Basingstoke and New York, Palgrave Macmillan.
- Lambek, Michael/ Das, Veena/ Fassin, Didier/ Keane, Webb (2015). *Four lectures on ethics. Anthropological Perspectives*. Chicago, HAU Books.
- Schiffauer, Werner et al. (eds.) (2018). *So schaffen wir das - eine Zivilgesellschaft im Aufbruch: Bedingungen für die nachhaltige Projektarbeit mit Geflüchteten: eine Bilanz*. Bielefeld, transcript.

Schlothfeld, Stefan (2012). Dürfen Notleidende an den Grenzen wohlhabender Länder abgewiesen werden? In: Cassee, Andeas/Goppel, Anna. (eds.): Migration und Ethik. Münster, Mentis. 199-210.

Sozialwissenschaftliches Institut der EKD (SI) (eds.) (2017). Zwischen Skepsis und Zuversicht. Wie blickt Deutschland auf Flüchtlinge. Von Petra-Angela Ahrens, Hannover, SI, https://www.siekd.de/wp-content/uploads/2018/06/Skepsis_und_Zuversicht.pdf.

What is Owed to Refugees when Attributing Responsibilities to States in Institutionalized Responsibility Sharing Regimes?

Lukasz Dziedzic¹

Legal Philosophy Group/INTERVICT, Tilburg Law School

Abstract

Responsibility sharing has been at the core of the debates on asylum in the European Union given that the legal framework designed to perform this task, the so-called Dublin System, failed to provide justice among states in responsibility attribution by its very design. This paper addresses the question of justice in responsibility sharing among the Member States of the EU while also providing normative and empirical arguments for rethinking what is being owed to refugees qua refugees, as the envisioned beneficiaries of responsibility sharing regimes, when thinking about reforming the system of responsibility attribution in Europe.

Keywords

Asylum; Responsibility Sharing; Justice

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The aim of this paper is to provide normative support and empirical examples for the need of extending our understanding of what is owed to refugees when they are distributed among states through institutionalized responsibility sharing mechanisms. The focus will thereby be on the conceptualization of this issue particularly in the context of the EU – with the examples and concluding remarks being embedded in this context. While it is not being denied that ultimately, a just international regime of refugee protection is something that should be normatively strived for, the realist

¹ Email: l.dziedzic@tilburguniversity.edu.

position taken in this paper and its focus on the European Union is being justified by feasibility constraints on the international level. On the international level there is a need for firstly creating ad hoc coalitions of the willing to address the problems at stake, the European Union, however, provides a context of a permanent group of states that collectively agreed to provide refugee protection and where states have committed to sincere cooperation and created political institutions and policy instruments able to tackle the questions of responsibility sharing.²

Responsibility Sharing – A Just Distribution between States?

In the context of the European Union, the question of justice between states in regard to refugee protection emerged as a topic of broader debate in the early 1990s in the follow-up of the refugee movements caused by the Balkan wars, which resulted in a large discrepancy in the numbers of refugees taken in by single Member States of the community. Germany, for example, received more than 435,000 asylum applications in 1992 alone, what constituted 66% of all the applications of the – back then – European Community.³ As a result of these developments, the German Council Presidency in 1994 pushed for a Draft Council Resolution on Burden Sharing, which envisioned a distribution of asylum seekers and their temporary protection based on a distribution key attributing quotas to Member States on the basis of a country's GDP as well as the size of its territory and population.⁴

These strict and seemingly objective criteria however, and especially the binding nature of the envisioned burden sharing scheme, did not survive the negotiations of the proposal. After these initial marginal efforts, considerable developments took place in 1997. The Dublin convention entered into force, and specifically the Amsterdam Treaty moved the policies on asylum and migration into the first pillar of the EU. For the first time, an embryonic fair sharing provision was also introduced into primary EU law on asylum with Article 63 of the reformed EC Treaty calling for

² Rainer Bauböck, "Europe's commitments and failures in the refugee crisis" (2018) 17 *European Political Science* 140, 147.

³ Piotr Juchno, "Asylum Applications in the European Union" (2007) 110 *Statistics in Focus: Population and Social Conditions*, 2, available at: <https://ec.europa.eu/eurostat/documents/3433488/5285137/KS-SF-07-110-EN.PDF/c95cc2ce-b50c-498e-95fb-cd507ef29e27> (last accessed: 02.12.2018).

⁴ The criteria used for the distribution key were taken from the so-called 'Königssteiner Schlüssel', which is the distribution key Germany applies within its territory to distribute asylum seekers equitably across its territory.

“measures promoting a balance of effort between Member States in receiving and bearing the consequences of refugees and displaced persons.”⁵

The Treaty also called for legislation in the area of asylum to be enacted to provide for a minimal harmonization of asylum legislation across the European Union. This was put into practice in 1999 at the Tampere European Council, which was the birth place of the Common European Asylum System (CEAS) and the regulations and directives making it up, which were enacted in the following years and provided a minimum harmonization of amongst others refugee status determination, reception conditions for asylum seekers and asylum procedures. The CEAS for the first time in history created a shared commitment and responsibility of states to collectively provide protection to refugees.⁶ Unfortunately, however, the instrument within the system, which was envisioned to distribute the responsibility for the status determination and reception of asylum seekers across this group of states, the above mentioned Dublin Convention that – after several reforms – is still in force today as the Dublin-III Regulation, did not really tackle the issue of a fair distribution of responsibilities, and thus justice between states, but instead established (in the majority of cases) irregular entry into European territory,⁷ a morally arbitrary criterion based on geographic location of particular states, as the default condition for responsibility attribution.

Parallel to these legal developments a broader academic debate on the question of how to share the ‘burden’ of refugee reception within Europe and globally was also taking place, with economists, political scientists, international relations as well as refugee law scholars being the dominant voices in its early stages. Burden sharing, as this issue has been coined in reference to earlier debates in economics regarding the

⁵ Dirk Vanheule, Joanne van Selm and Christina Boswell, “The Implementation of Article 80 TFEU on the principle of solidarity and fair sharing of responsibility, including its financial implications, between Member States in the field of border checks, asylum and immigration”, European Parliament, Directorate-General Internal Policies, Policy Department C, Citizens Rights and Constitutional Affairs, Civil Liberties, Justice and Home Affairs, PE 453.167, April 2011, Brussels, 31.

⁶ Reinhard Marx, “Europäische Integration durch Solidarität im Flüchtlingsschutz” (2016) 49 *Kritische Justiz* 150, 151.

⁷ The criteria for responsibility attribution are being established in chapters III and IV of the Dublin-III Regulation. While there are several criteria that hierarchically precede irregular entry into the territory of a Member State, it is nevertheless, together with the criterion of previous visa issuance or residence in a particular Member State, the criterion that in most cases in practice attributes responsibility for protection status determination to a particular Member State. See UN High Commissioner for Refugees (UNHCR), *Left in Limbo: UNHCR Study on the Implementation of the Dublin III Regulation*, August 2017, available at: <https://www.refworld.org/docid/59d5dcb64.html> (last accessed: 02.12.2018).

sharing of costs for military spending among NATO members, has thus been looked at from the perspective of public goods theory, prisoner's dilemma contexts in game theory and other forms of cooperative action failures based on a lack of states' self-interest in refugee protection in order to explain the problems the refugee regime was facing globally, as well as in Europe.⁸ In response to these problems with responsibility sharing and the provision of protection that the refugee regime was facing, refugee law scholars came up with some controversial proposals of reforming the global (and European) refugee regime. Hathaway and Neve for example suggested that responsibility for refugee protection should be allocated to the states in the region of a refugee crisis and other (e.g. Western) states would then only be obliged to contribute financially to the protection in the region, as such regional protection would be more effective given the cultural affinity, in the communitarian sense as e.g. defined by Walzer,⁹ between states and refugees.¹⁰ Schuck went even a step further in terms of the controversy of his proposal by suggesting a refugee quota trading model, whereby states would be able to trade refugee quotas they would have been assigned.¹¹ These proposals provoked strong criticism as they were accused of potentially shirking the responsibility to the states in vicinity of conflicts, while rich Western states would acquire the possibility to buy themselves out of responsibility for refugees through providing money to either regional protection or by means of buying refugee quotas. The refugee quota trading proposal was further criticized for commodifying refugee protection with refugees becoming a good to be traded on a market.¹²

⁸ Alexander Betts, "Public goods theory and the provision of refugee protection: The role of the joint-product model in burden sharing theory" (2003) 16 *Journal of Refugee Studies* 274, 275ff.; Gregor Noll, "Risky games? A theoretical approach to burden sharing in the asylum field" (2003) 16 *Journal of Refugee Studies* 236, 246ff.; Astri Suhrke, "Burden sharing during refugee emergencies: The logic of collective versus national action" (1998) 11 *Journal of Refugee Studies* 396, 397ff.

⁹ For a convincing critique of the communitarian foundation of Hathaway's and Neve's proposal see e.g. Satvinder Juss Singh, *International Migration and Global Justice* (Ashgate Publishing, 2006), 224ff.

¹⁰ James C. Hathaway and R. Alexander Neve, "Making international refugee law relevant again: A proposal for collectivized and solution-oriented protection" (1997) 10 *Harvard Human Rights Journal* 115, 144ff.

¹¹ Peter H. Schuck, "Refugee burden-sharing: A modest proposal" (1997) 22 *Yale Journal of International Law* 243, 283ff.

¹² See e.g. Deborah Anker, Joan Fitzpatrick and Andrew Shacknove, "Crisis and cure: A reply to Hathaway/Neve and Schuck" (1998) 11 *Harvard Human Rights Journal* 295, 299 ff.; Debates on the morality of refugee markets and refugee quota trading have recently gained in significance again, given the fact that practical proposals on these forms of refugee governance have, as will be also discussed further below in this contribution, gained in significance again in policy and practice. See e.g. Jaakko Kuosmanen, "What (if anything) is wrong with trading refugee quotas" (2013) 19 *Res*

At the same time, although there have been extensive discussions in the ethics of asylum on the question of refugee definition and the morality of treatment of refugees,¹³ there has been until recently far less theorizing on the very idea of the moral foundations of burden or responsibility sharing between states.¹⁴ The few contributions in the areas of political philosophy and the ethics of asylum that mention the issue thereby agree that each state having to take a fair share of refugee burden is normatively desirable. Some of the contributions engaged a bit further in what factors might help to determine what such a fair share might be, whereby causal contribution by some states to the creation of a certain refugee population is broadly considered as a primary consideration in responsibility attribution,¹⁵ while in calculating remedial responsibility and its corresponding fair share, common but differentiated responsibilities of states are regarded as factors to be considered.¹⁶ Thus any state's fair share would not be determined by attributing it a numerically equal ratio of the total refugee population, but instead factors that determine its ability to host a certain number of refugees, such as the country's GDP, its population size or the size of the already hosted refugee population living in its territory, would need to be taken into consideration when determining any state's fair share in refugee protection.¹⁷ Given the fact that there are potentially many different variables influencing a state's ability to host refugees and that a consensus on a defined set of variables when calculating fair shares among states would be potentially hard to reach, David Miller,¹⁸ for example, suggested that any state should have a certain autonomy to determine its own share as it is in the best position to assess its own abilities for refugee reception. But others have pointed out that having the possibility to determine

Publica 103; Mollie Gerver, "Moral Refugee Markets" (2018) 11 *Global Justice: Theory Practice Rhetoric* 45.

¹³ See e.g. Andrew Shacknove, "Who is a Refugee?" (1985) 95 *Ethics* 274; Matthew Gibney, *The Ethics and Politics of Asylum* (Cambridge University Press, 2004); Matthew E. Price, *Rethinking Asylum: History, Practice and Limits* (Cambridge University Press, 2009).

¹⁴ Tally Kritzman-Amir, "Not in my backyard: On the morality of responsibility sharing in refugee law" (2008) 34 *Brooklyn Journal of International Law* 355, 363.

¹⁵ James Souter, "Towards a Theory of Asylum as Reparation for Past Injustice" (2014) 62 *Political Studies* 326, 327f.

¹⁶ David Owen, "Refugees, economic migrants and weak cosmopolitanism" (2017) 20 *Critical Review of International Social and Political Philosophy* 745, 749 ff; Rainer Bauböck, "Refugee Protection and Burden Sharing in the European Union" (2018) 56 *Journal of Common Market Studies* 141, 147f.

¹⁷ Matthew J. Gibney, "Refugees and Justice between States" (2015) 14 *European Journal of Political Theory* 448, 456-457.

¹⁸ David Miller, "Immigration: The case for limits", in: Andrew I. Cohen and Christopher Heath Wellman (eds.), *Contemporary Debates in Applied Ethics* (Wiley-Blackwell, 2005), 203.

its own fair share would lead to decision making focused on self-interest that would undermine collective action and more or less maintain the status quo of current refugee protection.¹⁹

Notwithstanding the partial disagreements of how states' fair shares should eventually be determined, there is nevertheless a broad consensus in the few contributions on the topic that justice between states in terms of refugee protection with every state accepting its fair share is a desired goal of the broader refugee regime. Having a system that distributes the responsibilities for refugee protection justly among states is being considered to be just towards refugees, since it aims at ensuring that every refugee receives protection by being the responsibility of some state. What is thereby being owed to the individual refugee is the protection of her basic needs that could potentially be provided in any country participating in responsibility sharing – what is broadly being disregarded is the individual's say in regard to where she might potentially have an interest to end up.

The argument that refugees are owed the protection of their basic needs but have no say as to the place where this protection should be provided, given among others the concerns the consideration of their preferences might have on distributive fairness between states, is not only being raised regularly in the public and policy discourses concerning asylum in Europe, but has also been raised by normative theorists working on questions of the ethics of asylum. Ferracioli for example, claims that it is “permissible to deny refugees the right to choose the country of final destination given the importance of creating a regime that fares better in terms of distributive and procedural fairness.”²⁰ Similarly, Carens has repeatedly emphasized that “refugees have a moral right to a safe place to live, but they do not have the moral entitlement to choose where that will be.”²¹ In the same vein Kuosmanen states that having a claim to protection “does not directly amount to having a claim to access any particular country.”²² Thus these authors indicate that what is being owed to refugees is the protection of their basic needs that can potentially be provided in any country, while they do not need to have a say in where this might be. Most of these views, however, consecutively relativize this position by emphasizing that certain

¹⁹ Matthew J. Gibney (2015), 457.

²⁰ Luara Ferracioli, “The Appeal and Danger of a New Refugee Convention” (2014) 40 *Social Theory and Practice* 123, 142-143.

²¹ Joseph Carens, *The Ethics of Immigration* (Oxford University Press, 2013), 216.

Thereby, he also claimed that refugees are human beings with agency but that this agency, however, does not imply the right to choose the place of protection. (ibid, 208).

²² Jaakko Kuosmanen, 108.

rights-based claims need to be taken into consideration when deciding to which country a particular refugee should be allocated. If somebody for example has close family members in a particular state she should be able to receive protection there.²³ But is this really all that is owed to refugees when thinking about where they should end up enjoying protection?

It can be namely expected that schemes based on a recognition of certain strong interests of refugees short of a rights claim, such as cultural ties, knowledge of the language of the destination country, extended family relations in such a country or potential previous residence therein,²⁴ would have beneficial outcomes for both, receiving states and protection seekers,²⁵ and that such a refocussing towards the autonomy of the protection seeker could contribute to repositioning of refugee law into the heart of human rights law.²⁶ While these interests might not be weighty enough to justify their nature as human rights in general, they can be considered to be weighty enough to have moral force in the context of refugee protection as they often justify refugees' choices of their country of destination.²⁷

Gibney mentions that respecting claims based on strong moral interests is important in order to enable refugees to re-establish a meaningful social world in the country of protection.²⁸ In the next section it will be argued accordingly that distributive justice between states in terms of the physical distribution of refugees sometimes needs to give way to certain strong moral interests refugees might have in receiving protection in a particular state.²⁹ Based on Raz' conceptualization of personal autonomy, it will be shown that what is owed to refugees qua refugees

²³ Matthew J. Gibney (2015), 458.

²⁴ Stephen H. Legomsky, "Secondary refugee movements and the return of asylum seekers to third countries: the meaning of effective protection" (2003) 15 *International Journal of Refugee Law* 567, 664.

²⁵ From the point of view of states taking into account certain strong interests refugees might have in ending up in a particular place might facilitate their integration into the societies of particular states.

²⁶ Matthew Zagor, "The struggle of autonomy and authenticity: framing the savage refugee" (2015) 21 *Social Identities* 373, 374.

²⁷ Jaakko Kuosmanen, 110.

²⁸ Matthew J. Gibney (2015), 460f.; The reason why respecting certain strong moral interests going beyond rights claims might be important when treating the claims of refugees is that, next to the harm caused to refugees' basic needs, another essential harm inherent in refugeehood is displacement, which might potentially only be remedied through granting refugees the possibility to re-establish a meaningful social world in a place they can at least co-determine. Cf Mollie Gerver, 53f.

²⁹ Cf in regard to this argument Rainer Bauböck, "Refugee Protection and Burden Sharing in the European Union", 146.

potentially needs to go beyond the protection of basic needs as claimed by Ferracioli or Carens, towards an idea of the refugee as a part-author of her own destiny within an institutionalized framework of responsibility sharing.³⁰

What is Owed to Refugees in Institutionalized Responsibility Sharing Regimes?

There are certain moral reasons for why certain strong interests short of rights claims of protection seekers should be taken into consideration in order to reinforce the political character of refugeehood and bring it closer to a human rights discourse again by reinforcing the agency of protection seekers.

A way to demonstrate the importance of the agential capacity³¹ and the consideration of certain preferences of protection seekers is through approaching this issue from the point of view of Raz' concept of personal autonomy. Raz sees the ideal of personal autonomy as "the vision of people controlling, to some degree, their own destiny."³² The ability to choose one's relationships and goals is thereby regarded as an important part of individual well-being, but Raz also acknowledges that no life can be wholly self-created independently of being enmeshed in certain particular societal structures.³³ He thereby identifies three conditions that need to be met in order for an individual to be able to lead an autonomous life, which consist of having the appropriate mental abilities, being provided with an adequate range of options to

³⁰ Next to the acknowledgment of the importance of the consideration of certain strong interests of protection seekers, another crucial debate in normative theorizing on responsibility sharing and asylum potentially refocuses some of the attention in the discourse towards what is owed to refugees in an institutionalized framework in which states are collectively committed to provide protection to refugees – namely the debate concerning the duty of some states to take up the slack in case other states fail to take up their fair share. While some voices in this debate stress that what a state has an obligation of justice to do is taking its fair share of refugees, and anything that would go beyond that would only potentially be a humanitarian obligation, others stress that fairness between states (thus the level of justice between states) should not outweigh the vertical obligations towards protection seekers that in the end require states to take up the slack. While there is dissent on whether there is a duty to take up the slack on a global level given the lack of institutionalized collective duty to provide protection, Bauböck for example argues that the case is different in Europe, where, as has been argued further above, there is a collective duty to provide protection to refugees and thus Member States should take up the slack of other Member States failing in their obligations towards refugees, something that is of topical importance in the practical discourses on asylum in Europe at the moment. See Rainer Bauböck, "Europe's commitments and failures in the refugee crisis", 7f.

³¹ Christine Straehle, "Justified state partiality and the vulnerable subject of migration" (2017) 20 *Critical Review of International Social and Political Philosophy* 736, 740.

³² Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1986), 369.

³³ Peter Jones, *Rights* (Macmillan Press, 1994), 131.

choose from as well as independence from coercion in making such choices.³⁴ Personal autonomy, however, does not require that a person needs to be able to pursue any option she chooses, and the person can be even prevented from pursuing certain options by coercion as long as there are adequate other options that she can choose from.³⁵ This is something that distinguishes personal autonomy from self-realization in Raz' terms, which would consist of "the development to their full extent of all, or all the valuable capacities a person possesses."³⁶

When considering the debate that is at the heart of this paper from the point of view of personal autonomy of those seeking protection, and recalling that an "[autonomous] person must not only be given a choice but he must be given an adequate range of choices",³⁷ it can be questioned whether the conditions of personal autonomy can be met by a protection seeker deprived of any agency. In the Dublin System for example the individual protection seeker is factually being coerced into receiving the protection of her basic needs in a particular state while none of her choices that are potentially based on strong moral interests are considered at all.³⁸ The reassertion of autonomy would, however, be an integral part on the path of moving away from the image of the protection seeker as a vulnerable subject lacking the capacity to be autonomous to an agent having some active role in determining the course of her life.³⁹

It needs to be clarified that what is being argued for here is not a right to autonomy, the existence of which Raz denies himself,⁴⁰ but instead seeing the provision of adequate options from which a protection seeker can choose and which are linked to strong moral interests she may have (which however do not need to amount to rights claims)⁴¹ as a prerequisite of equal moral concern. This would serve

³⁴ Joseph Raz, 372.

³⁵ Ibid, 377.

³⁶ Ibid, 375.

³⁷ Ibid, 373.

³⁸ With the exception of a certain limited consideration of family ties and rights of minors.

³⁹ Peter Jones, 125; Matthew Zagor, 374.

⁴⁰ Joseph Raz, 207.

⁴¹ There are, however, some rights based claims which are already being considered, such as the possibility of protection seekers to find protection in a country in which certain family members are present derived from the right to family life, which even in the Dublin System precede the criterion of attribution based on illegal entry into EU territory (see Articles 9-11 of the Dublin-III Regulation). See also Rainer Bauböck, "Refugee Protection and Burden Sharing in the European Union", 145.

to balance out the horizontal level of distributive justice between states with what is owed to individual protection seekers – when thinking about designing institutional schemes of protection provision – in order to re-establish the individual as an agent in such schemes instead of just being a humanitarian subject in need of protection.

A way of showing that the provision of adequate choices taking into account certain strong moral interests individual protection seekers may have - going beyond the pure provision of basic security – seems to be morally required within a refugee regime, can be provided by looking at an analogy Gibney uses between a responsibility to refugees and a state's responsibility for abused and battered children in a domestic society. Gibney demonstrates that in case of battered children the state's responsibilities are not limited to taking children out of the failed families and providing physical protection but that in a second step the state also has to search for long-term arrangements (such as adoption) that are able to best promote the long-term welfare of a child. In this process several weighty interests such as e.g. the child's personal experiences, his or her cultural and ethnic background or special needs, and even the child's subjective preferences need to be taken into consideration. He then argues that the situation of refugees can be conceptualised analogously, whereby providing security is the minimal and most important duty, but “states also have a duty to look for ways to settle refugees in countries where they are likely to flourish.”⁴² In developing Gibney's argument further, could it not be argued that certain strong interests by protection seekers, while not weighty enough to ground rights claims (a right to choose), could nevertheless be weighty enough to have moral force in the context of refugee protection,⁴³ and could eventually amount to something like a “principle of the best interest of the protection seeker”, whereby states would have a duty to provide an adequate range of options and a duty of justification in considering protection seeker's choices?

In fact, some of this thinking, while not present in the initial Commission proposal for a Dublin-IV regulation, has recently emerged in the European Parliament's report on the Commission proposal, the so-called Wikström report⁴⁴, that will support the Parliament's position in the further negotiations. In this report

⁴² Matthew Gibney, 459.

⁴³ Jaakko Kuosmanen, 110.

⁴⁴ LIBE Report on the proposal for a regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), 7 November 2017, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2017-0345+0+DOC+PDF+V0//EN> (last accessed: 02.12.2018)

MS examining an application would be under the new Article 19(2), subparagraph 1, entitled to request another state to take over the application “based in particular on family, cultural or social ties, language skills or other meaningful links which would facilitate his or her integration into that other Member State.” Another fruitful suggestion can be found in the new default rule proposed for the Dublin-IV reform in the Wikström report, whereby the new Article 3(2), subparagraph 1, would require to shift the responsibility to a state that has so far taken the smallest number of protection seekers in (“correction mechanism”), and whereby the protection seeker would be offered four countries from which she could choose her preferable one. Of course that would constitute a fundamental first derogation from “the no choice for protection seekers” approach and would strengthen their capacity as autonomous social agents capable of rebuilding a meaningful social world for themselves – thus reinforcing autonomy as a specific ideal that states ought to foster in the Razian sense.⁴⁵ It needs to be added, however, that the prospects of this proposed corrections surviving the further negotiation stages are not very promising.

A Case Study of Dispersal in the UK

When thinking about responsibility sharing in the European Union it appears useful to draw on empirical examples of schemes that have been already applied in comparable contexts⁴⁶ and that show the difficulties that might arise when trying to balance the fair distribution of refugees across a certain territory and certain strong interests refugees might have in residing in particular parts of that territory. One such an example is the UK system of dispersal of asylum seekers introduced through the Immigration and Asylum Act 1999, which aims at the dispersal of asylum seekers on a no-choice basis, with interests of individuals not being considered in the relocation process.⁴⁷ This dispersal system followed a preceding period during which asylum seekers basically had a free choice of where to settle on the territory of the UK and

⁴⁵ Jeremy Waldron, “Moral Autonomy and Personal Autonomy” in: John Christman and Joel Anderson (eds.), *Autonomy and the Challenges to Liberalism* (Cambridge University Press, 2005), 316

⁴⁶ Although the distribution of refugees between Member States of the EU cannot be directly compared to the way refugees are being distributed within the territory of certain states, there are however strong similarities given the fact that due to the border free Schengen Area refugees in principle also cannot be coerced by physical borders to stay within a particular Member State rather than moving on to another one to claim asylum there - as can be seen upon the example of large number of secondary movements across the EU.

⁴⁷ Emma Stewart and Marnie Shaffer, “Moving on? Dispersal policy, onward migration and integration of refugees in the UK”, 14, available at: http://www.migrationscotland.org.uk/uploads/user_contributed/Moving_On_Final_Report_2015.pdf last accessed: 02.12.2018)

thus effectively self-allocated themselves. The self-allocation model led to a large majority of protection seekers settling in the greater London area and the South East, and the dispersal system was a direct reaction to the presumed pressures this geographic concentration created on the welfare and housing sectors of these regions. The shift was a radical one, from complete self-allocation to no-choice, and the importance of depriving asylum seekers of any choice was explicitly emphasized in the documents preparing the dispersal policy, such as the “Fairer, Faster, Firmer” White Paper by the Home Office of 1998, which stated e.g.: “Asylum seekers would be expected to take what was available, and would not be able to pick and choose where they were accommodated [...]”⁴⁸ Earlier assessments prior to the implementation of the dispersal policy have shown that criteria which determined the allocation patterns of asylum seekers were the presence of family members or ethnic communities, as well as employment opportunities in particular regions. While those factors were initially envisioned to be considered by the authorities performing the dispersal in deciding where to send particular applicants, ultimately the factors that mostly determined where certain individuals would eventually end up was the availability of cheap social housing in many cases, which contributed to asylum seekers being dispersed to already economically deprived areas which further spurred social tensions in these areas.⁴⁹ The situation further deteriorated with an additional shift towards the privatization of dispersal in 2012, whereby three large private companies (G4S, Serco, Clearel) became responsible for housing provision, which further contributed to dispersal being solely based on market rationales in the sense of availability of cheap housing.⁵⁰

Examples like this might show that both extremes, either the coerced allocation of protection seekers into particular regions, or the alternative where protection seekers could self-allocate themselves, led to unsatisfactory results. The full-choice model led to disproportionate responsibilities for some regions in comparison to the rest of the country and thus justice deficits on a horizontal level between the single regions, while the no-choice model of dispersal completely disregarded the interests of individual protection seekers and led to large-scale secondary migration of this

⁴⁸ Home Office, “Fairer, Faster Firmer”, 1998, para 8.22, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/264150/4018.pdf (last accessed: 02.12.2018).

⁴⁹ Patricia Hynes, *The Dispersal and Social Exclusion of Asylum Seekers* (Policy Press: Bristol, 2011), 71ff.

⁵⁰ Jonathan Darling, “Asylum in Austere Times: Instability, Privatization and Experimentation within the UK Asylum Dispersal System” (2016) 29 *Journal of Refugee Studies* 483, 488.

group of people into other regions.⁵¹ There were some local practices in the early times of the dispersal scheme where local refugee service providers managed to accommodate some wishes and preferences of asylum seekers into the process of determining their dispersal destination through informal practices, as far as this was possible within the broader institutional framework, but which were later dismantled given institutional pressures and the push for privatization.⁵² While there is no broad empirical data available on these practices, it could be claimed that they went a bit closer towards reconciling the interests of hosting regions and asylum seekers.

Some Concluding Remarks

As the discussion above shows, there is some value in arguing for more consideration of the choices of refugees short of rights claims. Constructing the protection seeker legally as an active agent possessing the capacity to co-determine her destiny has a certain potential in the process of redrawing the public image of protection seekers and refugees from passive, ethicized supplicants depending on their vulnerability in their claims for protection, to more active agents with an autonomous sphere of influence in regard to the decisions taken upon them.

Of course the question remains whether a scheme of responsibility sharing that takes account of refugees' interests going beyond the protection of their basic needs is politically feasible in Europe at the moment. Several interesting approaches have been provided by a variety of authors as to how to cope with this issue. Byrne and Shacknove have already as early as 1996 advocated that the next step in the development of the Dublin regime should involve an extended recognition of certain links between a refugee and the country where she seeks asylum, such as "prior periods of residence for professional or educational reasons; strong linguistic and cultural ties [...] or the existence of a well-established expatriate community."⁵³ Another potential first step into the right direction might be a refugee quota trading mechanism as suggested by Rapoport and Moraga, which encompasses a preferences-matching-mechanism by which the preferences of states and protection seekers are being assessed and people are sent to certain states in case the preferences of both

⁵¹ Vaughan Robinson, "What works? Improving the effectiveness and efficiency of dispersal" in: Vaughan Robinson, Roger Andersson and Sako Musterd (eds.) *Spreading the 'Burden'? A Review of Policies to Disperse Asylum Seekers and Refugees* (Policy Press: Bristol, 2003), 154.

⁵² Patricia Hynes, 75f.

⁵³ Rosemary Byrne and Andrew Shacknove, "The Safe Country Notion in European Asylum Law" (1996) 9 *Harvard Human Rights Journal* 185, 206.

parties match.⁵⁴ Such a matching mechanism has recently been developed further in the work of Jones and Teytelboym,⁵⁵ who suggest a refugee matching mechanism encompassing the preferences of both the state and protection seekers and matching them with the help algorithms which have been in the past successfully applied to match doctors to hospitals and school children to potential schools.

A further interesting proposal, which appears to be more feasible and would tackle some of the core problems related to the limitations of mobility and agency of recognized beneficiaries of international protection, has been presented by Jürgen Bast.⁵⁶ He argues that while one could keep the Dublin criteria in regard to protection seekers, limitations to the freedom of movement beneficiaries of international protection should be removed. This would mean that while people needed to wait in an assigned country during the process of status determination, they would be free to go to the place of their preference after obtaining a status. Initially, there could also be a transition period before granting the right to freedom of movement, but it should be drastically shorter than the five years currently required in the Long Term Residents Directive.⁵⁷ Such a solution would be a compromise in between the fair-allocation-of-responsibilities interests of states and the mobility interests of beneficiaries of international protection.⁵⁸ It would also contribute to a fairer distribution of responsibilities between states since the Member States at the external borders would still be responsible for the biggest part of status determinations while the remaining states would probably be responsible for the longer term protection of those who decide to move on after status determination.⁵⁹

⁵⁴ Hillel Rapoport and Jesús Fernández-Huertas Moraga, “Tradable refugee-admission quotas: a policy proposal to reform the EU asylum policy” (October 2014) EUI Working Paper RSCAS No.101.

⁵⁵ Will Jones and Alexander Teytelboym, “The International Refugee Match: A System that Respects Refugees’ Preferences and the Priorities of States” (2017) 36 *Refugee Survey Quarterly*, 84-109.

⁵⁶ Jürgen Bast, “Solidarität im europäischen Einwanderungs- und Asylrecht”, in: Stefan Kadelbach (ed.) *Solidarität als Europäisches Rechtsprinzip?* (Baden-Baden: Nomos, 2014), 155-156.

⁵⁷ See Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:132:0001:0004:EN:PDF> (last accessed: 02.12.2018).

⁵⁸ Dana Schmalz, “Verantwortungsverteilung im Flüchtlingsschutz: Zu den Problemen ‘globaler Lösungen’” (2017) 1 *Z’Flucht Zeitschrift für Flüchtlingsforschung* 9, 35.

⁵⁹ Such a model though would still potentially require financial flanking measures in form of monetary transfers in order to even out the financial contributions more popular and less popular reception states would have to bear – thus a form of additional financial ‘burden sharing’.

Postscript: Response to the Commentary by Matthias Hoesch

I am very thankful for the comment on that paper provided by Matthias Hoesch⁶⁰ and I am happy that we at least seem to be in agreement as regards the conclusions suggested in the paper, although there seem to be several disagreements between the two of us as to the arguments used to arrive at these conclusions. In my opinion the reason for some of those disagreements stems from the different levels of abstraction on which we set our arguments – thus in a broader sense from a difference in the sensitivity to real-world factual constraints on the spectrum between ideal and non-ideal theorizing.⁶¹ In this context I would like to respond to two critical remarks that Hoesch has voiced in commenting on my paper.

Let me start with the first critical remark that Hoesch makes in regard to my paper. He questions the added value of having to look for “special arguments” that would justify the need for taking into consideration strong moral interests of refugees going beyond rights claims when thinking about schemes of distribution of refugees across territory (in my case of the EU). He claims that it is maybe “enough just to point out that refugees are persons, and just because of that simple fact we have to consider their claims, perspectives, interests, and preferences, at least as long as there are no opposing reasons.” Point taken – and from the perspective of abstract normative theorizing that could be all that should be asked for. On a lower level of abstraction, however, such an argument falls on deaf ears. Therefore, my point was to look at the special living conditions of refugees as a particular group of persons who have been forcefully displaced and relive this form of displacement through the coerciveness of the Dublin regime. My reference to Raz was meant to not only focus on the second criterion in Raz’ typology, thus the provisions of an adequate range of options (or in my interpretation countries) to choose from, but on its interrelationship with Raz’ third criterion through the coerciveness of the Dublin regime, whereby a particular group of people after already having been coerced once to leave their home territory is being coerced again to dwell in an assigned territory without once again having a say in the process. The point thereby is not the question whether they potentially could find adequate options to re-establish a life in the place they are being coerced to – but the fact that they are being forcefully coerced to move to a particular place on which they again have no say and what is something an adequate range of choices should be provided against as a remedy – a point that I admit could have been worked out a bit better in the paper.

A second critical remark provided by Hoesch that I would quickly like to comment upon concerns his warning directed towards the tendency found in my paper, but also in the work of other colleagues working in the field,⁶² of limiting one’s focus in normative theorizing to regional actors

⁶⁰ Matthias Hoesch, “Comment on Lukasz Dziejczak: What is Owed to Refugees When Attributing Responsibilities to States in Institutionalized Responsibility Sharing Regimes?”, in: Matthias Hoesch and Lena Laube (eds.) *Proceedings of the 2018 ZiF Workshop “Studying Migration Policies at the Interface between Empirical Research and Normative Analysis”* (ULB Münster: miami.uni-muenster.de), 95–99. doi: 10.17879/95189436504.

⁶¹ For an account on the question of real-world factual constraints in non-ideal theorizing see e.g. Laura Valentini, “Ideal vs. Non-Ideal Theory: A Conceptual Map” (2012) 7 *Philosophy Compass* 654–664.

⁶² See e.g. Rainer Bauböck, “Refugee Protection and Burden-Sharing in the European Union“ (2018) 56 *Journal of Common Market Studies* 141-156; Nils Holtug, “A Fair Distribution of Refugees in the European Union“ (2016) 12 *Journal of Global Ethics* 279-288.

such as the European Union rather than taking a universal perspective, a tendency that according to Hoesch poses a big danger for those engaging in it to come into fallacies. Here once again I would claim that Hoesch is on a different level in regard to real-world factual constraints on the spectrum between ideal and non-ideal theorizing. In an ideal world in which one had the possibility to impose normative requirements of fairness upon states globally one of course should focus on a fair global system of responsibility distribution. As Hoesch in his examples indicates, the real world situation is rather one in which the EU as a whole and its Member States do not take their globally fair share of refugees but rather to some extent free ride on the efforts by other states - often those in vicinity to conflicts causing refugee movements. To draw from this the conclusion, however, that given the global inequality in refugee responsibility attribution it does not make sense to think about schemes of fair sharing inside the European Union since it would nevertheless remain unjust towards the countries outside bearing the brunt of the burden is in my opinion not helpful. In the paper I already justified why I think that such an institutional framework of refugee responsibility distribution is most likely to be first implemented in the EU given some particular elements of the institutional design of the EU. And from a point of view contextual normative theorizing I believe that it makes sense to first and foremost have a system based on solidarity and fair sharing of responsibilities inside Europe before the relationship with the global arena, and the fair share the EU as a collective should have, can be addressed. If the EU as an entity will be working on the basis of such principles internally, it is a first step in the process of reflecting upon such principles also in regard to the EU's relationship with the outside world. If the EU already internally, with the institutional capacities for collective action it has, does not have a system based on solidarity between states and fairness towards refugees – it is difficult to even begin to factually address questions of solidarity and fairness in refugee distribution towards the broader world (in which the institutional parameters for coordination and collective action are comparatively limited).⁶³

⁶³ I do, however, to some extent agree with Hoesch that a strong focus on real-world factual constraints to normative theorizing, at least in principle, can if performed uncritically contribute to a defence of the unjust global status quo.

Comment on Lukasz Dzedzic: What Is Owed to Refugees when Attributing Responsibilities to States in Institutionalized Responsibility Sharing Regimes?

Matthias Hoesch¹

Cluster of Excellence "Religion and Politics", University of Münster

Abstract

This paper comments on a talk given by Lukasz Dzedzic at the 2018 ZiF Workshop "Studying Migration Policies at the Interface Between Empirical Research and Normative Analysis", September 2018, in Bielefeld. Dzedzic addresses an important question: When states form a scheme of fair distribution of refugees, do they have to take into account the interests and preferences of the refugees? Or is getting protection from somewhere the only moral claim that refugees have? Although I don't disagree with Dzedzic's conclusions and proposals, I doubt that some of his arguments are useful to justify his conclusions. Furthermore, I claim that the focus on the European Union puts him (and others) at risk of fallacies. Dzedzic's paper is available under doi: 10.17879/95189437167.

Keywords

Cluster of Excellence "Religion and Politics"; asylum; refugees; responsibility sharing

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In his paper, Lukasz Dzedzic addresses an issue of great importance: Suppose there is some system of sharing the burdens for asylum seekers between states. Are states entitled to distribute refugees amongst each other without considering the interests

¹ Email: matthias.hoesch@uni-muenster.de.

and preferences² of the refugees? That would include the right to deport asylum seekers against their will and in the face of their resistance to other countries that offer refugee protection. Or are refugees, on the contrary, entitled to choose which state they will live in in the future? Or should there be a procedure of distributing persons to states that gives some weight to both sides, the interests and preferences of the asylum seekers and the ideal of fairness in burden-sharing?

I believe that the third option is the most plausible one. As Dziejczak mentions, in political reality we are far away from a satisfying balance of interests that is implied by the third option. In normative debates, however, there has been a growing interest in the question that Dziejczak has raised in recent years, in part caused by a criticism levelled by authors in the tradition of critical theory: they claimed that the liberal mainstream views asylum seekers as passive objects in need, instead of recognizing them as political actors that have their own preferences and moral convictions.³

Let me start with the question why the interests and preferences of refugees should be taken into account at all. I'm not sure whether we really need to look for special arguments that support that demand. Maybe it is enough just to point out that refugees are persons, and just because of that simple fact we have to consider their claims, perspectives, interests, and preferences, at least as long as there are no opposing reasons. Or we could highlight the fact that the starting point of normative discussions should be individual freedom, and thus it is up to the states to offer arguments for coercing refugees to live in a certain country, and not up to the refugees to explain why their preferences and interests should be taken into account.

Dziejczak seems to believe that there is more burden of proof on the side of those who support of taking into account the perspective of refugees, and he offers two particular arguments: firstly, he draws on Raz' conception of autonomy, and

² I believe that two different things are at stake if we require states to take into account the perspective of refugees: on the one hand, there are objective interests to live in a certain country, such as the fact that there are family ties to a country, that someone is familiar with language and culture, or that someone has good prospects at the labour market. On the other hand, and maybe more important, there are subjective preferences of refugees. In many cases, refugees have certain preferences because they also have objective interests, but that is not always the case. As I see it, even the pure fact that someone has a certain preference morally matters, regardless of whether that preference is based on an objective interest.

³ I am not sure that Dziejczak in his paper adequately describes the current debate. He first mentions writers who claim that refugees do not have a right to choose their destination. Then, he writes: "Thus these authors indicate that what is being owed to refugees is the protection of their basic needs that can potentially be provided in any country, while they do not need to have a say in where this might be." However, denying a right to choose is perfectly compatible with claiming that it is necessary to have a say.

secondly, he follows Gibney in making an analogy to caring for children. I'm not convinced that these two arguments really establish a stronger justification than the one I have indicated.

As is well-known, Raz holds that there are three conditions for leading an autonomous life: appropriate mental abilities; an adequate range of options to choose from; and independence from coercion in making such choices. Dziezic builds on the second of these conditions: persons need an adequate range of options, and therefore, he argues, they should not be coerced to live in a certain state, but they should be free to choose from a limited number of several states. However, in my view that argument is misleading: To lead an autonomous life, you will find an adequate range of options within every single state: no matter if you live in Germany, in France, or in Poland, you can choose between a wide range of professions, between many people to come into contact with, between living in a city or living in rural areas and so on. Thus, there is no need to have a range of options of which country to live in in order to have an adequate range of options of how to lead your life. Of course, things change if we no longer link the concept of autonomy to the leading of an autonomous life, but to the choice of the country where one will live, that is to query the conditions of having an autonomous choice of that country. But that begs the questions, since what we are looking for is an argument of why there should be an autonomous choice between countries.⁴

Dziezic's second argument uses an analogy between the responsibility towards refugees and a state's responsibility for abused and battered children in domestic society. In the same way a state should make efforts to promote the best long-term welfare of a child (and not only rescue it from the threat of abuse), a system of states should make efforts to provide the best opportunity for refugees to flourish in their new country. Obviously, there is some truth in that analogy. However, refugees should not be treated in the same way we treat children. In the case of children, the state should first and foremost take into account objective criteria for well-being. As I see it, in the case of refugees, at least the same weight should be given to their subjective preferences. The demand to take into account the perspective of refugees is not primarily based on prospects for well-being, but is based on respecting the freedom and choices of autonomous persons.

⁴ Some writers refer not to the second, but to the third condition of Raz' analysis; see Hoesch, M.: "In welchem Sinn kann es ein Recht auf offene Grenzen geben?" *Jahrbuch für Recht und Ethik* 25 (2017), 49–73. However, those writers try to justify open borders in general, and not a particular claim of refugees.

Other than my critical remarks concerning some of Dzedzic's arguments, I believe that there is no disagreement between us concerning the conclusion that refugees have a *prima facie* right for their interests and preferences to be taken into account within a scheme of burden sharing between states. Let me now turn to the question of whether states, in contrast, have a similar claim to determine the destinations of refugees. As I see it, the following statement could plausibly be true:

A state has a *prima facie* right to deport asylum seekers against their will to other states that provide protection, or to refuse them entry, if that state has already fulfilled its fair share and the state that is made responsible for the asylum seeker by that act has done less, proportionally to its own fair share, and there are no other options for compensation.

According to that principle, states have a *prima facie* right to improve fairness between states, or to come closer to what would be a fair distribution of burdens, and they are entitled to use coercive means to achieve that aim. Of course the principle is controversial. Those who are generally in favour of open borders won't be convinced that fairness between states trumps individual freedom. Others will claim that the statement will seldom apply, since in most cases there is an opportunity to financially compensate those states who have admitted more refugees than their fair share; according to that view, refugees should be free to choose their destination, and afterwards those states that were chosen by many refugees receive money. I'm not going to discuss that in detail, since it seems that Dzedzic would be able to accept the principle I proposed. Instead, I would like to use Dzedzic's paper as an opportunity to cast doubt on the idea that a focus on the European Union might serve as a step from theory to practice – an idea that can be observed in many publications.

Dzedzic focuses on the EU mainly on pragmatic reasons: A burden-sharing scheme within the EU seems to be more feasible and more likely to become a political goal in the nearer future than a burden-sharing scheme on an international level. In the debate, views can also be found that hold that fair burden sharing is only morally required within a framework like the EU. I am not convinced by that position, and I will follow Dzedzic's approach.

If we focus on the EU, it seems natural to hold that European states who actually take a greater burden than other European states are morally entitled to deport refugees to these less-burdened states. Suppose we had some metrics by which to measure the burden caused by refugees, adjusted by factors that reflect criteria of fair burden sharing like GNP, size of population, size of territory, etc. Suppose now that Italy, Austria and Germany have a burden of, say, 8; France a burden of 3, and

Poland a burden of 1. Now it seems that Italy, Austria and Germany would be entitled to deport refugees to France and Poland, up to the point that those countries reach the average burden of European states. Deporting refugees to these countries (thereby restricting the refugees' freedom and using coercive means) would be justified, it seems, by the legitimate goal of the states to achieve a fair sharing of burdens.

However, it could turn out that states outside the EU carry much more burden. Suppose Jordan and Lebanon have a burden of 20, and a full protection of all those in need would require every receptive state to take a burden of 10. Now, the picture has changed. It now seems that Italy, Austria and Germany are not morally entitled to shift any burden to Poland and France; on the contrary, they are morally obliged to accept more burden for themselves. As a consequence, there is no justification to use coercive means to deport refugees against their will to these less-burdened countries.

For some writers, using the EU as an example is a step on the way to bringing theory into practice, and thus combining ethical theorizing with empirical observations and political proposals. I am convinced that in doing that, there is a big danger to fall into fallacies. As long as the EU as a whole does not accept its fair share, the discussion of how to share burden fairly within the EU comes to somewhat resemble the discussions of mafiosos of how to share the loot from a bank heist: if the EU as a whole does not accept its fair share, the EU has illegitimately gained some advantage, and the extensive discussion between the member states of who should be responsible for those few who reach the EU border is a discussion of how to share that illegitimate advantage.

(Recent) Deviations in Border Control – Challenges for Normative Strategies of Justification?

Verena Risse¹

Department of Philosophy and Political Science, TU Dortmund

Abstract

This paper targets the observation that border control has become increasingly diversified not least since what is commonly referred to as the ‘refugee crisis’. This development, however, prompts the question to what degree conventional normative justifications or legitimization strategies of border control can still acknowledge these diversified practices. Alongside, the discussion allows evoking the more general question at what point a normative argument must take into account diverging practices. This paper consists of two parts: The first part investigates the deviations in border control, thereby structuring these along the lines of externalization, internalization, and privatization; the second part examines whether commonly used normative arguments for the justification or legitimation of border regimes can still be upheld in the face of deviating border control practices. The discussion ultimately allows a reflection upon the relation between theoretical considerations and changing practice in the context of border control.

Keywords

Migration; borders; border control; justification

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During the last years, one could witness not only a considerable increase in refugee movements, migration routes and asylum applications, but also a continuing diversification in border control strategies. This development, however, prompts the question to what degree conventional normative justifications or legitimizations of

¹ Email: verena.risse@tu-dortmund.de. This paper presents several arguments that I have previously published in German language in two papers. Please also refer to them for references: Verena Risse, „Die Diversifikation von Staatsgrenzen – Anlass zu einer konzeptionellen Neubestimmung?“, Berliner Debatte Initial Vol. 29, No. 1 (2018), pp. 62-72; Verena Risse, „Staatsgrenzen als faktische Grenzen der theoretischen Reflexion?“ In: Carlo Masala (ed.), Grenzen: Multidimensionale Begrifflichkeit und aktuelle Debatten, pp. 39-54. Baden-Baden: Nomos, 2018.

border control can still acknowledge the diversified practice. Alongside, the discussion allows evoking the more general question at what point a normative argument must take into account diverging practices. This paper will proceed in three steps.

After brief preliminary definitional remarks in a first section, an investigation of the increasingly diverse practices of border control mechanisms will be made in the second section. In contrast to the standard case of a geographical state border controlled by a state official to prevent unauthorized access to the territory, several deviations can be noted. The dominant deviations can be grouped in three categories, i.e. the externalization, internalization and privatization of border control. Externalization refers to the relocation of border control outside the state territory (as for instance witnessed in Australia's turning-back-the-boats policy). Internalization refers to the relocation of border control within the state territory (exercised e.g. by means of reviewing a person's documents or residence status). Privatization describes delegating the task of border control to non-state agents (as in the case of outsourcing refugee registration or in the established practice of carrier sanctions).

Against the background of these depicted practices of border control, in a third section, it shall be examined whether commonly used normative arguments for the justification or legitimation of border regimes can still be upheld in the face of deviating border control practices. In particular, arguments turning on democracy, autonomy and rights as well as procedural and instrumental justification strategies will be considered. What can be shown by investigating these justifications is first, that they accommodate non-standard ways of border control only insufficiently and second, that the deviations seem to be explicitly tailored to make use of normative gray zones.

To what degree, however, a normative theory must take into account new and diversified legal and political practices is a question that accompanies the discussion in this paper and will therefore be made explicit in section four, before the findings are summarized in a concluding section.

1. Preliminary definitions and clarifications

Before turning to the different deviations of border control and a discussion of the relevant cases illustrating them, a few definitions and clarifications seem appropriate.

First of all, it is necessary to point out that 'deviation' inherently implies that there is a standard case from which new or altered cases differ. This standard case of

border control is as follows: A state official prevents unauthorized access to the state territory at the geographical state border. Several elements are important here. First, with regard to the actor, it is a civil servant acting in the name of the state when performing the duty of border control. Second, the location of border control usually is the geographically defined state border delimiting the state territory. Third, the aim of the action is to prevent unauthorized access, i.e. to prevent access to those persons who do not produce the necessary documents or reasons to enter. This standard case is still at work at numerous borders, but has been complemented by different variants of border control as will be laid out in the next section.

Furthermore, in this paper, a border shall be understood as the point where those measures are carried out in which the access of foreigners to a state territory is being controlled. It seems noteworthy that this definition links a geographical place with a targeted action.

2. Systematizing deviations in border control mechanisms?

Deviations in border control mechanisms cannot only be witnessed during the last couple of years, but constitute an ongoing development. Still, one might consider that today there is a new degree of differentiation to these deviations², forging mechanisms that target certain groups or even individuals ever more specifically.

In order to structure this wide range of diverse border control mechanisms, this paper will concentrate on three kinds of deviations that center on spatial and actor-specific changes: externalization, internalization and privatization. The following paragraphs will define and conceptualize these deviations in more detail and illustrate them with examples.

a. Externalization

The first case, which will be discussed here, is the spatial deviation of externalization. Border control is being externalized when the decision of whether someone is admitted to a country is relocated outside the state territory.³ This is to say, the effective action of border control takes place before the would-be immigrant reaches state territory. The places where the externalized border control is carried out could be third or neighboring countries, the migrants' home country or international zones.

² Among many others, see e.g. Heintel, Martin et al. (2017): *Grenzen – eine Einführung*, pp. 1-15.

³ Other scholars refer to a similar set of cases as “extraterritorialization”. See e.g. Hoesch (2017): *Grenzpolitiken und Flüchtlingsschutz*, p. 315.

But not only the places, also the precise mechanisms and actions through which externalized border control is being executed differ as the following cases show.

One of the oldest and most commonly practiced variants of an externalization of border control is the practice of carrier sanctions⁴. Carrier sanctions are incurred if airlines or other shipping and transport companies transport passengers to their destination who do not carry the necessary documents required for entry into this country. The sanctions take the form of pecuniary fines and – in some cases – the denial of landing privileges. In addition, the transport company is required to transport the person back to the country of origin. The duty to check the documents is thus conferred upon the carrier personnel handing out boarding passes. These employees, however, are not trained border officers. Rather, they perform this check alongside a number of other professional duties. It might be assumed that in the aim of avoiding a fine for their employer, the personnel in charge will carry out the check rather strictly. Carrier sanctions are thus a form of externalization by which border control is relocated to any airport with which an air connection is being upheld.

Another example for the externalization of border control is Australia's "Turning Back the Boats Policy".⁵ Here, Australian marine ships intercept refugee boats on the High Seas to prevent them from reaching Australian shores and (ideally) divert them back to their country of origin. This practice is predicated on the fact that on the High Seas international law applies, but not the more detailed Australian migration law.

A slightly different case, but effectively also an emanation of an externalization, are emigration controls at countries of origin or in transit states in order to explicitly prevent migration movements towards (specific) third countries. One of the best-known examples for this practice is the control of Northern African shores to prevent boats from leaving towards Europe across the Mediterranean. Another example are French officials preventing migrants from crossing the channel to Britain. Usually, these practices are stipulated in bilateral agreements between the countries involved. Between Italy and Libya, for instance, several agreements have been concluded in which Libya commits to secure its Northern maritime borders so that no refugee

⁴ For an extensive discussion of the legal background and normative implications of carrier sanctions, see Bloom, Tendayi; Risse, Verena (2014): *Examining Hidden Coercion at State Borders. Why Carrier Sanctions Cannot Be Justified*, p. 65-82. Also see Kritzman-Amir, Tally (2011): *Privatization and Delegation of State Authority in Asylum Systems*, pp. 193-215.

⁵ Klein, Natalie (2014): *Assessing Australia's push back the boats policy under international law: Legality and accountability for maritime interceptions of irregular migrants*, pp. 414-444. Schloenhardt, Andreas; Craig, Colin (2015): *Turning Back the Boats. Australia's Interdiction of Irregular Migrants at Sea*, pp. 536-572.

boats can leave for Italy, while Italy commits to support Libya financially and in the training of its border staff.⁶ It is thus the border officers of a foreign country, who in this emanation of an externalization of border control practices, protects another state's national border. The border control is thus externalized in the sense that it is relocated to another country.

Also certain forms of detention centers outside a state's territory have been established, e.g., by the United States, and add to the externalized border complex.⁷ The European „hot spots“, which have been established in Greece and Italy since 2015, are not entirely of the same kind. These centers are indeed located on European territory and are officially meant to facilitate the registration and the check of the entry documents of the arriving migrants. However, first analyses suggest that especially the Greek hot spots are rather used to intercept migrants and send them back to third countries or transit states and most importantly to Turkey.⁸

The various examples for an externalization of border control, that were given here, differ regarding the form through which the externalization is executed, the external location (i.e. several countries in the case of carrier sanctions, one country in the case of border controls in countries of origin or no national territory in the case of Australia's turning-back-the-boats policy) as well as regarding the actors charged with carrying out the border control (i.e. foreign state officials or private [economic] actors).

b. Internalization

A deviation that takes the reverse direction is the internalization of border control. Border control is being internalized when the decision of whether someone is admitted to or authorized to stay in a country is relocated inside the state territory. In this form of internalized border control, it will most often be checked whether a person holds the required legal status or residence permit to stay in the country. This

⁶ Bialasiewicz, Luiza (2012): Off-shoring and out-sourcing the borders of Europe: Libya and EU border work in the Mediterranean, pp. 843-866.

⁷ Mann, Itamar (2018): Maritime Legal Black Holes: Migration and Rightlessness in International Law, pp. 347-372; for a legal analysis, see Costello, Cathryn (2012): Human Rights and the Elusive Universal Subject: Immigration Detention Under International Human Rights and EU Law, pp. 257-303.

⁸ Ziebritzki, Catharina; Nestler, Robert (2017): Abschiebung statt Umsiedlung? EU-Hotspots in Griechenland und die EU-Türkei-Erklärung – Ein Überblick aus rechtlicher Sicht. 74-94. For a more general appreciation, see Guild, Elspeth et al. (2015): Enhancing the Common European Asylum System and Alternatives to Dublin, pp. 1-67.

is to say, despite having physically crossed the state border, a migrant can still be subjected to scrutiny that can result in her expulsion.

The most important cases of this kind of deviation are inspections of the residence status of foreigners (or assumed foreigners) residing inside the country. The inspection of the residence status can be undertaken by different actors as well as in different situations and settings. First, there are situations and actors in the context of which an inspection of the residence status seems rather natural in that the identification of a person is part of a bureaucratic procedure. Among these are inspections by police officers or inspections in public administrations. However, there are other circumstances, too, in which an inspection of the residence status is legally required. In the USA and the UK, for example, landlords have to check the residence status of would-be tenants and are required to report illegal residents.⁹

A slightly different example for internalized border controls are border controls along the inner European borders or inside Schengen member states. Generally, the external, i.e. the outer border of the Schengen Area is the location where the decision is being taken of whether or not a person is admitted to all signatory countries of the Schengen Agreement without additional border controls when entering another Schengen member state. However, most member states require travelers (including residents of member states) to carry identification documents.

Another, albeit special, case of internalization of border control are reception centers where e.g. the identity and legal status of asylum-seekers are being checked. Here, too, the border has technically already been crossed, but the migrant has not been cleared yet. Therefore, the reception centers are more similar to actual border control than to a posterior control as in the first examples of internalization.

In all given examples, as already stated, the border has technically already been passed when the control is taking place. Still, it seems justifiable to cite all these cases of internalization as a form of border control in that first, the consequences of the control are similar to controls at the border, because persons without the necessary legal title will have to leave the country. Second, these internal controls seem to be intended to serve as a backup if the actual (first) borders have been porous in letting people in that were not intended to be allowed to enter and therefore can be said to “thicken” the border.

⁹ For the introduction of this obligation in Britain, see Bate, Alex; Bellis, Alexander (2017): Right to Rent: private landlords’ duty to carry immigration status checks, pp. 1-45.

c. Privatization

The third deviation that will be discussed here is the privatization of border control. Border control is being privatized when the decision of whether someone is admitted to a country or authorized to stay is taken by no state officials. This kind of deviation does not relocate the effective border control to another place, but puts it in the hand of a different, i.e. a non-standard actor.

Several of the cases that were above can be cited as examples of privatization of border control as well. The practice of carrier sanctions, for instance, puts the border control in the hands of airline personnel and thus of persons who act as employees of a profit-oriented company and not as state officials. Although airline personnel receive some training to perform this job, it must be taken into account that overall the character of their position differs considerably from the one of border officers.

Also, the above-mentioned example of landlords checking the resident status of would-be tenants constitutes a case of privatization of border control, because here, too, landlords as private economic actors are taking up a sovereign task.

Several aspects, which the privatization entails, must be noted. First, as was pointed out above, the precision and strictness with which private actors execute the task of checking travel documents or residence permits can differ from the one of state actors performing the same task. It can be assumed that private persons act more strictly in case of doubt. This also draws on the fact that, generally, the realm of action of private actors is bigger as opposed to public ones who act in the name of the state. This is due to the fact that the first have a general freedom of action whereas the second need an authorization to act.¹⁰

This links to another notable aspect, which is that in the case of privatization, the state technically exercises pressure on two actors: the person controlling the documents and the person requesting access or residence. Whereas in the case of borders being controlled by state officials, the state official is not external to the state body.¹¹

¹⁰ Waldron, Jeremy (2011): *Are Sovereigns Entitled to the Benefit of the International Rule of Law?*, pp. 324-326.

¹¹ Bloom, Tendayi; Risse, Verena (2014): *Examining Hidden Coercion at State Borders. Why Carrier Sanctions Cannot be Justified*, p. 71.

d. General findings and consequences

What the systematization of the deviations in border control and the discussion of the examples so far show is that in the discussed cases border crossings are generally made harder and more difficult to foresee or plan. The latter is the case insofar as all three kinds of deviations, i.e. externalization, internalization and privatization, make it harder to anticipate at what point and by which person the effective border control will be performed.¹²

Moreover, one might wonder whether the deviations have further implications on how borders are characterized. In this regard, it can be assessed to what degree the three mentioned developments change the conceptualization of borders. This has several emanations. First, it seems that due to the described developments, borders are extended from a demarcation line to a wide area, stretching e.g. from Italy across the Mediterranean to Libya. Second, it seems as if borders change from a demarcation line to a network¹³. Indeed, the characterizations of deviating border control practice given above seem to support this idea as carrier sanctions, for instance, literally place borders on the network of connected airports. Yet, considering that not only carrier sanctions, but several different deviations relocate borders, the character of a network is more dense and diverse.

Furthermore, one might wonder whether the described developments change the role of borders. If one reconsiders the definition of borders given at the beginning of this paper, the role of borders can be described as first, marking the contours of a state territory, and second, intercepting the persons intending to enter the state territory so that it can be checked whether they are indeed authorized to enter. Following the slightly broader definition given subsequently, this check, too, is part of the border. Yet, it could be possible that even this more encompassing definition does not cover the role that the deviated borders take up entirely. Against the background of the given characterizations, borders also seem to be employed to prevent people from attempting to cross or to approach them. If, for instance, the departure of refugee boats in direction of Europe is hindered on the other side of the

¹² It should be noted, however, that the development of making border crossings harder and more difficult to plan and anticipate is matched by a countermovement of facilitating border crossings. This is achieved through bi- or multilateral agreements between states by which visa freedom is granted. Yet, these programs usually benefit different groups of people than the ones that are the target of the described deviations of border control. Taken together, these two parallel developments seem to increase one another and both rely on more and more targeted border politics overall.

¹³ This idea of borders as networks has been discussed by several authors from various disciplines. See e.g. Walters, William (2004): *The Frontiers of the European Union: A Geostrategic Perspective*, pp. 674-689.

Mediterranean, this prevention happens at a place still far away from the actual border. Also, one might consider that borders are channeling migrating persons. This can be attributed to the fact that migrants are being diverted at an early stage of their journey, for instance by intercepting migrants' journeys far outside the state territory as is taking place with externalized border control. It is therefore not implausible to assume that these kinds of measures are able to impact on and potentially change migratory routes.

3. Normative Challenges

The deviations in border control, which have been presented so far, prompt the question of whether they constitute normatively problematic developments. This section is therefore aimed at assessing the normative implications of the discussed cases.

In particular, it will be considered whether the diverging border control practice matches standard or traditional justification or legitimation strategies of border control. Three justifications will be evoked here: first, procedural and democratic justification strategies, second, arguments drawing on autonomy and rights, and third, instrumental justification strategies. All three types of justification strategies are used (more or less prominently) to justify border control as such and it will thus be questioned whether they also apply to the deviating practices of border control that were presented in this paper.

a. Procedural and democratic justification

The first group of justification strategies, which will be considered, comprises procedural and democratic justifications. This group assembles two justification strategies, which both generally rely on the idea that public officials ought to act according to a predefined procedure. The democratic aspect adds that the legitimacy of this procedure is determined in public decision-making processes and is also subjected to public control. Rule of law considerations are an essential part of the procedural justification. This encompasses that actions of public actors follow prescribed rules and that they are subject to judicial review.

These procedural requirements also apply to border control as this constitutes a sovereign action generally carried out by state officials. In particular those actions, which are backed by state coercion, must be carried out on the basis of an authorization and must be subject to judicial review.

In order to fulfil the requirements of this procedural justification and democratic control, the actions at stake must satisfy a certain degree of publicity and transparency. These are needed because actions and practices that remain unknown cannot be submitted to public or legal control.

In the light of this group of justifications, the cases of deviated border control seem problematic and this in several ways. To begin with, several of the above-mentioned cases move the effective border control to a certain grey zone. This is to say, it remains unknown, for instance, what exactly happens on Australian marine ships or on the High Seas when refugee boats are being diverted. Consequently, it is hard to determine which legal norms and which (administrative or judicial) procedures are applicable in this case.

Privatized border control presents a different kind of problem in that actions of private or economic actors neither rest on the same legal authorization nor are they subject to the same kind of judicial review as actions by public officials. Instead, as was already indicated above, private actors rely on a general assumption of freedom of action. In opposition, public actors only have an entitlement to act if they are legally authorized.¹⁴ Consequently, it can be assumed that the realm of action of private persons usually exceeds the one of public actors and that this larger scope of discretion also applies in the case of border control.

The degree of discretion is altered by the state exercising coercion on private actors within the limits of its territory. This means that in the case of private actors performing tasks of border control, these persons, too, are subjected to state coercion and can, for instance, incur a fine if they do not perform the relevant action as required. Thus, private persons charged with border control perform actions of state officials, have a greater degree of discretion, which forces them to choose an adequate course of action, and are under the threat of sanctions in case they do not perform these actions properly.

The actions of private persons not only benefit from a larger degree of discretion; they are also not tried by the same courts or subject to the same procedures of judicial review as actions by state officials. This can be problematic when legal action against border-relevant decisions of private persons cannot be taken or can only be taken with difficulties. The requirement of access to courts is thus not fulfilled, the procedural justification incomplete.

¹⁴ Waldron, Jeremy (2011): Are Sovereigns Entitled to the Benefit of the International Rule of Law?, pp. 324-326.

Similarly, actions by officials of foreign states, as practiced when border control is delegated as a kind of emigration control to Libya, for example, cannot be tried by the courts of the state whose borders cannot be reached (like Italy in this example). Here, too, is therefore a procedural gap between action and legal interest.

b. Autonomy and rights

The justification strategy drawing on autonomy and rights relies on the assumption that rights and autonomy are core values and therefore ought not to be infringed by any means. If an infringement cannot be avoided, this can only be justified if the measure at stake is overall fostering autonomy or rights.¹⁵ Clearly, it is impossible that state institutions, which are inherently coercive, do not impede autonomy or rights. Yet, any such impediment must be weighed against its benefits, thereby considering the enhancement of autonomy and rights. The same reasoning applies to border control, which also constitutes a situation where state coercion is in place (and thus violations of autonomy and rights are imminent), but which can be justified if overall, autonomy and rights are being respected and enhanced.

Against this background, several considerations need to be elaborated on. First, it can be assumed that in the case of border control, there is generally a discrepancy between those persons whose rights and autonomy are protected or enhanced and those persons whose rights or autonomy are threatened. While the first group of persons most likely resides inside the state, which effectuates border control, the second group is formed by the persons arriving at the border from outside. Still, this does not undermine the justifiability of border control if, for example, by way of stable institutions and expectations autonomy and rights are improved.

Second, it does not seem implausible to assume that violations or insufficient guarantees of rights in migrants' home or transit countries can be a reason to justify open borders. This holds true as long as open borders do not worsen the institutional conditions inside the receiving state to a degree that rights are at stake there, too.¹⁶

One might thus assume that border control creates stability of expectations and this for both the population residing inside the state that exercises border control, and the migrants that arrive at its border. This applies if the mechanisms of border control are transparent and predictable.

¹⁵ Blake, Michael (2002): *Distributive Justice, State Coercion, and Autonomy*, p. 265. Also see Raz, Joseph (1986): *The Morality of Freedom*, p. 419.

¹⁶ Blake, Michael (2015): *Immigration, Jurisdiction, and Exclusion*, p. 125.

Yet, even if one assumes that border control in general enhances autonomy and rights in that it provides stability of expectation and can thus be justified, it is hard to see how this extends to the cases of deviated border control discussed in this paper. More precisely, it is not clear how these enforced border control mechanisms enhance rights or autonomy (and this for actors on either side of the border); rather, they only seem to threaten them. Therefore, the deviated cases of border control seem hardly justifiable in terms of rights or autonomy when, for instance, at the externalized border fundamental rights and basic freedoms are at stake by not letting migrants approach the border to articulate their quest for asylum.

c. Instrumental justification

The instrumental justification will be discussed here as what might be referred to as a “back-up” justification strategy in that it tends to apply more downstream than the other two justification strategies considered so far. The instrumental justification justifies practices of border control with regard to other goods or values such as culture, or also rights or democracy.¹⁷ It is thus referred to as “downstream” in that it does not address these values directly, i.e. the justification does not follow from these concepts themselves, but relies on the importance of upholding these values.

The idea behind this kind of justification is that border controls are instrumentally good to achieve or to ensure another good that is deemed valuable. This could be the institutional guarantee of rights or democracy, a cultural identity or tradition, or the functioning of the state’s legal-political institutions more generally.¹⁸ Thus, according to this justification strategy, border control would be necessary in order to ensure either of these values.

The instrumental justification strategy of border control has several problems with some being especially severe in the cases of deviating border control discussed here.

The first problem is that it is hard to establish a gapless causality chain where border control is a *sine qua non* condition for the guarantee of either of the values. This is to say, there is no evidence that controlled borders are a necessary (and even less a sufficient) condition for the preservation of culture or the functioning of a

¹⁷ Also see Bloom/Risse (2014): *Examining Hidden Coercion at State Borders. Why Carrier Sanctions Cannot be Justified*.

¹⁸ On culture, see e.g. Scheffler, Samuel (2007): *Immigration and the Significance of Culture*, pp. 93-125. Patti Lenard argues for the instrumental role of culture for the preservation of democracy: Lenard, Patti Tamara (2010): *Culture, Free Movement, and Open Borders*, pp. 627-652.

state's institutions.¹⁹ It can be assumed, however, that an uncontrolled inflow of migrants in a very short period of time could be problematic for the functioning of state institutions and the guarantee of fundamental rights and duties. This argument has been advanced regularly in the German debate after the big migration movements in 2015, however without giving clear evidence as to when the point of institutional collapse is being reached.

With regard to the deviations of border control, another point must be added. Even if one assumes that under certain circumstances the instrumental justification can legitimize border control as such, it seems hard to sustain why it should cover those deviated cases, too. In order to merely prevent people, who are not authorized to enter, from crossing the state border or to close the borders at a point where too many people have already reached the country, it is unclear why, for instance, externalized borders are needed.

4. Lessons to learn for the theory-practice relation?

Notwithstanding the normative problems presented in the third paragraph, the evaluation of practical cases by drawing on theoretical arguments – as has been done in this paper – prompts the question of whether the discussion conducted in this paper provides insight into the relation between theory and practice in the context of migration more generally. This question, of course, would deserve longer considerations than can be given in these few lines. Therefore this discussion will stay close to the cases and arguments made so far.

For the same reason of brevity, no specific understanding of either theory or practice will be developed here. Instead, it will be assumed that practice refers to actions, rules and situations as they appear in real life; while theory denotes the conceptions and arguments that are the object of abstract thinking and which can take the form of generalizations of real life or natural situations. Still, even on the basis of these basic definitions, several lessons can be learned.

First, the normative discussion of the cases of deviated border control shows that there is a way in which a thorough engagement with practice and facts allows questioning theoretical concepts or normative arguments, which are intended to apply to these cases. This is to say, matching theory and practice and showing to what degree

¹⁹ The different values also pose additional conceptual problems as to what exactly ought to be preserved.

the theoretical arguments do not cover some relevant practice can shed light on deficits in theoretical arguments.²⁰

When one draws this conclusion, one must, however, be aware that theoretical arguments tend to be tailored for general cases and not necessarily for specific ones (and this for good reasons).²¹ Still, it remains to be determined when (formerly) specific cases are significant enough to skip the threshold to being general enough so that they have to be taken into account theoretically, too. This question would deserve much more consideration than can be given here and will thus be left open at this point.

What can be stated, however, is that even a seemingly specific practice should not be ignored (and especially not be ignored from a theoretical point of view) when this practice is aimed directly at circumventing values inherent to standard justification strategies (be they normative or legal). This means that if, for example, transparency, or the respect of fundamental rights are crucial for justifying the practice of border control, one may consider that measures that are inherently aimed at circumventing these principles are problematic.

Second, the opposite insight also follows from the discussion led in this paper. This is to say, normative arguments or theoretical conceptions more broadly are adequate to investigate a given practice. By way of discussing the three justification strategies, i.e. procedural and democratic justification strategies, arguments drawing on autonomy and rights, and instrumental justification strategies, it could be shown that even if these arguments apply to border control as such (and this sometimes with relevant problems, too), it was hard to see how they could encompass the deviating cases. Such a discussion therefore helps identify where a normatively justifiable practice turns into one that can be considered normatively problematic.

In sum, insofar as bringing together the theoretical argument, which is meant to apply to 'regular' cases of border control, and the deviating cases, the tension and the problematic aspects of the deviations become visible.

5. Conclusion

To conclude, the most important findings of this paper shall be briefly reflected on. In the first part, it could be demonstrated that border control is no longer solely carried out by a state official along the physical border of a state by checking the

²⁰ Verena Risse (2018): Staatsgrenzen als faktische Grenzen der theoretischen Reflexion?, pp. 39-54.

²¹ This does not suggest that there is no need for generalization.

documents of arriving travelers. Instead, it was shown that border control has undergone both spatial and actor-related developments, which were presented along the lines of externalization, internalization and privatization of border control. To illustrate these cases, pertinent examples from the practice of different states worldwide were given. Alongside, it was discussed whether these deviations in border control make border crossings harder and less transparent and whether they are changing the character and role of borders. Several reasons were given to answer these questions affirmatively.

In the second part, these deviations in border control were discussed with regard to their normative implications. In particular, it was referred to procedural and democratic justification strategies, arguments drawing on autonomy and rights, and instrumental justification strategies. The discussion showed that standard justification strategies that are articulated in international political philosophy or theory do not fit the deviating cases of border control in relevant ways.

Against this background, this paper concluded by reflecting on what can be learned from the discussed cases for the relationship between theory and practice in the context of border control. It appeared that as much as a thorough investigation of a practice can shed light on deficits in theoretical reflections and concept-building, an examination of a particular practice through the lens of a given theory can help discover normative problems of the practice. The discussion thus revealed that the practices of deviated border control pose challenges for normative arguments, while the investigation by reference to theoretical concepts was equally able to challenge the practices.

Postscript: Response to Matthias Hoesch

In his comment on that paper²², Matthias Hoesch points out a distinction, which, indeed, has been given less attention in my paper. This is the distinction between general arguments for or against open borders, on the one hand, and normative evaluations of specific border practices (which operationalize open or closed borders), on the other hand. Hoesch is right in that tied to this distinction are two discussions that are situated at different levels of the debate. It is inconceivable, however, that these discussions can be kept entirely separate. Rather, it seems reasonable to assume that those moral arguments, on which the claims for (partly) open or closed borders are grounded, must also be taken into account or seen as a general normative framework when it comes to the question of how these open or closed borders are implemented. This holds especially true when the open borders discussion is led by reference to norms and values that are considered fundamental for

²² Matthias Hoesch (2019): Comment on Verena Risse: (Recent) Deviations in Border Control – Challenges for Normative Strategies of Justification?

society. This objection notwithstanding, Hoesch launches an important appeal when he calls for a more fine-grained approach that brings together normative arguments and detailed facts about borders or migration more generally. As political philosophers, we have to further sharpen our normative tools, but also develop a more nuanced account of relevant legal and political practices.

References

- Bate, Alex; Bellis, Alexander (2017): Right to Rent: private landlords' duty to carry immigration status checks In: *House of Commons Library Briefing Paper* No. 7025, pp. 1-45.
- Bialasiewicz, Luiza (2012): Off-shoring and out-sourcing the borders of Europe: Libya and EU border work in the Mediterranean. In: *Geopolitics* 17 (4), pp. 843-866.
- Blake, Michael (2002): Distributive Justice, State Coercion, and Autonomy. In: *Philosophy and Public Affairs* 30 (3), pp. 257-296.
- Blake, Michael (2015): Immigration, Jurisdiction, and Exclusion. In: *Philosophy and Public Affairs* 41 (2), pp. 103-130.
- Bloom, Tendayi; Risse, Verena (2014): Examining Hidden Coercion at State Borders. Why Carrier Sanctions Cannot Be Justified. In: *Ethics and Global Politics* 7 (2), pp. 65-82.
- Costello, Cathryn (2012): Human Rights and the Elusive Universal Subject: Immigration Detention Under International Human Rights and EU Law. In: *Indiana Journal of Global Legal Studies* 19 (1), pp. 257-303.
- Guild, Elspeth; Costello, Cathryn; Garlick, Madeline; Moreno-Lax, Violeta (2015): Enhancing the Common European Asylum System and Alternatives to Dublin. In: *CEPS Paper in Liberty and Security in Europe* No. 83, pp. 1-67.
- Heintel, Martin; Musil, Robert; Stupphann, Markus; Weixlbaumer, Norbert (2017): Grenzen – eine Einführung. In: Heintel, Martin; Musil, Robert; Weixlbaumer, Norbert (eds.): *Grenzen: Theoretische, konzeptionelle und praxisbezogene Fragestellungen zu Grenzen und deren Überschreitungen*. Wiesbaden: Springer, pp. 1-15.
- Hoesch, Matthias (2017): Grenzpolitiken und Flüchtlingsschutz. In: *Zeitschrift für Rechtssoziologie* 37 (2), pp. 313-336.
- Hoesch, Matthias (2019): Comment on Verena Risse: (Recent) Deviations in Border Control – Challenges for Normative Strategies of Justification? In: Hoesch, Matthias; Laube, Lena (eds.): *Proceedings of the 2018 ZiF Workshop "Studying Migration Policies at the Interface between Empirical Research and Normative Analysis"*. ULB Münster (miami.uni-muenster.de), 119-123.
DOI: 10.17879/95189433078.

- Klein, Natalie (2014): Assessing Australia's push back the boats policy under international law: Legality and accountability for maritime interceptions of irregular migrants. In: *Melbourne Journal of International Law* 15 (2), pp. 414-444.
- Kritzman-Amir, Tally (2011): Privatization and Delegation of State Authority in Asylum Systems. In: *Law & Ethics of Human Rights* 5 (1), pp. 193-215.
- Lenard, Patti Tamara (2010): Culture, Free Movement, and Open Borders. In: *The Review of Politics* 72, pp. 627-652.
- Mann, Itamar (2018): Maritime Legal Black Holes: Migration and Rightlessness in International Law. In: *European Journal of International Law* 29 (2), pp. 347-372.
- Raz, Joseph (1986): *The Morality of Freedom*. Oxford: Oxford University Press.
- Risse, Verena (2018): Staatsgrenzen als faktische Grenzen der theoretischen Reflexion. In: Masala, Carlo (ed.): *Grenzen*. Baden-Baden: Nomos, pp. 39-54.
- Scheffler, Samuel (2007): Immigration and the Significance of Culture. In: *Philosophy & Public Affairs* 35 (2), pp. 93-125.
- Schloenhardt, Andreas; Craig, Colin (2015): Turning Back the Boats. Australia's Interdiction of Irregular Migrants at Sea. In: *International Journal of Refugee Law* 27 (4), pp. 536-572.
- Waldron, Jeremy (2011): Are Sovereigns Entitled to the Benefit of the International Rule of Law? In: *The European Journal of International Law* 22 (2), pp. 315-343.
- Walters, William (2004): The Frontiers of the European Union: A Geostrategic Perspective. In: *Geopolitics* 9 (3), pp. 674-689.
- Ziebritzki, Catharina; Nestler, Robert (2017): Abschiebung statt Umsiedlung? EU-Hotspots in Griechenland und die EU-Türkei-Erklärung – Ein Überblick aus rechtlicher Sicht. In: *Berliner Debatte Initial* 28 (4), pp. 74-94.

Comment on Verena Risse: (Recent) Deviations in Border Control – Challenges for Normative Strategies of Justification?

Matthias Hoesch¹

Cluster of Excellence “Religion and Politics”, University of Münster

Abstract

This paper comments on a talk given by Verena Risse at the 2018 ZiF Workshop “Studying Migration Policies at the Interface Between Empirical Research and Normative Analysis”, September 2018, in Bielefeld. Risse describes three general concepts of how border control tends to deviate from the standard case of a state official performing control at the geographical border. Then, she attempts to establish that these developments create a situation that is not covered by classical approaches of the normative justification of border controls. Though I agree with many of Risse’s observations, I doubt that there is a straightforward link from those three general concepts to normative problems. Therefore, if we want to evaluate border policies, we need a much more fine-grained apparatus of, on the one hand, normative principles, and, on the other hand, information about the nature and consequences of these border policies. Risse’s paper is available under doi: 10.17879/95189433777.

Keywords

Cluster of Excellence “Religion and Politics”; asylum; refugees; border control; externalization

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I am very thankful that Verena Risse’s paper highlights one of the core issues that form the motivation of the conference. In my view, addressing current border policies and questioning what we should think about them from a normative perspective is an

¹ Email: matthias.hoesch@uni-muenster.de.

exceedingly important task for academic research and especially for interdisciplinary research. Risse's attitude is certainly in line with a common critical stance towards recent developments in border policies that is shared by many empirical researchers. However, what distinguishes her approach from the current literature is that she combines empirical observations with explicitly normative reasoning so that her normative conclusions are not spun out of whole cloth, but have a basis that can be rationally discussed. In her view, recent developments like the externalization, the internalization and the privatization of border control do not find justification in the established arguments presented in favour of border control – Risse mentions arguments based on the value of democratic decisions, arguments based on the idea of rights and autonomy, and instrumental arguments. These new kinds of border control thus appear in an unflattering light, so long as we cannot find new kinds of justifying arguments.

As much as I endorse that approach in general, I am not sure if Risse's discussion brings us far enough in the direction of a firm evaluation of border control mechanisms (by now, I have similar doubts towards my own attempt that I developed in Hoesch 2017). In my comment, I would like to focus on what Risse calls the 'externalization' of border control, that is the fact that border control is increasingly located outside the territory of a state. Risse views externalization as a 'deviation', since she defines the standard case of border control as an act of a state official at the geographical border. Externalized border control, in contrast, is performed far away, usually by officials of other states or by private companies. What do the normative justifications of border control Risse discusses tell us about externalized borders?

To start, let me introduce a distinction between two levels of normative justification that might be helpful in addressing the issue: we can distinguish between the legitimacy of general policy goals and the legitimacy of concrete measures to reach those goals. To illustrate, here is a simple example not from the area of border control, but from integration policies: It is surely a legitimate goal to enable immigrants to speak the dominant language, but it would not be legitimate to achieve that goal by incarcerating those who do not display any effort to learn the language. The same distinction applies to border policies. I regard the existing philosophical debate on open and closed borders as a debate about the legitimacy of a general policy aim: are states generally entitled to restrict immigration, or is restricting immigration an illegitimate aim? If we answer that question in some sense affirmatively (and almost everybody in the debate gives an affirmative answer under certain circumstances), we can next ask whether concrete border control policies that aim to achieve that general goal are justified. That is an independent step, since it could turn out that, though the

general aim to restrict immigration is legitimate, some measures to reach that goal are not, since they violate some further normative principle or are disproportionate. It could even turn out that there is no legitimate way to achieve a certain aim that as such would be legitimate.²

As I see it, Risse addresses both of these levels: sometimes she discusses arguments on the level of justifying immigration restrictions in general, and sometimes she refers to arguments on the level of justifying measures to restrict immigration. However, is the former really relevant for evaluating the current deviations in border control? Risse offers possible reasons for why there should or should not be immigration restrictions in general: enhancing the rights and autonomy of refugees; protecting culture or democratic institutions etc. Though I believe that discussing that level of justification is, of course, of great importance, I don't believe that it tells us anything about how to evaluate, say, externalized borders.

Take the argument that border control diminishes the rights and autonomy of refugees. It is certainly true that states use the externalization of borders as a means to avoid refugees reaching the states' territories. However, does that give us a reason to oppose externalized borders? Is it really the externalization that appears in an unflattering light? I don't think so. On the contrary, externalized borders could even help to improve the situation of asylum seekers, by opening up the possibility to select from the millions who would like to migrate those who are in greatest need. So, the problematic aspect from the perspective of normative reasoning is not, in my view, the deviation from the standard case, but what states try to achieve with that deviation. Therefore, we should not oppose externalized borders, but we should oppose the states' policy to deny entrance to refugees.

If we have a closer look, even this claim is too general. No state has the obligation to admit all asylum seekers that would like to enter that state. There is a discussion about whether states are entitled to restrict the admission of refugees to what would be their fair share within a scheme of burden-sharing amongst all states, or if states have to admit refugees up to a maximum reasonable level of investment in the interests of foreigners. Whatever position you favour in that debate, you should acknowledge that states have normative reasons to restrict admission in some way. Given that, externalized border controls can be a useful means to achieve the legitimate aim of limiting the number of asylum seekers to the required number. It could even turn out that externalized border controls are, from a moral point of view, the best means to achieve that goal. To sum up, the correlation of certain border

² Such a view is put forward in Sager 2017.

control policies and the enhancement of the rights of refugees is a complex one, and we should not argue that externalized borders generally are hostile to refugee protection. Instead, we should criticize the fact that most Western states use externalized borders in an illegitimate way. That, in turn, compels us to engage in more detailed normative discussion about what are legitimate and illegitimate ways of enforcing border control.

Risse also addresses the level of the justification of certain measures to restrict immigration. I take the discussions of transparency and of access to courts as two examples of a discussion on that level. When it comes to externalized border controls, nobody knows what really happens, Risse argues. Since coercive actions of state officials need democratic control, according to her, the lack of transparency is a serious threat for the legitimacy of those externalized borders. Certainly, there is some truth in that statement. However, is the lack of public transparency a sufficient reason to doubt externalized borders in principle? Firstly, even externalized borders could be organized in a way that makes them more transparent. Secondly, although public transparency is an important democratic value, usually it is assumed that public transparency is not a necessary condition for a policy to be legitimate. We would need a much more elaborated account of which kind of transparency is needed for which kind of public action in order to make a firm argument against non-transparent borders. In many cases, I believe, we should be satisfied if there is some opportunity to achieve transparency via judicial examination, instead of creating public transparency from the outset.

That observation, of course, brings me to the next point Risse raises: access to courts. According to Risse, externalized borders entail a lack of opportunity to resort to legal measures. Those who are arrested by the Libyan coastguard do not have the opportunity to litigate at a European court against the policy of European states to support the Libyan coastguard. This effect is even stronger when externalization is combined with the privatization of border controls: those who are denied entry to an aeroplane by the staff of an airline do not have the opportunity to lodge an objection against that decision at an administrative court. I think that Risse really does raise a strong point here. However, this point is also only marginally linked to the externalization of borders. Externalized borders are in fact compatible with access to courts, as is demonstrated by the right to litigate against Visa decisions even if the person is situated outside the country in, say, German law. In the case of the staff of private companies, bilateral contracts could provide a remedy. And concerning the Libya example, I'd say that a lack of opportunity for those affected to litigate is only a minor problem. There are numerous NGOs who try to do this in their stead. The

greater problem is that, as far as I know, international law does not provide a sufficient basis to stop those practices conducted by single EU states and the EU as a whole.

Let me summarize. Risse describes three general concepts of how border control tends to deviate from the standard case of a state official performing control at the geographical border: the externalization, internalization, and privatization of borders. Then, she attempts to establish that these developments create a situation that is not covered by classical approaches of normative justification of border controls. Though I agree with many of Risse's observations and arguments, I doubt that there is a straightforward link from those three general concepts to normative problems. I claimed that parts of the arguments Risse discusses address the issue of justifying the general aim to restrict immigration. Since concrete border control policies are just a means to restrict immigration, a change of border policies does not affect the justifications of the general aim. Further arguments Risse discusses are indeed situated on the level of evaluating border control policies. However, the normative problems Risse talks about are only linked marginally to the general concepts she had used before. As I see it, we should stop complaining about those general tendencies in the development of border policies. The externalization of border controls as such is neither good nor evil. Instead, it is certain goals that states strive for with the externalization that are problematic. Therefore, if we want to evaluate border policies, we need a much more fine-grained apparatus of, on the one hand, normative principles, and, on the other hand, facts about the nature and the consequences of these policies. Risse has taken a step in the right direction, but we are still far away from secure judgements about what would be a morally defensible way of organizing border control.

References

- Hoesch, Matthias (2017): Grenzpolitiken und Flüchtlingsschutz. *Zeitschrift für Rechtssoziologie* 37(2), pp. 313-336.
- Sager, Alexander (2017): Immigration Enforcement and Domination: An Indirect Argument for Much More Open Borders. *Political Research Quarterly* 70(1), pp. 42-54. Available at SSRN: <https://ssrn.com/abstract=2997257>.

'What Justice Requires' – a State-Centric Bias in the Ethics of Migration

Johannes Servan¹

Department of Philosophy, University of Bergen

Abstract

In this paper I clarify and scrutinize some of the implications of a state-centric bias in political philosophy. Based on Serena Parekh's analysis of "the ethics of admission" (2014, 2017), the main example of this bias I will present is how political philosophers have addressed the question of what justice requires of states in relation to refugees. I begin by clarifying the central features of the state-centric bias in political philosophy and how it is given concrete expression in the ethics of migration as an emphasis on obligations of hosting states to admit immigrants. Further, I present one central implications of the ethics of admission that seem morally unacceptable: the cherry-picking of problems. This is a shortened version of a paper in progress.

Keywords

State-centric bias; ethics of migration; refugees; cosmopolitan law

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Although philosophers don't like to be reminded of it, they are often as vulnerable to arguing in a biased manner as everyone else. What is most often pointed out is perhaps their lack of interest for the world outside, leading their philosophy to become "armchaired". Philosophers are also easily ridiculed for their lack of interest for their own life. There's often a stunning discrepancy between theory and practice; building (as Kierkegaard put it) a castle in their mind, but continuing to live in a shack of ethical

¹ Email: johannes.servan@uib.no.

virtue. More recently, experimental moral psychology has revealed how strongly moral reasoning is influenced by implicit biases and dispositions.² Except, perhaps, from a few very dedicated utilitarian philosophers, little suggests that philosophers are less prone to this kind of influence than others.³

In this article I will look closer at a rather stable state-centric bias among political philosophers. In particular, I will describe this bias as it comes to expression in an overall trend in the political philosophy of migration as an “ethics of admission”. (Parekh 2017) In general a state-centric bias implies an agent-based perspective that takes for granted the role of states as the moral agents who distribute legal membership and redistribute wealth. In the specific thematic field of migration ethics, it is easily noticed in the definition of the basic problem: migration is a problem of *immigration*, and hence a problem of admission.

On face value there is nothing controversial about this. To the contrary, this bias reflects deep-seated assumptions of our social imaginary and political culture. So why bother pointing it out? After having defined the state-centric bias in more detail, I will present some of the problematic moral consequences of this bias. It seems plausible to argue that the influence of the state-centric bias is connected to a number of worrisome tendencies in the ethics of migration: the main problem is that it tends to selectively pick problems that are pressing for a few affluent hosting states, and not for most of the refugees.⁴

For those who might not find these worries persuasive, I suggest Kant’s distinction of domestic and cosmopolitan justice as a possible common ground. I argue that this conceptual alternative might remedy some of the consequences of the state-centric bias, because the notions of “cosmopolitan obligations” and “cosmopolitan rights” are more specific than “universal human right” (or some similar term). Unlike the traditional terms and in contrast to domestic issues and issues of charity, cosmopolitan justice specifies what justice requires in the distinct situations where the relevant moral agents are states and foreigners. Independent of one’s view

² See for instance <https://plato.stanford.edu/entries/experimental-moral/> for an overview.

³ See “Implicit Bias, Stereotype Threat, and Women in Philosophy” by Jennifer Saul for feminist critique along similar lines, in *Women in Philosophy: What Needs to Change?* (2013), ed. K. Hutchison and F. Jenkins.

⁴ In the full version of this paper I present two additional problematic tendencies: secondly, the tendency to depoliticizing foreigners is increasingly inadequate as the ground for a moral response, and proportionally so to the density of cross-border relations in a globalized world; and, thirdly, it leads us to tolerate crimes against humanity, such as permanent statelessness and long-term encampment, which are continuously reproduced by the modern state system.

of the exact character and scope of the state's cosmopolitan obligation, we could at least improve the clarity on what problems we are discussing.

Symptoms of the problem: defining traits of the state-centric bias

The state-centric bias of political philosophy seems to be rooted in deep-seated habits of how we imagine the social world and the norms we hold as central to political culture. (Taylor 2007) Hence, it is difficult to pinpoint the exact properties of the bias. In the following I will present two rather superficial symptomatic features: taking the state as the central moral agent and neglecting the perspective of the foreigner. These are the most salient features of the state-centric bias as presented by Aleinikoff (1992) and Parekh (2014, 2017).

Before I present these two features, I want to make clear that although the term “centric” usually implies the biased favoring of one group or agent at the expense of others (as in anthropocentrism or ethnocentrism), state-centrism is not synonymous with the normative position of statism. Whereas *statism* is a view on global justice according to which (most) duties of justice depend on the existence of the institution of the state and are limited to the relation of the state towards its own citizens and the relations between these citizens, most contributors to the debates in political philosophy that are biased in this state-centric manner are actually proponents of some sort of the counter model of statism, namely *moral cosmopolitanism*. In other words, the state-centric bias is not cancelled by rejecting the statist idea that self-enforced limits on state power are empty or unfounded. As we will see in the case of the ethics of migration, all the central contributors provide state-centric moral criticism of state behavior.

However, there seems to be some relation between taking a strong normative position of moral cosmopolitanism and contributing with ideas that might remedy the bias. My suggested explanation to this plausible connection is connected to Hannah Arendt's diagnosis of the current human rights regime: It is overly confident in the belief that the rightful claims of individuals and the corresponding obligations of the states – developed historically to solve domestic problems – are well designed to solve cosmopolitan problems. (Menke 2007) Promoting strong moral cosmopolitanism does not directly seek to respond to this diagnosis, but it might reflect a stronger concern for cosmopolitan issues, i.e. issues involving states and foreigners. Hence, promoters of strong cosmopolitanism are more likely to stumble upon and criticize the problematic implications of the attempt to “domesticate”

cosmopolitan problems. I'll come back to these problematic implications of state-centrism after discussing its defining features.

State as moral agent

The first feature of the state-centric bias can be described as inherent to the liberal international regime of states, as a reformed Westphalian system. The basic idea is to imagine states as sovereign and self-regulating moral agents that are committed to a certain standard, usually conceived as universal and normatively independent of enforced legislation. This standard can be expressed as certain requirements or constraints on the state in its interaction with other states or with individuals. In the case of the obligations a state has toward individual agents, it is common to distinguish between its specific obligations to its own citizens, and its general obligations to all moral subjects (lately including animals as well). Corresponding to these state obligations, it is common to distinguish citizen rights from human rights.

Although this notion of the state as a moral agent committed to certain liberal and democratic principles seems clearly preferable to an absolutist notion of state sovereignty, these theoretical ideas, and its concrete expression in the historical regime of liberal-democratic states, offers for the most part a standard on how to treat one's own citizens (or more widely the residents of the state's territory).⁵ It has little to say on how to deal properly with global issues where the scope of affected parties goes clearly beyond the domestic sphere. (Benhabib 2004)

Nevertheless, the recognition of states and individuals as the relevant moral agents sets the frame for the possible distribution of duties and rights. In this context I will put justice between states aside⁶, and focus on state obligations and rights in relations to individuals. When we discuss the principles of justice regulating the relation between the state and its citizens, I suggest we call it "domestic justice", and when we discuss those principles concerning the relation between the state and foreigners, I prefer to call it "cosmopolitan justice".

The classical liberal variants of political philosophy emphasize what domestic justice *forbids* or *permits* of the states in their relation to individual agents. These

⁵ This wider "cosmopolitan" notion of state responsibility seems to have gained support after the UN declaration of Human Rights (1948). The status of foreign resident does, however, in most cases imply a secondary status compared to citizens.

⁶ Although relevant for the coordination of realizing commitments, such as "burdensharing"-schemes, I understand it to take on an instrumental value in order to realize state obligations to individual agents.

constraints on state behavior are typically articulated in the language of individual rights or freedoms. The negative duties of the states implied in this liberal view are less controversial and contested than the positive duties of the state, especially when considering cosmopolitan justice. Hence, the question of what justice *requires* tends to divide political philosophers on the scope and character of the obligations the states have to their own citizens compared to foreigners.

It is common to ascribe specific obligations of the state to protect the interest and welfare of its own citizens, whereas foreigners are ascribed with less demanding and more generic moral obligations. For instance, Michael Walzer – perhaps the most influential contributor to the ethics of migration – understands citizenship as a “primary good”, because it sets the boundaries within which all other distributive choices can be made. (Walzer 1983) This defining view bears clear similarity to John Rawls domestic version of the Original Position, where we are asked to consider the most preferable principles of justice for citizen of a “closed society”. (Rawls 1971, 1993) Both express a view where “justice” is more or less synonymous with “domestic justice”.

In comparison foreigners are for the most part excluded from the question of what justice requires. There seems, however, to be a general consensus among the central contributors to the ethics of admission that all human beings are of equal moral worth. In other words, there seems to be a general agreement on at least the basic feature of moral cosmopolitanism. In its weakest interpretation, moral cosmopolitanism implies the obligation to consider all affected parties of our actions, and to provide justifications for unequal treatment. (Miller 2016, p. 23-5) So, even though Walzer and Rawls agree that the issue of *what justice requires* is generally limited to the scope of citizens, there are some hard cases where the moral claim of foreigners is strong enough to make the justification of special obligations to one’s own members difficult for the state. The claim of the refugee for asylum is such a hard case.

From the perspectives of Walzer and Rawls, which stay quite close to the bureaucratic perspective of the state, it is not surprising that there is an absence of concern for global problems. We would, however, be wrong to assume that the state-centric bias is limited to these liberal-democratic accounts of “bounded” justice. Both Joseph Carens (2013), perhaps the most important opponent to the “bounded justice” view, and Seyla Benhabib (2004), who explicitly criticizes the neglect for state-centrism even in cosmopolitan political philosophy (of Thomas Pogge and Charles Beitz), are biased in this way! Let me explain why I believe that this is indeed the case.

For some reason most contributors to the ethics of migration still seem to accept Walzer's legalist definition of what a refugee is deprived of: the non-exportable good of citizenship. The state's assistance to refugees cannot be a matter of offering extra-territorial charity, the way it may assist the starving and the sick. Within this framework, and in contrast to other migrants, refugees are seen as having a particularly strong claim to assistance. Partly this is because they are in greater need of protection or sanctuary than most other migrants. But, it is probably also because refugees pose a threat to the legitimacy of the system of states since they are excluded from this order. The urgency of their situation, caused by a breakdown of the relation to the state of origin, reflects a crisis for the other states as well. All of this is explicitly acknowledged by the contributors to this debate.

On most accounts that recognize the equal worth of all human beings, the positive duty of a state to offer assistance to foreigners in need of sanctuary is recognized. The corresponding right to asylum is probably the most widely accepted principle of cosmopolitan justice. But, if the numbers of those requesting admission is high enough, it forces the hosting state into a dilemma: on the one side, to respect the refugees' equal moral worth, and on the other hand, to sustain the sovereignty and integrity of the hosting state. To maintain its moral legitimacy, the state is required to provide reasons to justify their excluding policies. To justify the special obligation (or what Miller calls "compatriot partiality") for one's own citizens, there are various strategies. Those who put strong constraints on our obligations to foreigners tend to appeal to the social cohesion or welfare of citizens, such as the "communities of character" (Walzer 1983) or "the welfare state"⁷. The softer and more liberal approaches emphasize minimal requirements of domestic integrity such as "public autonomy" (Benhabib 2004) or "public order" (Carens 1987, 2013). In each case the appeal is meant to draw a justified line for the threshold of cost that a hosting society should take before having good reasons to close its borders.

To summarize, it seems even proponents of a stronger moral cosmopolitanism – like Benhabib and Carens, who render territorial borders and citizenship less (or in principle *no*) significance in the question of what justice requires – are caught up in the state-centric problem of justifying excluding admission policies. Consequently, the moral challenge posed by those excluded from the modern state system is reduced to a question of finding a sound justification for allowing some and denying others admission. Although the case of the refugee presents an anomaly to this system, and

⁷ In the conference (Bielefeld) Miller suggested the concern for the welfare state as the main reason for the attention devoted to the issue of admission.

hence a potential threat to the legitimacy of the system if not included, it is usually marginalized as a problem by framing it as an ethics of admission. (Parekh 2017) I think this is because the ‘ethics of admission’ has a tendency to *domesticate* cosmopolitan justice in the sense that it conceives the problem posed by the refugee as analogue to historical issues of domestic justice; i.e. as another category of excluded individuals that are entitled to territorial residency and legal protection. This tendency marginalizes large groups of those excluded from the modern state system since only a fraction is able to seek admission through resettlement, leaving the large majority of the long-term excluded in the shadows of the current debate.

The depoliticized foreigner

The second feature of the state-centric bias is a tendency to marginalize the perspective of foreigners. The character of this marginalization I think is best explained as the way foreigners, i.e. subjects of cosmopolitan justice, are reduced to moral subjects with generic, basic needs. Parekh relates this reduction to the humanitarian principle of mutual aid.

For Walzer, the moral claim of the refugee is peculiar because it combines the appeal to the positive duty of mutual aid with the need for a new membership. Hence, similar to offering assistance to a complete stranger that you meet (like the good Samaritan), there is no need to facilitate political deliberations to reach mutual agreement on what is just or good in the cases of admitting refugees. The needs of the victim of assault and the refugee are rendered self-given or pre-defined by our common (animalistic) nature. T. Alexander Aleinikoff (1992) identifies two main examples of this depoliticization of foreigners in recent history associated with the international regime of refugee law:

After the Second World War, resettlement was seen as the preferred durable solution in refugee law. Aleinikoff refers to this preference as the “exilic bias”. The emphasis on resettlement was grounded in the legal conception of a refugee:

The definition [of refugee]⁸ is quite clearly based on the idea that a refugee is someone who has lost the protection of his or her state, is now located outside that state, and is in need of a new guarantee of protection. That is, the “problem” to be solved is the de jure or de facto loss of membership [i.e. citizenship], as measured by the likelihood of persecution on the specified grounds. (Aleinikoff 1992, p. 123)

⁸ Referring to the 1951 convention.

Clearly the idea of what the refugee needed was defined in a top-down manner. According to the legal conception, a refugee is someone who is deprived of citizenship, and prefers resettlement as the solution to it. Some refugees were probably consulted, and outspoken refugees like Hannah Arendt readily admitted that in the case of German Jews repatriation was not an option. It bore, nevertheless, the character of a generic assumption. The inclination of hosting states to insist on offering resettlement might seem counterintuitive today, but it was articulated in a situation where many refugees could clearly not be asked to return, and where most Western countries were in need of labor and army forces.

The theoretical parallel to the exilic bias is quite easily recognizable in Walzer's account. Although Walzer is often associated with a rather conservative view on migration, his view allows for quite large quotas of refugees within the threshold of cost carried by the communities of character. This threshold level is circumstantial, and the post-war period offered favorable circumstances for those refugees who preferred to be resettled in Western states.

The second example Aleinikoff discusses is a "dramatic shift" of the refugee regime in the 1980's. As the moral battle of the Cold War was settled in the late 1970's, the regime of resettlement was replaced by the current regime of repatriation. From the early 1980's the "resettlement solution" was criticized theoretically and new humanitarian positions (both liberal and communitarian) became dominating, arguing in the support of voluntary repatriation as the basic solution to the problem.

The new dominating view established that it was in the interest of the refugees to stay close to their "home" in order to ensure an easier return. Again, the assumed need of the refugees takes on a generic form, despite the radical shift of view. This new emphasis on repatriation as the preferable solution to the refugee problem is labelled the "source-control bias" by Aleinikoff, because it applies a human rights discourse to address the root causes of the refugee flows.

In his latest book, *Strangers in our midst* (2016), David Miller holds a definition of refugees based on the individual need⁹ rather than the causes of flight. In other words, his definition emphasizes less the juridical requirements of a refugee, and argues rather from a moral ground. His theory shares this trait with the humanitarian discourse since the end of the Cold War. This seems to be an improvement of a rather narrow and less robust definition based primarily on persecution as the only legitimate cause

⁹ Which he defines in terms of the deprivation of some "basic human rights".

of flight. Miller defines refugees (in the wide sense) as “people whose human rights cannot be protected except by moving across a border, whether the reason is state persecution, state incapacity, or prolonged natural disasters.” (Miller 2016, p. 83)

Since Miller’s definition focus on the deprivation of basic human rights, rather than the loss of membership, his view on resettlement is also less committed to it as a permanent solution. According to Miller, what justice requires is temporary residency, and not necessarily permanent membership.¹⁰ Although Miller makes clear that this temporary status is only an acceptable solution for a few years, it is quite clear that the relevant concerns are not to attract labor force, but to avoid a disproportionate share of the “burden” of the poor and unskilled migrants from the Global South.

The moral claim of the refugee corresponds to the obligation of the international community of states to find durable solutions for all, and for each state to take its fair share of the burden. The fair share must be measured according to the capacity of each state, but Miller is not very specific on the distributive mechanisms one should put in place or the criteria for measuring the relative capacity of each state. The point seems to be a more general one: if the claim for asylum is justified, ‘what justice requires’ is for each state to take its fair share of the burden, until a threshold of cost is reached. (Miller 2016)

Although Miller is clearly critical to long-term encampment, the humanitarian account of a durable solution for refugees has been criticized for giving a nice facade to a refugee regime that in reality functions as policies of containment or warehousing of the undesired. Whether or not this is a completely intended consequence of the shift to repatriation, it seems clear to me that Aleinikoff addresses this feature of the state-centric bias in an adequate manner when he calls for a shift from a control-based aid to a facilitating one. Gibney raises a similar point, when he suggests: “let the refugees’ strongest preferences be built into the system of asylum distribution.” (Gibney 2015, p. 461)¹¹

The ethics of admission - a case of the state-centric bias

Further, one might ask: why is state-centric biased political philosophy so problematic? In the following section I’ll begin by defining more specifically the state-

¹⁰ This is compatible with the shift in discourse from resettlement to repatriation and the emphasis on safe return in the situation after the civil war in former Yugoslavia (1993).

¹¹ A rather formal variant of this concern was built into the original Dublin IV-proposal.

centric tendency within the ethics of migration, known as “the ethics of admission”. Parekh provides this label to point out a tendency among political philosophers on migration to emphasize the question of what obligations Western (or Northern) hosting states have for immigrating foreigners. Since refugees have the strongest claim, they also present the strongest ethical challenge.

I’ll present three arguments as to why this tendency is problematic. First, the ethics of admission cherry-picks problems that are important for some states. These problems are not likely to correspond to the most pressing issues of cosmopolitan justice. Second, the rapidly increasing global scale of the problems at hand alters the non-relational character of the circumstances, which once made the state-centric depoliticization of foreigners appear adequate and legitimate. Third, the state-centric ethics of admission seems to dispose those who benefit from the current international order with a certain tolerance for grave systemic injustice, i.e. crimes against humanity, such as encampment reproduced over generations.

Ethics of admission

According to the first feature of the state-centric bias, Parekh identifies in the ethics of admission a tendency to frame the cosmopolitan issue of refugees as perceived from the hosting state. From this perspective the central question of the moral agent is: “Are we obliged to admit refugees to our country?” (Parekh 2014, p. 647) Parekh blames Walzer, with his strong influence, for this tendency to define the issue of refugees in such a way that our obligations can only be met by *admission*. She claims that: “Since Walzer, all philosophers stress the legal/political dimension of the harm of statelessness and the importance of ethical consideration of admission standards.” (Parekh 2014, p. 647)

This framing is noticeable in contributors to the debate that are quite close to Walzer’s position. For instance, Miller’s account mainly “explores the basis on which refugees can make their claims to be admitted and the extent of the obligations incurred by the state in which asylum is sought” (Miller 2016, p. 77). But, it is also found in the proponents of much more liberal views on the topic, such as Benhabib and Carens.

Cherry-picking admission as the central problem of cosmopolitan justice

In general, political philosophy and social sciences has historically marginalized issues where foreigners are to be considered affected parties. In social science this is called methodological nationalism. In political philosophy the state-centric bias has yet to

find a commonly accepted label. In any case, there is also a clear tendency in political philosophy to marginalize what I will call problems of cosmopolitan justice, i.e. problems involving the relation between the state and foreigners.

As already mentioned, the state-centric interpretation of the state as a moral agent is noticeable in Rawls' conception of justice: We are asked to imagine the domestic sphere as a closed society, bracketing out concerns of justice among states or in relation to foreigners. Methodologically this has the obvious advantage of simplifying reflections on justice in a highly complex world. The downside is that it marginalizes or postpones pressing global issues such as environmental destruction, extreme poverty and long-term encampment. Immigration is conceived as an anomaly and as a result of failure of other states to provide their own citizens with proper life conditions.

During the last ten years the ethics of migration has gained significant interest among political philosophers. It is no longer postponed as a problem. Still, the basic framing of the issue seems to remain the same. The states obligations are mainly domestic, and the obligations to foreigners are first and foremost "territorial", i.e. concerning foreign residents or new arrivals at the borders. Consequently, the global, extra-territorial scope of the problems associated with migration is marginalized by the main state-centric problem, i.e. to find an ethical standard of admission.

In recent years we've also seen an increased emphasis on providing assistance to refugee camps in neighboring areas and on improving the conditions in the countries of origin. On one side, this might be a way to remedy some of the consequences of a state-centric approach to the issue. On the other side, we should be cautious not to allow this new emphasis to deteriorate into a self-serving humanitarian discourse of containment and source-control. That is, we should explicate the problem which solutions, as such repatriation and improved condition in long-term camps, are answering to. If the problem is still defined by the ethics of admission, these solutions easily take on the function of containment and control-based aid.

Although "cherry-picking" usually refers to selective use of empirical findings, I think there is good reason to speak of a "cherry-picking" of problems in political philosophy. For instance, we might understand the ethics of admission as a way to cherry-pick a problem that focus on the responsibility of an individual state (including its fair share of burden/responsibility) at the expense of problems related to systemic outcomes or the net effect of individual state actions.

From a state-centric position one easily gets the impression that forced displacement is an exceptional anomaly to the system. In Parekh's view, this problem can be traced back to the influence of Walzer's defining premise of the debates on admission and its implied normative blindness:

Prolonged encampment and long-term displacement, which are in many circumstances the result of uncoordinated policies of various sovereign states each acting to preserve their "communities of character," *are never raised as moral issues* (!). (My exclamation, Parekh 2017, p. 57)

Accordingly, the main criticism that Parekh raises against "the ethics of admission" is how the centrism seems to leave the vast majority of refugees in a normative blind spot. Many of the most prominent contributors (Walzer 1983, Benhabib 2004, Carens 2013, Miller 2016) to this debate focus "predominantly on the obligations raised by refugees for Western states in terms of resettlement". (Parekh 2017, p. 51) Since, in practical terms, this leads the debate to address an irrelevant fraction of the numbers of refugees, the main consequence is that the vast majority of stateless people become *normatively invisible*. (Parekh 2014, p. 646) Resettlement is, at least in theory, considered an important element of a global response to refugees, mainly because it facilitates a burden sharing that involves the affluent states of the global North. In practice, however, resettlement only affords assistance to an insignificant fraction of the refugees in need of protection.¹²

...

In the full version of this paper (work in progress) I aim to defend the two more controversial claims in this second part, where the critique of the state-centric view is presented. First, I address the question on how a non-relational, humanitarian response becomes increasingly more inadequate as globalization develops. Second, I also promote the even stronger claim, following Arendt and Carens, that independently of this Kantian requirement of affected parties, there are duties connected to the predictable institutional failures of the modern state system as a whole (because it is a globalized whole, i.e. with nowhere else to go for those excluded from it). When these failures are willingly ignored or intentionally reproduced, they are no longer conventional crimes, but, in Arendt's terms, crimes of humanity. In the third part, I further aim to provide at least one contribution to a remedy of the state-centric bias by offering a revitalization of the Kantian triad of law as a way to domesticate the discussion on what justice requires.

¹² Today 1,2 out of 19,9 million refugees are registered as in need of resettlement by the UNHCR, in 2017 only 75.500 (less than 0,5 % of the refugees worldwide) was resettled.

References

- Aleinikoff, T. Alexander 1992. "State-Centered Refugee Law: From Resettlement to Containment." *Michigan Journal of International Law* 14, no. 1: 120-138.
- Benhabib, Seyla. 2004. *The Rights of Others: Aliens, Residents, and Citizens*, The Seeley Lectures. Cambridge: Cambridge University Press.
- Carens, Joseph H. 1987. "Aliens and Citizens - the Case for Open Borders." *Review of Politics* 49, no. 2 (Spr): 251-273. <Go to ISI>://WOS:A1987K262000005.
- . 2013. *The Ethics of Immigration*. Oxford University Press.
- Gibney, Matthew J. . 2015. "Refugees and Justice between States." *European Journal of Political Theory* 14, no. 4: 448-463.
- Menke, Christoph. 2007. "The "Aporias of Human Rights" and the "One Human Right": Regarding the Coherence of Hannah Arendt's Argument." *Social research* 74, no. 3: 24.
- Miller, David. 2015. "Justice in Immigration." *European Journal of Political Theory* 14 no. 4: 391-408.
- . 2016. *Strangers in Our Midst : The Political Philosophy of Immigration*. 1. printing. ed. Cambridge, Mass.: Harvard University Press.
- Parekh, S. 2014. "Beyond the Ethics of Admission: Stateless People, Refugee Camps and Moral Obligations." *Philosophy & Social Criticism* 40, no. 7 (Sep): 645-663. <http://dx.doi.org/10.1177/0191453713498254>.
- . 2017. *Refugees and the Ethics of Forced Displacement*, Routledge Research in Applied Ethics.
- Taylor, Charles. 2007. *A Secular Age*. Cambridge, Mass.: Belknap Press of Harvard University Press.
- Walzer, Michael. 1983. *Spheres of Justice : A Defense of Pluralism and Equality*. New York: Basic Books.

Comment on Johannes Servan: 'What Justice Requires' – a State-Centric Bias in the Ethics of Migration

Matthias Hoesch¹

Cluster of Excellence "Religion and Politics", University of Münster

Abstract

This paper comments on a talk given by Johannes Servan at the 2018 ZiF Workshop "Studying Migration Policies at the Interface Between Empirical Research and Normative Analysis", September 2018, in Bielefeld. Servan rightly emphasises the problem of biased attitudes in political philosophy. However, that problem can only be countered by evaluating the arguments that are raised in the debate. Although some of Servan's observations might be true, more normative reasoning would be necessary in order to level fundamental criticism at the current debate. Servan's paper is available under doi: 10.17879/95189431960.

Keywords

Cluster of Excellence "Religion and Politics"; state-centric bias; ethics of migration; refugees

DOI

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I am glad that Johannes Servan addresses the problem of biased discourses in political philosophy in forthright terms. Indeed, it is a plausible assumption that there are (and have previously been) certain biases in the normative debate. When Europeans emigrated to the newly discovered Americas, European intellectuals predominantly argued for a general right to acquire unworked land. Today, faced with migration flows from the global south, many philosophers argue for a (qualified) right to close

¹ Email: matthias.hoesch@uni-muenster.de.

borders. Thus, the idea suggests itself that philosophers might be biased towards what serves their interests (or, at least, what serves the interests of the society they belong to and that forms their intellectual background). Similarly, there could be a bias towards academic methods that have been common sense in the recent past, or a bias towards asking questions that are central in public discourse, or a bias to give a greater weight to those ethical considerations that are familiar or belong to one's own realm of experience. I am personally inclined to see a bias at work in the case of some German philosophers who provided claims on how to balance the need of asylum seekers and the interests of the host states in recent years. I consider it doubtful whether those philosophers would maintain their views if they had once experienced the world from the perspective of refugees, a perspective that naturally is unknown to them. My conviction that normative theorists should engage in empirical literature on migration much more than they normally do today is, in part, based exactly on that fact: the more we know about how others perceive certain rules or normative problems, the more likely we will argue from an impartial point of view, seeking fair treatment of all those affected.

However, how are we to decide if a certain attitude or a certain focus on problems is indeed biased in a problematic way? My assumption that certain philosophers would change their view if they also learned to see the world from a different point of view is simply nothing more than a mere assumption. And it could even turn out that those who are familiar with the perspective of migrants are analogously biased, with the only difference that they are biased in the opposite direction (in the eyes of some, precisely those left-wing researchers from critical migration studies are biased in that direction). As an example of philosophers who seem to be free from any bias, Servan mentions in his paper those utilitarians who, setting aside many of their moral intuitions, just straightforwardly spell out what the utilitarian principle implies. However, why not claim that those people in particular are problematically biased, since they focus only on well-being, setting aside all further aspects that are morally relevant?

What I'm trying to say is that every claim concerning a problematic bias in philosophy is based on assumptions of what a balanced view would be. These assumptions are not supported by facts on how philosophers in fact approach the debate, but they have to be justified within normative reasoning. As far as I can see, Servan doesn't engage much in laying out and justifying his normative assumptions, and a full answer to the question he raises would need more discussion.

Let me turn to the concrete points Servan addresses. According to him, in the current discussion there is a focus on admission and resettlement, setting aside

questions on what people living far away need to flourish. Thus, according to Servan, millions of people remain “in the shadows” of the debate; and issues such as environmental destruction, extreme poverty and long-term encampment are widely ignored. I am not sure if Servan’s description of the current debate is right here. Of course, nobody can address all normative problems, so we need a kind of differentiation. I don’t think that we should accuse those working in migration ethics of not addressing environmental destruction: they simply have chosen to ask different questions.

Nevertheless, Servan could be right in claiming that the question of admitting asylum seekers finds more attention than questions concerning human flourishing in countries of origin. I will not decide that question, but it could be the case that some philosophers give priority to the question of how to deal with those who are on the territory of a state or on the way towards it. The situation of those living in refugee camps for long periods especially seems to be ignored as an important issue in its own right within current debates (today, we tend to talk about improving the conditions of those living in camps as a way of preventing them from trying to immigrate into our country). Even if that were true, it is far from clear that giving priority to the question of how to treat those who are here is a mistake. There could be reasons to set priorities in that way. To be sure, if we were pure act utilitarians, we should address the needs of all those who could be made better off, regardless of who and where they are. However, most philosophers are not pure act utilitarians. Most of them believe that it is more important that we not actively violate anyone’s rights than it is to improve the situation of those who are worse off. If the German state deports some asylum seekers to Afghanistan, it is our responsibility that those people now are exposed to danger. Hence, it seems to be reasonable to focus on the question of whether the German state is justified in deporting these people, and not to ask in the first instance which duties we have towards those who are living in Afghanistan. Of course, this statement is arguable, and it could turn out that the focus on those who are on the territory of a state is indeed misleading and ‘biased’. However, there is a lot to be done in order to provide evidence for that claim.

According to Servan, a further problem of the current debate is that it is unconsciously assumed that it is up to us, or up to the Western countries, to decide the best solution for refugees: resettlement, repatriation, or ongoing encampment. The paper suggests (at least between the lines) that instead we should enable refugees to decide for themselves what solution they prefer, and we should give them a voice within the debate to articulate their preferences. Although in principle Servan faces, in my view, similar problems to those I highlighted in the previous passage, I believe

that this observation is more likely to be true. However, in recent years, there is a tendency to incorporate the perspective and the preferences of the refugees into normative reasoning, as is shown, for example, in Lukasz Dziezic's paper in that volume, or by Anna Lübke in her recent publications.

The Role of *Entscheider* in the Asylum Procedure: A Legal and Ethical Analysis

Nicolas Kleinschmidt & Jessica Krüger¹

Department of Philosophy, RWTH Aachen / Bucerius Law School, Hamburg

Abstract

In this article we examine the role of *Entscheider* (decision-makers) in the German asylum procedure, both legally and ethical. As the responsibility for deciding on asylum applications lies exclusively with them, their significance for the German asylum procedure can hardly be underestimated. However, over the last few decades the situation of *Entscheider* changed significantly: While the number and complexity of the cases they have to decide on has increased due to the growing immigration, the requirements for their education have been lowered, owed to critical amendments to the relevant law. We analyze how the law currently defines the role of *Entscheider*, whether the legal framework is constitutional, and what modifications morality requires. Although the law defining their role seems to be constitutional, *Entscheider's* education must be improved and they must be entrusted with the hearing of the applicants to meet what morality requires, we conclude.

Keywords

Entscheider; Ethics of Entscheider; German Asylum Procedure Law; Ethics of Administration

DOI

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The German asylum procedure is centred on the decision of *Entscheider* (decision-makers), as they exclusively decide on asylum applications. Hence, the decisions of a single *Entscheider* significantly influence the lives of hundreds of asylum seekers. Despite their central role in the asylum procedure, research has so far paid remarkably little attention to them. What may look astonishing at first glance, is rather unsurprising regarding the difficulties that we encountered as soon as we started working on this topic.

¹ Email: nicolas.kleinschmidt@rwth-aachen.de; jessica.krueger@law-school.de.

When we designed our research project, we asked the BAMF (Federal Office for Migration and Refugees) for permission and cooperation for a survey on BAMF *Entscheider* in order to additionally answer the empirical question on how they themselves understand their role in the asylum procedure. We were quite optimistic, as the chairwoman of the Scientific Advisory Board of the BAMF supported us greatly and even the head of the BAMF appeared to be curious about our project. Then came spring 2018, a series of press releases about meddled asylum applications, which amounted to a profound crisis, and – after weeks of waiting – the BAMF preferred not to cooperate with us.

Therefore, our analysis consists of two parts now. First, we outline the role the German administrative law assigns to *Entscheider* in the asylum procedure and critically analyze whether the current design meets legal and especially constitutional requirements. Second, we provide an ethical analysis of the relevant legal framework, concentrating on the three most debatable characteristics of the role of *Entscheider*. Although we are forced to leave the empirical question aside, we want to emphasize its general importance.

The Role of *Entscheider* in the Asylum Procedure *de lege lata*

The legal analysis we would like to start by giving a short overview of the quite remarkable historical development of *Entscheider's* role in the German asylum application system.

Historical Development

The first Aliens Act, enacted in 1965, stated that the decision on asylum applications had to be taken by a committee consisting of two assessors and a chairman who had to be qualified to hold judicial office (§ 30 AuslG). Decisions on intra-administrative objections (*Widersprüche*) against the committee's decisions were taken by another committee of a similar composition. The assessors were appointed equally by the Federal Minister of the Interior and the Federal Council (*Bundesrat*, i.e. the second chamber of the German Parliament). Both committees were unbound by directions and instructions.²

In 1982, the AsylVfG (later: AsylG) abolished the committees and replaced them with single and independent *Entscheider* (*Einzelentscheider*).

² Marxen 1967, § 30.

With the enactment of the Immigration Act on January 1, 2005, legislation was altered to the effect that *Entscheider* are now subject to directives. This means that specific instructions regarding individual procedures are now permissible. BAMF *Entscheider* no longer have a special position compared to other federal officials. The main objectives pursued by this change in legislation as laid out in the explanatory statement of the law are to maintain the uniformity of the legal system, relieve pressure on the administrative courts, as well as accelerate the asylum procedure. The earlier design was considered “impracticable and retarding the asylum process”.³

Unity of *Entscheider* and Hearer

Up to date, neither in the Asylum Act, the Asylum Procedures Directive nor by the administrative courts has it been recognized that hearing the applicant and deciding on her application should be conducted by the same person.⁴ Hearing the applicant has never been one of the original tasks of *Entscheider*, but it can be entrusted to them.⁵ For a long time, it was deemed normal that *Entscheider* who would finally decide on the asylum application had also heard the applicant. However, the BAMF deviated from this rule, as this was deemed necessary in the past decades. In the course of the so-called refugee crisis in 2015, the BAMF set up so-called “decision centres”, where cases already heard were being decided by a central pool of *Entscheider*, so that hearing and deciding are now regularly conducted by different officials.⁶

Qualification and Training of *Entscheider*

The demands on the qualification and training of *Entscheider* have drastically decreased over the decades.⁷ Whereas earlier legislation (§ 30 I 3 AuslG) provided for the chairman of the recognition committee to be qualified for judicial office (i.e. two legal state examinations), the individual *Entscheider* who replaced the committee was only required to have the qualification of the higher intermediate-level civil service (§ 4 III 2 AsylVerfG 1982). Another change of legislation (§ 5 AsylVfG, replacing § 4 AsylVerfG) then allowed that civil servants of the middle-level civil service may also be appointed as *Entscheider*, if permitted by statutory ordinance (*Rechtsverordnung*).

³ BT-Drs. 15/420, 106.

⁴ BVerwG, Beschl.v. 13.5.1996 – BVerwG 9 B 174/96, Rn. 6 (Jurion); VG Frankfurt (Oder), Beschl. V. 23.3 2000 – Az. 4 L 167/00.A, Rn. 8 (juris).

⁵ Bergmann 2018, § 5 AsylG Rn. 17; BVerwG, B.v. 13.5.1996; VGH München Beschl. v. 8.8.2017 – 9 ZB 17.30, BeckRS 2017, 123005.

⁶ VGH Mannheim, VBIBW 2017, 424; BT-Drs. 18/9415, 67.

⁷ Bergmann 2018, § 5 AsylG Rn. 18.

In the course of the so-called refugee crisis, the training of newly hired staff was shortened once again so that it lasted three weeks for hearers, four for *Entscheider* and five weeks for *Vollentscheider* – *Entscheider* who can also conduct a hearing.⁸ Since July 31, 2016, the hearing may also be conducted by a trained employee of another administrative authority that carries out tasks under the AsylG and the AufenthG.⁹

Constitutionality of the Legislation

In a nutshell, *Entscheider* today are subject to directions and instructions, decide single-handedly instead of in a panel, and rarely conduct the hearing themselves that they base their decisions on. This structure and thus the role of *Entscheider* must be measured against sub-constitutional administrative law as well as constitutional law, such as the fundamental right to asylum, Article 16a GG, and the principle of the rule of law, Article 20 III GG, as well as against the EU directive on common procedures for granting and withdrawing international protection (2013/32/EU).

Training and Qualification

In a ruling on airport asylum proceedings (*Flughafenverfahren*) in 1996, the Federal Constitutional Court found, without any discernible differentiation between hearers and *Entscheider*, that detailed training and ongoing further training were required, but accepted the existence of these conditions as given without further examination.¹⁰ Besides, the Asylum Procedures Directive (2013/32/EU) only requires “adequate knowledge in questions of international protection” and the “necessary training” of *Entscheider* (recital 16) and makes (little) more detailed provisions on the qualification of hearers (Art. 15 para. 3 lit. a). However, the Directive calls for the persons involved in the decision to be in a position “to carry out their activities with due respect for the principles of professional ethics in force” (recital 17). Whether a few weeks of training suffices to meet these requirements, is doubtful.¹¹

Independence or Ligation of Instructions and Directions

The independence of instructions and directions used to include decision-making in its entirety. It served to keep decisions free of political influence, and thus to ensure that *Entscheider* were solely guided by Article 16a GG and to avoid foreign policy

⁸ BT-Drs. 18/9415, 65.

⁹ Göbel-Zimmermann/Eichhorn/Beichel-Benedetti 2018, Rn. 474.

¹⁰ BVerfG, NVwZ 1996, 678, 682.

¹¹ Göbel-Zimmermann/Eichhorn/Beichel-Benedetti 2018, Rn. 478.

difficulties.¹² It included the examination of the formal and material legality as well as the question whether all facts had been adequately ascertained. Instructions regarding individual procedures, but also general directions, e.g. regarding the prosecution of certain population groups in certain countries, were therefore not permitted. In this respect, the independence from instructions was partly comparable with the factual independence (*sachliche Unabhängigkeit*) of judges. Some instructions, e.g. such given to *Entscheider* in their function as hearer or on the order in which the processing of applications is carried out, were nevertheless permissible.¹³

Independence of directions and instructions, though, are very unusual in the German administrative law system. The German democratic principle, as laid out in Art. 20 II 1 GG, requires an uninterrupted chain of legitimacy (*demokratischer Legitimationszusammenhang*) from every act of the administration to the will of the people. This can only be guaranteed if every act of the administration can be traced back to the respective state minister as the supreme administrative authority, in this case, the Federal Minister of the Interior, who is chosen by the chancellor, accountable to the state parliament and thereby democratically legitimized.¹⁴ The minister can execute her authority by issuing orders for internal application of concrete or individual nature (known as instructions – *Weisungen*) or of abstract or general nature (administrative directions – *Verwaltungsvorschriften*).¹⁵ Therefore, federal officials have a duty to obey (*Geborsamspflicht*, as stated in § 62 I 2 BBG). Exceptions to this rule are possible if stated by a special law and constitutionally justified. Such exceptions exist e.g. for the Federal Accounting Office (*Bundesrechnungshof*, § 3 IV BRehG, Art. 114 GG) and for university professors as far as their teaching and research are concerned.

Hence, the question is whether such an exception could also be justified in the case of *Entscheider*. In view of Article 16a GG, which enjoys a particularly important position due to its close connection to the fundamental right of human dignity (Article 1 GG), and the peculiarities of the determination of the facts in the asylum procedure,¹⁶ it does not appear to be entirely excluded. Another question, however, is whether independence from instructions is constitutionally required. This is indisputably not the case, since there is no infringement of Article 16a GG by making

¹² Bergmann 2018, § 5 AsylG Rn. 19.

¹³ Bergmann 2018, § 5 AsylG Rn. 19.

¹⁴ Grigoleit 2017, § 62 Rn. 3.

¹⁵ Grigoleit 2017, § 62 Rn. 4.

¹⁶ Marx 2012.

Entscheider subject to instructions and directions and no violation of other constitutional goods comes into consideration. The design of the *Entscheider's* role as independent or bound by instructions is thus entirely the responsibility of the legislative authority.

Unity of Hearer and *Entscheider*

The administrative courts and legal literature agree that it is advantageous for the decision on the asylum application if the *Entscheider* also hears the applicant and is thus able to gain a personal impression.¹⁷ However, the mere advantageousness of a legal structure is not decisive for its legal or constitutional conformity. If the applicant's submission is believed and the application is rejected for reasons other than lack of credibility, for example, because the reasons put forward are not enough to substantiate the application, the separation of *Entscheider* and hearer does not make any significant legal difference. Thus, the separation of hearer and *Entscheider* in principle does not violate the duty of official investigation (*Amtsermittlungsgrundsatz*, § 23 VwVfG).¹⁸ The decision on the unity or separation of hearer and *Entscheider* is therefore incumbent upon the head of the BAMF, and thus ultimately on the Federal Minister of the Interior (Art. 65 GG) who has discretion over the design of the procedure of hearings, as it is not regulated by law.

The situation is different if the application is rejected due to a lack of credibility.¹⁹ The assessment of credibility is a subjective decision, even if it is linked to certain legally established standards.²⁰ If there are doubts about credibility, it must be ensured that the *Entscheider* can obtain a personal impression of the applicant. If this is not the case, this constitutes a violation of the duty of official investigation (§§ 24 VwVfG, 24 AsylG), which constitutes a concretization of the constitutional principle of the legality of the administration (*Grundsatz der Gesetzmäßigkeit der Verwaltung*, Art. 20 III GG).²¹

It seems questionable whether without legal regulation it is ensured that in individual cases hearings and decisions fall to the same person, despite the systematic separation of hearers and *Entscheider*. This is unlikely because the credibility of a

¹⁷ Göbel-Zimmermann/Eichhorn/Beichel-Benedetti 2018, Rn. 12-19; BVerwG, B.v. 13.5.1996; VGH Mannheim, VBIBW 2017, 424.

¹⁸ BVerwG, Beschl.v. 13.5.1996, Rn. 6.

¹⁹ BVerwG, Beschl.v. 13.5.1996; VGH Mannheim, VBIBW 2017, 424; BT-Drs. 18/9415, 67.

²⁰ Gies 2017, 410.

²¹ Schwarz 2016, § 24 VwVfG Rn. 4.

statement cannot be assessed before the hearing itself; once the hearing has been conducted by a staff member qualified only to conduct hearings, the entire hearing would have to be repeated by a different staff member. However, since the separation of hearer and *Entscheider* was introduced precisely to speed up proceedings,²² such a time-consuming correction of the procedural error mentioned above does not appear to be guaranteed in all cases. Although the legislator has a broad discretion to enact laws, there is a limit when the lack of legal regulation violates the prohibition of insufficient legislation (*Untermaßverbot*). This would be the case if the legislator did not enact a law that suffices to protect the fundamental right to asylum or to ensure judicial protection, which is generally very limited in asylum procedure law. It seems highly questionable whether the complete absence of a legal regulation to ensure the principle of official investigation in cases of dubious credibility can satisfy the prohibition of insufficient legislation.

What Should Be the Role of *Entscheider* in the Asylum Procedure?

It is not a trivial truth that law is not necessarily moral just because it is law. Therefore, an action might be perfectly legal and yet illegitimate. It is a kind of fallacy we have to keep in mind, since what is true for each and every law is also true for the German law defining the role of *Entscheider* in the asylum procedure.²³ So, the question is: What – from a moral point of view – should be the role of *Entscheider* in the asylum procedure?

There are two possible ways to answering that question: starting from scratch or taking the status quo into consideration. Both ways embody two different metaethical approaches. Let us call the first the idealistic approach and the second the pragmatic approach of ethical analysis. In the following, we pursue the pragmatic approach because we can assume that, although an idealistic approach may give a good answer to our question, the implementation of this answer would cost more resources and is therefore less likely to be implemented than the answer the pragmatic approach provides. It is a common mistake made by philosophers to aim for the best possible solution in ethics without thoroughly looking at its feasibility. In all the possible solutions we strive for the most feasible with the best moral consequences.

²² BT-Drs. 18/9415, 67.

²³ In his current introduction to administrative ethics, Benjamin Lindner (2017, 48) affirms the importance of the distinction between the terms of legality and legitimacy for administrative ethics in general.

By emphasizing the consequences, we have already revealed the basic ethical assumption which makes our approach consequentialist. But to define what the “best consequences” are, we have to reveal some more of our basic assumptions upon which we build our ethical analysis. We assume that the purpose of morality is at least to diminish suffering caused by human actions. As everyone who is affected by an action may be the subject to suffering caused by this action, anyone who is affected must be considered. This means for us not only to regard *Entscheider*, but also the asylum seekers and the German state.²⁴

Having clarified our approach and our basic assumptions, we try to answer what should the role of *Entscheider* in the asylum procedure be. As we have pointed out their current role has mainly three debatable characteristics: First *Entscheider* are bound by instructions and directions, second, they decide single-handedly and, third, not necessarily based on hearings they conducted themselves. We will discuss all three characteristics to analyse their role in the asylum procedure.

Should *Entscheider* Be Subject to Instructions and Directions?

The answer to this question first and foremost depends on whether we assume the current government should be allowed to influence the individual asylum procedures, as that is the purpose of instructions and directions. If one argues for *Entscheider* being instructed or directed, one accepts the influence of the government. If one argues against them being bound, one denies the government to exert influence on asylum procedures.

The best argument to put forward against the influence of the government seems to be the ill intentions a government could have and their consequences. The damage that could be caused by such bad influence of the government on the asylum procedure would, in the worst case, be life-threatening for the asylum seekers if the result were their legally or morally unjustified deportation. The argument is built upon the assumption that this damage needs to be prevented. However, the only possibility to avoid such damage appears to deny the government any influence on the asylum procedures. In consequence, it appears that *Entscheider* should not be subject to instructions and directions.

The argument is conclusive, but weaker than it seems. What would it mean for the influence of the government to be “bad”? The argument is primarily convincing

²⁴ With this assumption we are pursuing a more comprehensive approach to an ethics of *Entscheider* than Tobias Trappe (2015, 47), whose “ethics of asylum administration” is probably the only approach to such an ethics so far.

because it does not answer this question. Apparently, there are as many answers as there are migration policies. Even representatives of incompatible migration policies could agree on the argument. Moreover, the argument suggests that the influence of the government on asylum procedures could assume undesirable effects of alarming proportions. However, this suggestion lacks reason. The government is in its instructions and directions bound to the German constitution (Art. 1 III, 20 III GG) and every asylum procedure is contestable before an administrative court if it was violating constitutional or only sub-constitutional law. As no administrative judge is bound by any instruction or direction (Art. 97 I GG, § 1 GVG), all legally and probably most immoral consequences of the governmental influence on *Entscheider* would be revised by the court hearing.

We do not deny the possibility of immoral consequences due to the influence of the government. However, its instructions and directions could also lead to moral consequences. More precisely, they might offer the only possibility to compensate for the inadequate training of *Entscheider* by scaling down the leeway in their decision-making. This compensation could be of advantage for all three subjects we would like to regard in our analysis: for the asylum seekers (as the probability of legal and legitimate decisions on their application may rise), for *Entscheider* (since the instructions and directions at least partially release them from their moral responsibility for the applicants)²⁵ and for the state (because the higher probability of legal decisions implicates a lower probability of cost-intensive corrections by administrative courts). Therefore, it seems to be – especially within the pragmatic approach – morally demanded to obligate *Entscheider* to follow the instructions and directions of the government – at least for the moment.

Should *Entscheider* Decide Single-handedly?

As with the first question, we should disclose the assumption that is crucial to answering our second question concerning the role of *Entscheider* in the asylum procedure, namely whether they should decide alone. This assumption seems to be that *Entscheider* can at least make a legal decision on asylum applications.²⁶ If one leaves *Entscheider* to decide single-handedly, they should be able to make those decisions at

²⁵ In particular, this can provide moral relief for *Entscheider* who are aware that their training is hardly sufficient to fulfil their moral responsibility towards the applicants.

²⁶ Of course, it also would be right to state that the negation of this very assumption (i.e. “*Entscheider* cannot even make legal decisions on asylum applications.”) is decisive for answering the second question. In fact, the answers to all three questions concerning the role of *Entscheider* are always determined by a particular assumption or its negation.

least within the legal framework. Otherwise, we assume it is morally untenable to leave those decision to a single *Entscheider*.

The fact that there is a high number of cases overturned by the administrative courts may counter this assumption: In 2017 almost 40% of the decisions challenged before administrative courts were overruled by the judges.²⁷ This points to *Entscheider* not being able to reliably decide on the applications while abiding by the law. As long as this situation is not changed by providing them with better training, they therefore should not make those decisions. In consequence, though, this would call for *Entscheider* to be again part of a panel, which would decide on the asylum applications.

But this alternative is not much better. If the decision was made by a panel of *Entscheider*, the decision is not necessarily legal or legitimate. The assumption that *Entscheider* can compensate for each other's weaknesses is not evident.²⁸ Instead, forming panels entails the risk of group pressure.²⁹ In order to conform to the majority of the panel, some *Entscheider* might knowingly support illegal or illegitimate decisions on asylum applications. Even if we leave these objections aside, it has to be pointed to the significantly higher resource expenses for panels of *Entscheider* compared to sole *Entscheider*, especially concerning the expenditure of time. What does it mean for an asylum seeker if she has to wait for months for a decision on her asylum application? How many more resources does it take for the state to integrate someone after such a long period of waiting time for a positive decision? Ultimately, there is a threat of wasting private and state resources, that is hard to be morally legitimized.

Therefore, within the pragmatic approach, it seems the best alternative to let *Entscheider* decide on their own and to sufficiently train them, so they are able to make legal and legitimate decisions. If they are not sufficiently trained, they should not be replaced by better-trained *Entscheider* – even if there were actually well-trained *Entscheider* to supplant them. The change in personnel would delay the asylum procedures of many asylum seekers, cost the state additional resources and force current *Entscheider* into unemployment. Instead, their lack of competence should be compensated by further training. The ethics of migration and administration should contribute to the concrete design of this education and training if it is not to lose contact with the real world.

²⁷ Anzlinger/Auel 02.08.2018.

²⁸ We are grateful to David Miller for pointing out that even taking into account the Condorcet-Jury-Theorem, a panel of *Entscheider* would only make the decision significantly more likely legal or legitimate if the number of *Entscheider* in the panel were very high.

²⁹ For the influence of group pressure, see the by now classical experiment of Ash (1951).

Should *Entscheider* Also Conduct the Hearing?

How to answer this third question basically depends on whether one assumes that *Entscheider* can make legal and legitimate decisions on asylum applications without having heard the applicants themselves. If this assumption is false, it seems morally imperative that the *Entscheider* hear the applicants in the asylum procedure. If, however, one shares the assumption that *Entscheider* can make legal and legitimate decisions without having heard the asylum seeker, one allows the personal separation of hearing and decision in the asylum procedure.

We have argued for *Entscheider* to decide single-handedly for the procedure being more efficient. An adaption of this efficiency-argument also seems to be the strongest for the separation of *Entscheider* and hearer. It is therefore hardly surprising that the former president of BAMF, Jutta Cordt, put forward the same argument to justify the separation of hearing and decision.³⁰ The argument can be reconstructed as follows: If *Entscheider* are specialized in deciding on asylum applications and hearers are specialized in hearing the asylum seekers, the division of labour seems to let them work more efficiently. The smaller variance in operational procedures would raise the pace of work and division of labor could even lessen the influence of cognitive biases.³¹

But it is exactly the division between the one deciding the asylum application and the one hearing the asylum seeker which provokes further distortions. By this division the testimony of the asylum seeker is not only being distorted by the cognitive biases of *Entscheider* but also by the ones of the hearer. Let us not forget, that usually none of the two is able to speak the language of the asylum seeker, throwing a third person – the interpreter – into the mix, leaving a threefold distorted testimony. As the testimony is the foundation for the decision of *Entscheider*, the risk of a threefold distortion is morally untenable and altogether not efficiency-raising, these distortions increase the risk of not only morally but also legally wrong decisions, which probably take more time to be corrected than to be prevented. For this reason alone, the consequences of the separation of hearing and decision on asylum applications are neither in the interest of the applicants, nor the state nor *Entscheider* – assuming that they themselves strive for legal and legitimate decisions.

However, there is a second reason. The division of *Entscheider* and hearers implicates a division of moral responsibility for the decision on the asylum applicants.

³⁰ Haerder 28.02.2017.

³¹ Trappe (2015, 48) has already stressed the influence of the cognitive bias of *Entscheider* on their asylum decisions as a problem and thus a topic of administrative ethics.

This division poses a risk leaving *Entscheider* only with an indirect responsibility for those whose applications they decide on. If they do not hear the applicants, they decide solely based on a report on the testimony of the applicants, which they are not responsible for. Of course, it is not impossible to determine the respective responsibility of the *Entscheider* and the hearer in a decision. But the division of responsibility evidently makes this determination more difficult. This problem, which Dennis Thompson called the “problem of many hands”,³² is not a particular problem of asylum administration. But in the asylum administration it can be particularly dangerous, as *Entscheider* are responsible for people in particular need of protection. If they do not take sufficient account of this responsibility, their decisions can be life-threatening for the applicants in the short term. However, the division of labor allows *Entscheider* to distance themselves from their responsibility for the applicants³³ – even more than if they heard the asylum seekers themselves.³⁴ Therefore it seems appropriate for *Entscheider* to hear in person the testimony of the asylum seekers on whose applications they decide.

In summary, *Entscheider* should be bound by instructions and directions, decide single-handedly and on the basis of their own hearings. We are well aware that this answer only takes into account the three most debatable characteristics of the role of *Entscheider* in the asylum procedure and is therefore just a start. It will be the task of an ethics of migration and administration, which takes greater account of *Entscheider*, to proceed and define their role in more detail.

Conclusion

As we have shown, the current legislation on the role of *Entscheider* in the German asylum procedure is constitutional and morally justifiable in many aspects. The systematic separation of hearing the applicant and deciding on her application, however, is not acceptable from a moral point of view. It is therefore gratifying that BAMF is beginning to entrust the *Entscheider* with the hearing of the applicants again.³⁵

Even though laws are not necessarily based on moral considerations, the importance of this specific area of administrative law on the life of human beings

³² Thompson 1980, 905.

³³ Trappe (2013, 254) also points to the problem of the many hands in asylum administration. Unlike us, however, Trappe sees the greatest danger in the loss of human dignity of *Entscheider*

³⁴ Schneider and Wottrich (2017, 106) indicate that *Entscheider* – due to the limited contact – can distance themselves from their responsibility for their decisions on the asylum applications even if they hear the applicants themselves.

³⁵ www.bamf.de.

demands high standards of not only legal but also moral justification – a necessity that European lawmakers have already recognized in recital 17 of the Directive on Asylum Procedures. But although they have recognized the necessity of a professional ethics of *Entscheider* they did not elaborate on this. It seems that at this juncture ethicists are in demand to help filling in the gap. Since the gap is one in European law, filling it is neither only a German interest nor only a task of German ethicists and lawyers.

References

- Ash, Solomon E. 1951. Effects of Group Pressure Upon the Modification and Distortion of Judgements. In: *Groups, Leadership and Men. Research in Human Relations*, ed. Harold S. Guetzkow, 177-190. Oxford: Carnegie Press.
- Anzlinger, Jana/Auel, Juri. 02.08.2018. Wie Richter die Schlamperie des Bamf korrigieren. In *Süddeutsche Zeitung* (= <https://www.sueddeutsche.de/politik/asylklagen-wie-richter-die-schlamperie-des-bamf-korrigieren-1.4070309>; 24.08.2018).
- www.bamf.de. Entscheiderinnen und Entscheider (= <http://www.bamf.de/DE/Fluechtlingsschutz/Entscheider/entscheidungen-node.html>; 24.08.2018).
- Bergmann, Jan. 2018. § 5 AsylG. In *Ausländerrecht*, ed. Jan Bergmann and Klaus Dienelt. München: C. H. Beck. Göbel, Ralph/Eichhorn, Alexander/Beichel-Benedetti, Stephan. 2018. Einleitung. In *Asyl- und Flüchtlingsrecht*, ed. Ralph Göbel, Alexander Eichhorn, Stephan Beichel-Benedetti. München: C. H. Beck.
- Gies, Moritz. 2017. Prinzipien der Sachverhaltsermittlung im Asylverfahren. In *Zeitschrift für Ausländerrecht und Ausländerpolitik* 2017: 406-412.
- Grigoleit, Klaus. 2017. § 62 BBG. In *Bundesbeamtenengesetz: Kommentar*, ed. Ulrich Battis. München: C. H. Beck.
- Haerder, Max. 28.02.2017. Flüchtlingsamt-Chefin Jutta Cordt: „Es gibt kein Ende“. In *Wirtschaftswoche* (= <https://www.wiwo.de/politik/deutschland/fluechtlingsamt-chefin-jutta-cordt-es-gibt-kein-ende/19431034.html>; 24.08.2018).
- Lindner, Benjamin. 2017. *Verwaltungsethik. Ein Lehr- und Lernbuch*. Hamburg: Maximilian Verlag.
- Marx, Reinhard. 2012. Probleme der Kommunikation und Darstellung der Lebenswirklichkeit von Flüchtlingen im Asylverfahren. In *Zeitschrift für Ausländerrecht und Ausländerpolitik* 2012: 417-424.

- Marxen, Walter. 1967. *Deutsches Ausländerrecht*. München: Verlag für Verwaltungspraxis Franz Rehm.
- Schneider, Stephanie/Kristina Wottrich. 2017. „Ohne ´ne ordentliche Anhörung kann ich keine ordentliche Entscheidung machen...“ Zur Organisation von Anhörungen in deutschen und schwedischen Asylbehörden. In *Asyl verwalten. Zur bürokratischen Bearbeitung eines gesellschaftlichen Problems*, ed. Christian Lahusen and Stephanie Schneider, 81-115. Bielefeld: transcript.
- Schwarz, Kyrill-Alexander. 2016. § 24 VwVfG. In *Verwaltungsrecht*, ed. Michael Fehling, Berthold Kastner, Rainer Störmer. Baden-Baden: Nomos.
- Thompson, Dennis F. 1980. Moral Responsibility of Public Officials: The Problem of Many Hands. In *The American Political Science Review* 74 (4): 905-916.
- Trappe, Tobias. 2015. Zur Ethik der Asylverwaltung. In *Grenzbereiche der Supervision – Verwaltung in Bewegung*, ed. Elise Bittenbinder, Silvia Schriefers, and Jenny Baron, 46-64. Göttingen: Vandenhoeck & Ruprecht.
- Trappe, Tobias. 2013. Ethik der Asylgewährung. Über die Subjekte des Asylverfahrens. In *Zeitschrift für Ausländerrecht und Ausländerpolitik* 33: 249-256.

Comment on Nicolas Kleinschmidt & Jessica Krüger: The Role of *Entscheider* in the Asylum Procedure

Veit Bader¹

Department of Humanities, University of Amsterdam

Abstract

This paper comments on a talk given by Nicolas Kleinschmidt and Jessica Krüger at the 2018 ZiF Workshop “Studying Migration Policies at the Interface Between Empirical Research and Normative Analysis”, September 2018, in Bielefeld. Kleinschmidt and Krüger’s paper is available under doi: 10.17879/95189429199.

Keywords

Entscheider; Ethics of Entscheider; empiricism; German Asylum Procedure; law

DOI

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Kleinschmidt and Krüger’s paper gives an excellent overview of the historical development of the “*Entscheider’s*” role in the German asylum application system and provides an ethical analysis of the three most debatable characteristics regarding their role. My brief comments raise two more general issues from a philosophical and sociological perspective that are relevant for Kleinschmidt and Krüger’s discussion of the role of the *Entscheider* before addressing the authors’ provisional answers to the questions of whether *Entscheider* should be subjected to directives, decide single-handedly and also conduct the hearing of asylum seekers.

¹ Email: V.M.Bader@uva.nl.

1. With regard to the “ethical analysis” (p. 149), the framework is, in my view, underdeveloped and under-argued. Firstly, the *normatively relevant reasons* do not only include the “moral point of view” (p. 149) or ‘*moral oughts*’ (we should do what universalist moral principles require) and “*consequentialist*” (p. 150) *ones* – including ‘*prudentialist oughts*’ (whatever we do we should do it ‘efficiently’ or least costly) – but, in addition and distinct from prudential ones, ‘*realist oughts*’ (‘feasibility’ or ‘effectiveness’ versus ‘justice be even if the heavens fall’ telling us not what to do but what we should not do) and also ‘*ethical oughts*’ (we should do what ‘values’ and cultural practices require). These four normative reasons do not work in harmony but are often in serious tension with each other. They have to be clearly distinguished and the tensions have to be taken seriously (see Bader/Engelen 2003: 379–382). Instead, we find in the paper by Krüger and Kleinschmidt phrases in which ‘consequentialist’ prudential arguments seem to simply overrule other ones: e.g. “higher resource expenses” (p. 152) seem decisive and “a threat of wasting private and state resources, that is hard to be morally legitimized” (p. 152) not only *ceteris paribus*, but in any case.

Secondly, it looks as if there would be two and *only two* “*meta-ethical approaches*” and that we would have to choose between an “idealistic” one and a “pragmatic” (p. 149) or “consequentialist” one. This picture is drastically under-complex and the choice for a consequentialist position is presupposed without any further arguments. In addition, it is at odds with the argument that “the purpose of morality is to diminish suffering caused by human actions” which seems to be a variety of a minimalist Millian ‘no-harm principle’.

2. From a sociological or *socio-legal perspective*, the opposition between either “independence of directions and instructions” (p. 146) or the “requirement that every act of the administration can be traced back to the respective state minister as the supreme administrative authority, in this case, the Federal Minister of the Interior, who is chosen by the chancellor, accountable to the state parliament and thereby democratically legitimized” (p. 147) – *Weisungen, Verwaltungsvorschriften, Gehorsamspflicht* – seems to be based on a fairly strict hierarchical interpretation of *demokratischer Legitimationszusammenhang* required by Art. 20 II 1 GG. Such a strict hierarchical interpretation of an “uninterrupted chain of legitimacy” tends to reproduce a mythical picture known from legal positivism and has difficulties to address conflicts of rights and laws (see Luhmann for some necessary ‘illegality’ of any administrative act), broad margins of discretion/appreciation and the need for and also presence of forms of ‘heterarchical’ democratic legitimacy and control (see recently Teubner). The opposition also tends to prevent a sober discussion of the first question.

3. *Should Entscheider be subjected to directives by the government?* (p. 150f.) It seems that we are confronted with an exclusive choice: either to accept the influence of the government on the individual asylum procedure or to deny it, depending on the good or “ill” or “bad intentions”. While Kleinschmidt and Krüger “do not deny the possibility of immoral consequences due to the influence of the government”, their conclusion is that “it seems to be [...] morally demanded to obligate *Entscheider* to follow the instructions of the government”, with an added hesitation: “at least for the moment” (p. 151). Kleinschmidt and Krüger trust that instructions and directions are bound by the constitution and that decisions are contestable before administrative courts so that “all legally and probably most immoral consequences” would be revised (p. 151) neglecting the possibility and any evidence to the contrary. Furthermore, they do not discuss what to do if this is not the case. ‘Bad’ asylum-policies may not be effectively blocked by courts and this may require morally legitimate ‘administrative disobedience’ (e.g. by Dutch municipalities against expelling so-called ‘*uitgeproceederde*’ asylum seekers) or by disobedience of *Entscheider* in addition to ‘civil disobedience’, Church asylum etc.

4. *Should Entscheider decide single-handedly?* (p. 151f.) Obviously, also single-handedly, they have margins of discretion within ‘the legal framework’ (p. 152). The fact that almost 40% of the decisions were overruled by administrative judges is alarming (time-pressure, not properly trained, etc.). Yet the discussion of decisions by a panel is, in my view, insufficient for two reasons. First, the argument that panel decisions are “*not necessarily legal or legitimate*” is rather strange: at issue is rather whether panel decisions significantly increase the chances in this regard; and, if true, this argument could also be mobilized against panel-decisions by higher courts and constitutional courts. Second, the argument of “*significantly higher resource expenses*” and *more time* (p. 152) has to be properly balanced with moral reasons which should not simply be overruled by prudentialist reasons (see above).

5. *Should Entscheider also conduct the hearing?* The argument that the division implies the dangers of a “threefold distorted testimony” seems convincing to me. The division is, indeed, “morally untenable and altogether not efficiency-raising” (p. 153). Here, we are lucky to find a case in which moral reasons and efficiency reasons are in line.

I agree with the conclusion that “the importance of this specific area of administrative law on the life of human beings demands high standards of not only legal but also moral justification” (p. 155) and also that a more developed and balanced “professional ethics of *Entscheider*” (p. 155) is badly needed. But I have raised some

doubts whether the ‘pragmatic’ or ‘consequentialist’ approach is promising in this regard.

References

- (2003) Bader, V. and Engelen, E.: Taking Pluralism Seriously. Arguing for an institutional turn in political philosophy. In: *Philosophy and Social Criticism* 29/4, 375–406.

The Microphysics of Deportation

A Critical Reading of Return Flight Monitoring Reports

William Walters¹

Department of Political Science and Department of Sociology & Anthropology,
Carleton University, Ottawa

Abstract

In the paper, I argue there is a whole political logistics to deportation. This is made visible by bringing the concept of microphysics to bear on the topic. Taking the case of enforced and escorted removals from the UK, I show that this logistics is vividly and graphically documented in the inspection reports. Hitherto largely ignored, inspection reports offer researchers a trove of information regarding the mechanisms and procedures of deportation. As I finally draw out, this focus can speak to questions about the relationship of ethics to deportation: the inspection reports show how a certain form of ethical calculation, based on a risk-based approach to the use of force has been inscribed into the practices of deportation.

Keywords

Air deportation; political logistics; inspection reports; ethicalization; Michel Foucault

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Introduction

‘The operation began with staff briefings at Spectrum House, Gatwick, one of which we attended. Not everyone could hear or was listening to the briefing. Staff had spilled out into the corridor and some people were having conversations outside. Staff received appropriate advice on record keeping and were reminded that if they were falling asleep or needed a break, they had to make sure an officer was awake and monitoring the detainee. Staff were told the

¹ Email: william.walters@carleton.ca.

detainees on the charter presented higher risks than those on other charters and “virtually all are violent criminals who have assaulted staff”. They were advised to “use close escorting... the officer behind the detainee should have his hands on the back of him”. There was a strong emphasis on the risk of disruptive behaviour. On the flight, a member of staff justified his wary approach, saying that although he had no specific knowledge of the individuals, “people were going to be killed” and were desperate enough to do anything. Although a number of staff on the operation had little or no experience of charter removals, the briefing contained no guidance on welfare issues, such as the stresses the detainees might be under and why, the importance of treating people decently and giving detainees the opportunity to make telephone calls. We spoke to one officer on his first charter flight who did not know his colleagues or what his duties were in any detail’.

You might think these are the observations of an ethnographer of borders and migration. In fact, they come from a report issued by the UK’s Chief Inspector of Prisons (HMIP 2017). The report’s object is a deportation charter flight, which flew from London’s Stansted airport to Kingston, Jamaica on 7-8 March 2017. 32 ‘detainees’ were ‘removed’ on this plane, under the watchful, but sometimes sleepy, eye of more than 100 escorts, 3 health care staff, and 3 inspectors. For many detainees this was a long journey. Once the time spent confined on coaches funnelling people to the airport from the Immigration Removal Centres is factored in, some people spent as much as 22.5 hours in transit. As is the case with nearly all the UK’s charter removals, the escorting service was privately contracted, in this case from a security company called Tascor. ‘The Customer is King’. That’s what Tascor proudly announces on its homepage (tascor.co.uk). This business slogan is rather apt given the link many scholars have drawn between the act of deportation and the performance of sovereign power.

I start with this vignette because it immerses us in the milieu that interests me in this paper, namely the world of *air deportation*. In using this term I want to draw attention to an asymmetry in the way we imagine and discuss deportation. In scholarship and public discourse on irregular migration the notion of boat migration has become commonplace. Observers recognize that ocean currents, fishing vessels, rescue zones, and many other maritime elements play an absolutely pivotal role in shaping border crossing, and the life and death of thousands of border crossers. Yet when we discuss deportation, when we consider the ways in which states forcibly remove certain classes of illegalized and criminalized people, a similar kind of materiality is less evident. A concern for the media, the vessels, the journeys is, if not missing, largely confined to the background. By far the majority of removals from the

EU are conducted via the skies. For example, of the 25,375 deportations carried out from Germany in 2016, according to Deutsche Welle (2017), 94% were by air. I suspect we would find a not dissimilar proportion if we looked at a small island state like the UK. Despite deportation's dependence on air routes, airlines, airports, the world of aviation has a rather peripheral place in deportation studies.

The minor place of aviation and transportation more generally within deportation studies is a puzzle. Deportation studies has grown into a subfield in its own right (Coutin, 2015). One of its hallmarks has been a widening of the understanding of deportation beyond a single act, policy or event, to include a whole range of places, relations, and effects. This includes a concern with the phenomenon of deportability (De Genova, 2002), namely the forms of precarity that may afflict people even if they are never actually deported; the relationship between anti-deportation struggles and questions of citizenship (Anderson et al., 2011; Nyers, 2003; Lecadet, 2018); the mechanisms and practices of detention (Bosworth, 2014); and increasingly the scene of post-deportation (Khosravi, 2018; Schuster and Majidi, 2013). Yet despite this necessary broadening of the field, and with certain important exceptions (Hiemstra, 2013; Gill, 2009; Mountz, 2011; Peutz, 2006; Blue, 2015), the role mobility systems play in the governance, politicization, and imagination of deportation remains somewhat marginal. Ships are widely recognized by scholars as constitutive of historical experiences of banishment, enslavement, transportation and displacement (Gilroy, 1993; Rediker, 2007), just as are railways in the massive dislocations and genocides of the c.20 (Presner 2007). I argue it is time to take the airplane more seriously as an active and irreducible presence in the deportations of our time.

The case for taking aviation more seriously is not just a matter of filling in a missing piece. As I have argued elsewhere (Walters, 2016; 2018), there are at least two reasons why aviation should be of theoretical as well as empirical interest to scholars of deportation, borders, migration and security studies.

First, aviation is not just a tool which states use. It actively contributes to the material construction and governance of deportation. We recognize the importance of aviation in discussions of the globalization of migration in the commonplace remark that cheap airfares have compressed the world and greatly accelerated the pace and reach of human mobility. But we haven't applied this insight to deportation specifically. Bruno Latour suggests if you want to know the difference which a given nonhuman thing makes, try the trick of removing it (Johnson, 1988). Try this with deportation. What would Britain's deportations to Nigeria – a regular, destination for its forced removals - look like were the skies closed and they could only travel by road

and sea? What degree of force would such journeys entail? Now, it seems to me the legitimacy of deportation rests on at least two somewhat contradictory claims: (a) it is a sovereign right of the state to control its borders and discriminate between its citizens and others when it comes to residence on the territory (b) however unpleasant, deportation is a practice that can be carried out while respecting the basic human rights and dignity of the deported. I think aviation underpins this tricky balance – one reason human rights authorities recommend ‘scheduled air transport’ as the preferred modality for forced removals (Council of Europe 2002). Aviation does not dispense with the need for force. Far from it. But it does transform the economy and perhaps the optics of force. Aviation has remade deportation; to use Latour’s terminology, aviation ‘translates’ the way states now expel their unwanted people (Johnson, 1988).

But let us not forget something important: aviation is not weightless. Aviation infrastructure has a material density which interacts with deportation. The securitization of airports (Salter, 2007), the logistics of flight schedules, the laws and regulations of aviation, the geography of air routes, the protocols of aviation security and safety, the economics of air travel, the culture of aerial life (Adey, 2010), the professional responsibilities of pilots, and much else mean aviation has an irreducibility. It is never just an instrument which states wield but a thick zone of interaction that shapes and interferes with deportation. It can also be leveraged by migrants and their allies when they struggle against deportations.

Second, a focus on aviation opens up questions about the corporeality of deportation, questions that have been rather overlooked in studies that dwell more on the level of state policy, law, and citizenship. Deportation does not just target non-citizens, illegalized others, etc. At the same time, it operates on and through living bodies (Khosravi, 2009; Makeremi 2018; Walters 2017). Moving people against their will entails a whole series of operations which include seizing but also calming, hurting but also soothing, personalizing and depersonalizing, informing and sometimes misinforming, promising and betraying, immobilizing and mobilizing, scaring and reassuring (Kalir, 2017). All these operations, the powers they mobilize, the norms they cite and frequently transgress, are especially visible when deportees are moved by plane. This corporeality is in evidence throughout immigration enforcement, but it is especially intensified in the milieu of air deportation.

Deportation: from policy to microphysics

In light of these claims about the significance of air deportation this paper aims to make a particular conceptual contribution. Following the lead of Collyer (2012), I argue that it is fruitful to think about deportation from the angle of microphysics. Whereas political science has tended to pose ‘why’ questions about deportation, a microphysics lens foregrounds the less studied ‘how’ questions. The notion of microphysics is, of course, closely associated with the work of Michel Foucault (1977). He coined the term to reorient the way we study power and power relations. Microphysics attunes us to a world comprised of a multitude of little devices, minor mechanisms, and molecular relations of force that have often passed under the radar of political scientists when they elect to focus on ideas, institutions, and interests. Now, a turn to microphysics is not a matter of dismissing big actors like the state so much as conducting an ascending analysis that works from the microlevel upwards, seeing these big agencies as the mobile and uncertain assemblages of the little things.

In order to study the microphysics of deportation I look to a particular data source. Immigration enforcement is far from being a transparent area of state activity (Maillet et al., 2017; Belcher and Martin, 2013). The involvement of private companies whether in detention, or in this case, airlines and private security, only adds further layers of corporate secrecy (Gammeltoft-Hansen, 2013). I argue that inspection reports of enforced removals on planes are a valuable but hitherto largely untapped source of information about this rather closed and sometimes secretive world. Building on literature on secrecy, security and methods (Gusterson, 1997; Monahan and Fisher, 2014), this paper will treat inspection reports as an archive that offers insights about the power relations of air deportation.

My case is flight monitoring of the UK’s escorted removals and charter flight programme (2011-2018). In the UK the inspection of deportation flights, as well as some areas of detention practice, is the responsibility of Her Majesty’s Inspectorate of Prisons (HMIP). Whereas in some EU states inspection is carried out by NGOs, in the UK it is this state actor (FRA 2018). HMIP conducted its first inspection of an escorted overseas removal in 2011, when it monitored the fate of 35 detainees on a chartered flight to Jamaica. To date (Sept. 2018) it has monitored about 15 flights, which includes such destinations as Pakistan, Nigeria, Ghana, Afghanistan, Sri Lanka, Albania and Kosovo. In 2018 HMIP (2018a) started to inspect ‘Dublin’ removals to France, Austria and Bulgaria.

The movement to set up flight monitoring systems gathered weight in the 2000s amidst mounting concern about the opaque world of airports and flights within the

immigration enforcement system (Pirjola, 2015). Journalists, scholars, legal experts and NGOs were pointing to a pattern in which a number of migrants and detainees had died in custody, while many more were experiencing abuse and degradation during removal (CPT 2003; APT 2012; Pro Asyl 2007; Medical Justice 2008; Fekete, 2011). Concern focused especially on so-called charter flights which have become a key weapon of the forced return arsenal of EU member states. Most deportations take place on regular scheduled flights, and involve the detainee being sat – usually at the back – amidst regular passengers. But on a charter flight the whole plane is dedicated to deportation. Since charter flights take place away from the watching eye of the fellow passenger they place detainees in a particularly vulnerable position, outnumbered as they are by the security and escort teams. Hence experts made a case that there should be independent monitoring of these forced return flights, conducted by professionals with the relevant (e.g., legal and medical) expertise, and encompassing all stages of the process (such as reception in the destination country) (Pirjola 2015). The normative and legal case for flight monitoring is now recognized in EU law. Article 8 paragraph 6 of the EU's Return Directive (2008) states that all member states 'shall provide for an effective forced return monitoring system' (quoted in Pirjola 2015: 315).

In this paper I show that by combining the inspection reports and the notion of microphysics, we get a richer, more material and more corporeal account of deportation by air. I use the reports to identify a number of these little devices, operations and mechanisms, these air forces of deportation. These include mechanisms of *force, containment, agency, surprise and reserve*. There is an important line of scholarship, especially within political science, that highlights the limits of deportation policy (Ellermann, 2008; Gibney and Hansen, 2003; Phoung, 2005; Collyer, 2012). It shows that a range of factors frustrate the state in its exercise of this special power. For example, how do states manage the social protest and obstruction that deportation inevitably generates? How do states ascertain official identities regarding people who have destroyed their own papers? How do they get other states to accept the 'return' of people who may not be their citizens, or when it is not readmission but remittance that these states value the most? Such research is important because it shows that deportation is not merely a policy or a power, but itself a dynamic machine or apparatus that is constantly improvising new ways of removing people, and continually pushing at the limits of law and ethics in the process (De Genova and Peutz, 2010; Fekete, 2005). In this paper I suggest that a microphysics lens offers something important to this literature on the deportation machine. Microphysics shows how this innovation happens not just at the level of interstate relations, or

bureaucracies, but within heterogeneous spaces and on the scale of bodies, spaces, temporalities, vehicles and feelings.

But there is a more specific factor behind my interest in reading these inspection reports in terms of a microphysics of air deportation. Here I return to my earlier point about the marginality of aviation within the study of deportation. One reason the world of the flight has been relatively marginal within deportation studies is surely the presumption that compared to the time spent in detention, or the precarity generated by deportability, the flight is a somewhat minor factor. This is mistaken. I argue that we should not take this speed and brevity for granted. It does not come from the propulsion of the engines alone. Just as commercial air travel requires myriad mechanisms for it to work – including the active compliance of passengers – then, in different ways, so does forced removal. In examining the microphysics we get a glimpse at the *production of speed*, that is, some of the practices that enact the deportation flight, and a sense of the enormous amount of work that goes into making up deportation. Put differently, if we liken air deportation to an iceberg, the actual flight is the visible tip. With microphysics we glimpse the vast mass lurking below the surface.

The remainder of this paper is organized into two sections. First, I consider the relationship between inspection and method, and ask what it means to read inspection reports critically. Second, and this is the main part of the paper, I propose some analytics and reflections on microphysics and the ethicalization of deportation.

Inspection and Method

Very briefly, let me summarize the benefits of using inspection reports.

First, inspection takes us into times and places within the deportation system that are otherwise very difficult for a social researcher to access. This makes them a valuable resource when conducting research on the more opaque aspects of immigration control. Inspectors have an eye for detail which can give us rich material on the little practices that interest me here.

Second, inspection is typically a recurrent practice. It is sensitive to shifts in practices over time, allowing insight into changing forms, relations and devices. For example, the fact that the buses now take detainees directly to the plane on the tarmac whereas they used to drop them off at the airport terminal: this hints at the mutability and dynamism of deportation's carceral geography.

Third, inspection is a problematizing activity. It is true that a reading of manuals and handbooks will tell us about norms of deportation procedure. However, inspection reports describe both the way procedures are supposed to operate as well as some of the actual practices in play. Moreover, like ethnography, inspection is alive to informal practices and procedures: it captures certain acts which might not be written down but whose practice can be very instructive.

Fourth, because they are produced by state agencies, or third parties authorized by the state, inspection reports have a certain epistemic robustness. This can be useful when engaging in a highly contested and controversial field like air deportation. It is certainly not the case that we lack other accounts of what happens on these flights. For example, there are websites like Detained Voices (<https://detainedvoices.com>), which publicize detainees' own testimonies and demands, and present first-hand accounts of deportation experience. But skeptics are always going to charge that these sources are not 'objective', that, of course, they will make things sound really bad. We can assume the state's own inspectors might not face the same charge.

The inspection report is not without problems as a data source. Let me now say something about the limits of inspection reports, and how the critical reading I propose in my title seeks to negotiate these limits.

Some readers will be skeptical of my proposal to research the microphysics of air deportation – or any aspect of deportation – using inspection reports as an archive. For some, these reports are little more than a legitimation exercise, an attempt to confer a veneer of transparency on a secretive, violent process. I argue that inspection reports are a valuable resource but one that has to be approached with care. There is, of course, a famous precedent here. It was Karl Marx who drew on the factory reports of the Victorian inspectorate to document the obscured world of industrial capitalism (Gidley, 2004). He recognized that inspection reports should not be dismissed out of hand, but neither should they be regarded as a neutral or self-evident practice. Hence, let me make several critical points here.

First, a critical reading entails that we read the inspection reports alongside other accounts of deportation. It requires that we 'triangulate' the observations of the inspectors with, say, the first hand accounts of detainees themselves, and other fragments of information that might circulate within the public sphere.

Second, a critical reading requires that we think about what might be happening offstage (Makaremi, 2018). Inspectors do not monitor all charter flights from the UK, only a small sample. Nor are these visits unannounced, perhaps in part because of the difficulties of finding seats on a plane at the last minute (HMIP 2011a: 4). It is quite

likely that inspection changes the way officials and authorities conduct themselves when they know they are being watched. Just as the monitoring of police by anti-torture experts does not necessarily end all abusive practices so much as reconfigure when and where they happen (Bahcecik 2011), then we should assume that flight monitoring reshapes but does not end the geography of violence that underpins deportation. Human rights oriented reporting about deportation operations suggest violence is an ongoing problem (Medical Justice, 2008).

Third, we cannot treat the language used in the reports as neutral. Inspection is a regime of knowledge which in part constitutes deportation in a particular way. Is it really 'return' if you are sent to a country you have barely ever lived in? If charter flights are 'forced removals', is that to say that all other removals are not forced? That they are voluntary? Or take the word 'restraint' which is how the violence of deportation is often codified. The term suggests a holding back, as though the subject is a priori struggling. But the reports document situations where people are leaving peacefully, compliantly, and still they are put in handcuffs, braces, straps, etc. Or, finally, there is the fact that the term 'detainee' is used uniformly to describe all people in the report. Technically, inasmuch as they are all under detention, you could say they are all indeed detainees. Yet the term is not without consequences when used in this way. It places all people in the plane on the same level. The reports themselves give us little glimpses of the individual stories, the biographies that have put people there. Some are ex-criminal offenders. Some are refugees denied asylum. Many are being torn away from families, jobs, and communities. But detainee effaces such differences, conferring a uniformity of condition. Charter flights have been criticized for lumping different cases and situations together, allowing for a generalized stigma (Holbourne/Guardian 2018). The category of detainee does little to challenge that.

Finally, one should highlight the geographical and political limits of flight monitoring as it presently exists. A 2011 study by the European Commission found that while a majority of the member states participating engaged in pre-departure monitoring, only 13% of those surveyed followed what happens post deportation (Podeszfa and Vetter 2013). Sociologies of ignorance and anthropologies of non-recording (Rappert, 2012; Kalir and van Schendel, 2017) insist the exercise of power consists not just in that which states make visible, but what they refuse to see or acknowledge. As things stand there is a cruel irony. Monitoring only covers the processes, places and events up to the return, up to the exact point at which the detainees are transferred into the hands – sometimes quite literally – of police and immigration authorities on arrival. This means the inspector can rightly highlight the denial of hot drinks or blankets on long flights as an unreasonable deprivation while

the official record remains silent about the much more serious deprivations which may then follow once the deportee is handed over. Social struggles have won recognition for the norm of return monitoring. It remains to be seen how growing political and scholarly mobilization around the timespace of post deportation might extend and transform this gaze (Khosravi, 2018; Lecadet, 2018; Kanstroom, 2017).

Towards a microphysics of air deportation

Reading the inspection reports I analyze mechanisms and techniques of removal under five headings. I do not claim these as exhaustive so much as illustrative. Many others could be added. Note also these headings are not usually those used by the reports themselves, in part because of the problems of terminology identified above. What I attempt is a transversal reading that respects empirical contents but refuses the official categories in favour of forging new lines of analysis.

Force

‘Waist restraint belts were used excessively. Coach commanders made what they described as “dynamic risk assessments” before the use of such belts. In the event, all but one detainee was fitted with a belt... Belts were used on detainees who were compliant throughout and who the Home Office considered to present little or no risk.... For these detainees, the risk assessment consisted merely of asking them whether they wished to go to the third country, whether they were happy to do so, or whether they had any problems about going. If they said they did not wish to go, this was considered on its own to be sufficient justification for the use of restraints, which was an incompetent approach to risk assessment. There was a clear presumption in favour of using waist restraint belts.’ (HMIP 2018a: 10).

Let me make two points in light of this passage which comes from an inspection report into one of the UK’s first ‘Dublin’ charter flights.

First, a microphysics of power insists that any given practice, any given relationship of power, has to be interpreted in terms of its complicated history of emergence and transformation. It has to be assessed in light of the other practices it has either displaced, mutated out of, or which might compete with or even haunt it. In the case of forced removals it’s a matter of recognizing that other ways of restraining, pacifying, neutralizing and controlling have been used in the past but have, whether through political struggle, legal challenge, or sheer unworkability, been rendered questionable, suspect or even taboo – at least within official policy discourse. One of these is gagging with adhesive tape, a practice that burst before the public in

the case of the unlawful killing of Joy Gardner during a deportation attempt (The Times 17/5/1995). Another is the use of drugs to sedate deportees. Official policies disavow and prohibit the use of sedatives, reserving them for exceptional circumstances.² Yet reports circulate about the authorities' use of sedatives on deportees which suggest this practice is not at all rare (e.g., Radio Sweden 2014). The point is that at present official policy discourse actively distances itself from sedation as a control practice. What it favours, at least in the UK case, is an approach to force which combines the muscular but regulated agency of escorts and what are called 'mechanical restraints', such as handcuffs and waist restraint belts.

To suggest that corporeal and mechanical restraint are the privileged modalities is still too general. We can be more specific and identify the way in which particular holds applied to the body have been problematized and outlawed and others approved. Here one sees how recommendations have begun to build in appreciation for the specific features of the aircraft cabin. Some practices employed in remand centres and prisons cannot simply be transposed to the cramped environment of the cabin. We see how they have also built in the lessons of previous practices that have been associated with death and violence, such as 'positional asphyxia' (Walters, 2016). It is possible to discern here a political anatomy of deportation, one that has broken down the body into zones in terms of minimizing the risk of lasting injury. Whereas the political anatomy of the body that interested Foucault was oriented to optimizing the productive capacities of the labouring and fighting body, the one at stake in air deportation is closer to the genealogy of non-lethality (Anaïs 2015) and the whole question of the political management of the struggling, recalcitrant body (Walters, 2017; Makaremi, 2018).

Second, let us note that the exercise of force is bounded and rationalized in particular ways but in its actual exercise it will surpass those boundaries. In the passage above, the inspector sternly reproaches the conduct of this particular operation. The model, which the inspector upholds, the model that is prescribed in various manuals and official guidelines, calls for a form of risk governance that is individualized, proportionate and graduated. Physical restraint should not be the default position but the exception, a violence held in reserve, something to be used only in cases where an individual's file indicates a high risk of violence, or when recalcitrance is encountered in the course of the operation. It should be applied in a framework of ongoing dialogue with the subject, oriented towards de-escalating the situation (HMIP 2018a: 11). Yet inspections find in a number of cases that the assessment is made not on an

² According to the EU's Return Handbook: 'The use of sedatives to facilitate the removal is forbidden without prejudice to emergency measures to ensure flight security' (European Commission 2017: 117).

individual basis, but at the level of perceptions about the ‘route’, the ‘nationalities’ of the detainees. In other words, racialized perceptions of the deportee powerfully mediate the way in which force is administered in practice.

Agents

The reports comment on the conduct, identity, expertise, and decision-making of a variety of actors involved in forced removals by air. They mention the powers and responsibilities of managers, medical experts, security teams, coach commanders. But they accord special attention to the escorts. In the UK case these are privately contracted. A microphysics insists power is something diffuse and generalized. The escorts may have a core responsibility for controlling the detainees, yet escorts are targets of governance as much as the detainees, as the following discussion will explore. This is evident, for example, in the regime of visibility which traverses their actions. Key stages in the charter flight are filmed. When force is used it is to be documented, etc.

The reports are not slow to commend the escorts in many places for calmness, preparedness, and for going out of their way to assist detainees. The reports are pleased to see escorts build up a ‘rapport’ with the detainees under their authority (HMIP 2011a: 17). This fact is worth underscoring since it echoes a much wider point that follows from ethnographic studies of what some scholars have called ‘soft deportation’ (Leerkes et al., 2017; Kalir, 2017). It is that there is a power of care as much as force. But this power of care is no less rationalized and calculated as is the exercise of force. To take just one example, an early report affirms the fact that there was a division of supervisory labour between a small G4S security team and the rest of the escorts. At the ‘key moment of boarding’ the detainees were ‘escorted by members of the security team in order to avoid undermining the rapport built up by the staff who had escorted them thus far, and would do so during the flight’ (HMIP 2011a: 10). A sort of good cop/ bad cop routine.

One concern that comes up frequently is the adequacy of training. Were the escorts equipped to deal with the unique situation inside a plane? Aside from overuse of restraint, the inspectors frequently note the tendency of escorts to crowd around, talk over, insult or ignore the people they are helping to expel.

There are also not infrequent and grave concerns expressed over the identity, attitude and demeanour of staff. One of the most striking comes in an early report on Jamaica. Here it was noted that there was ‘an overall impression of a largely white escort group’, and that some officials made ‘sweeping generalisations about different

nationalities, thereby undermining the objective of treating detainees as individuals' (HMIP 2011a: 16-17).

The criticisms of racist attitudes and language on the part of the escorts exemplifies a wider absence/ presence of race within the reports. There are strong grounds for considering racism as a set of forces that structure the entire deportation project (De Genova, 2013; Fekete, 2005). However, the racialized culture of hostility and xenophobia that finds expression in the politics of deportation lies well beyond the remit of the inspection report. Instead, the report effects a kind of displacement. The inspectors confine themselves to criticizing discrimination at the level of staff behaviour. So the reports do not completely ignore racism so much as render it in a form that makes it manageable – in this case with better training and recruitment practices.

Containment

'Detainees were collected on separate coaches from four immigration removal centres [...]. Searching by escorts was thorough but sensitive. However, it was sometimes hindered by the fact that detainees did not understand what was being asked of them in the absence of an interpreter [...]. Once they arrived at the airport, detainees were searched again by airport security staff following their own procedures [...]. Detainees spent too long waiting outside the terminal in coaches, and most were stationary for three to four hours. The first detainee to board the coach at Brook House near Gatwick airport did not get off at Stansted until seven hours later.' (HMIP 2012: 8).

Aircraft are pivotal to deportation, but so are coaches. A fleet of these vehicles funnel deportees and their escorts from the Immigration Removal Centres (IRCs) to the airport. Many of the reports mention the coaches, each overseen by a 'coach commander', due to the fact that deportees can spend many hours contained on these vehicles. Once on the coach, their opportunities for communication are strictly controlled. Their cell phones have been removed. They are assured by the officials they can check in with friends and legal support by borrowing phones from the security agents. One can imagine that the prospect and the act of borrowing a phone to make an urgent call sets up a new power relation in which access to vital means of communication now becomes a bargaining chip to be exchanged for compliant behaviour (IMIP 2011a).

The IRCs, coaches, airport terminals and planes make up a shifting continuum of fixed and mobile spaces which serves to contain, channel, and segregate deportation mobility. This dynamic continuum serves as a material correlate to what

scholars have identified as corridors of expulsion (Mezzadra and Neilson, 2003; Drotbohm and Hasselberg, 2014). The exact features of this mobile continuum itself changes over time. The earlier reports describe deportees being taken to airport terminals where they undergo a process of security clearance similar to any passenger. At London's Stansted airport the Inflight Jet centre was used rather than the normal terminal (HMIP 2011a: 7). Inflight is an executive facility, designed to offer celebrities and elites a higher degree of invisibility as well as comfort than regular departure areas (Bridle, 2015). With the charter flight programme this geography of discrete space is assigned to the task of hiding the deportation process. However, one later report notes the use of a 'new system of transit directly from coach to aircraft'. This is rationalized as a benefit since it spares deportees the 'demeaning process of being marched through airport security' (HMIP 2017: 13). We might wonder whether it also affords the authorities with greater invisibility for actions that have sometimes been the target of protest and politicization.

Vehicles and their infrastructures are active elements in deportation, but not simply by virtue of transporting, segregating or secluding bodies. They also shape the psychology of deportation, fostering certain moods which are a significant element in the removal process. The cramped space of the cabin has the potential to amplify protest and disturbance when proceedings get out of hand. This makes the aircraft cabin a delicate environment that calls for active management. But the aircraft, once airborne, can also generate affects of resignation and defeat which authorities seem to count upon. It appears the moment of take-off is a threshold for the deportation process. 'It was a G4S policy for refractory detainees not to have cuffs removed until after take off' (HMIP 2011b: 10; see also CPT 2003: 3; but see HMIP 2018a: 6). Some officials have mentioned in interviews that it is not uncommon for deportees to 'kick off' but that they usually settle down after take off.³

I think this little observation tells us something quite important about the way in which deportation weaponizes the airborne. By airborne I mean not just the status of being in the air, but the entire range of feelings that the experience of flight can generate. Scholars of border politics have explored at some length the way in which state authorities utilize the cruel inhospitality of the desert and the sea to control migratory movements, often with deadly consequences. You don't have to patrol those sections, which the sun or the terrain render virtually uncrossable (Squire, 2015). By comparison migration studies has surprisingly less to say about the air. With air deportation we see how the airborne becomes an active element. The plane is a more

³ "You get a lot of agitation", says David Wood [a senior UK Borders Agency official]. But once the plane is airborne, deported criminals 'know the game is up'. The Times, 13.9.2009.

absolute, hermetic form of transport than other modalities. Once airborne there really is no way out.

Reserve

‘The Home Office immigration enforcement (HOIE) directorate and Tascor managers communicated regularly by phone about changes to the list of passengers. This included three detainees at Brook House who had climbed over the railings on an upper landing walkway to the safety netting at 9.10 pm. They were removed from the flight list because of the delays involved. Their removal from the list at this late stage meant a coach assigned to Brook House was diverted to Yarl’s Wood to collect several women who had been on the reserve list. On 7 March about 50 people were designated for removal, but 18 were removed from the list and 32 flew’ (HMIP 2017: 9).

This passage underscores that air deportation is a zone of interaction where commercial aviation logistics, immigration enforcement’s desire for efficiency, cost-saving (and sometimes face-saving), and the recalcitrance of people targeted with deportation all come into conflict. Acts of resistance (like the one just profiled), ill health, and, in particular, last-minute legal injunctions all create the possibility that there will be empty seats on the deportation flight, which, in the hands of a press that is hungry for immigration scandals, translate into stories about incompetent authorities wasting tax payers’ money. It also means escorts might be in over supply, creating problems of workforce management. One workaround that British agencies have devised is the reserve list. The mobilization of reserves is a long-established device in military and sporting worlds for managing contingency. A campaign is more likely to succeed when it can draw reserves of force when faced with sudden or unexpected losses. Deportation campaigns are no different it would seem.

But reserving exacts a huge emotional cost and provokes pushback. This mechanism of reserving first came to light during inspections of removals in 2011. At that time detainees were not told they were on a reserve list. During an inspection of one IRC the inspector condemned this as an ‘inhumane practice’ that should cease (HMIP 2011c: 5) due to the additional distress it posed for detainees who, after preparing for removal, were brought to the airport only to find they were not in fact flying, and were returned to the detention centre (HMIP 2011c: 17). The inspector’s criticisms gained public and parliamentary attention (Guardian 25/7/2011). Yet the immigration authorities have persisted with the policy. As a concession to these criticisms, it seems they now inform detainees in advance when they are on the list (CPT 2013: 10).

We could consider reserving to be a limit practice which operates on the threshold of public, political and ethical acceptability. Rather than see deportation as a fixed power or instrument, I highlight here its tactical and experimental qualities. You try out new moves, face resistance, modify. Some moves are abandoned, others get institutionalized. It is a dynamic assemblage: it does not unfold according to a neat logic so much as adding bits and pieces, pushing at limits, withdrawing here, extending there.

Surprise

‘Many detainees were unaware of the exact date of the flight. All had been served a notice that outlined a period in which they could be removed, but some only became aware of the exact time when they were woken in the middle of the night [see also HMIP 2018a: 15]. Three detainees were also being removed under ‘operation preceptor’ which involved Home Office immigration enforcement teams arresting people deemed as having no legal right to reside in the UK and taking them to a flight on the same day; all three were removed from the escort before they boarded the aircraft following legal intervention. At Yarl’s Wood, detainees were given no time to pack their own property, which staff had to do for them’ (HMIP 2018b: 9).

Scholars have noted that a key aspect of the deportation turn has been the drive by governments to ‘accelerate’ removals (Fekete, 2011). In Britain this has for some time had the matter of deportation targets as one of its more public elements. Target has a twofold meaning here. Targets are numerical benchmarks, which drive performance, guide policy evaluation and can be offered to publics as evidence of ‘toughness’ on immigration. But targets can also mean particular social-administrative groups/categories. If deportation policy multiplies categories this is tied in part to perceptions that some are easier to deport than others (Fekete, 2011), whether due to their nationality/ destination, their legal status, or public opinion. ‘Operation preceptor’, which the inspector mentions above, is one such instance of targeting. It zeroes in on people in the UK with no family ties on the assumption they will be easier to deport (Guardian 28/4/2018). It is one of a number of ways in which rules and procedures have been changed so as to lessen the chances for appeal, and increase the exposure of migrants to removal.

Microphysics is attentive not just to programmes, but second order effects, to power relations that are perhaps tiny and only very partially formalized. When people are rushed into removals it is not uncommon they do not get the chance to pack their possessions properly. On several occasions the reports note how staff would assure

distressed detainees that if they would just get on the bus, and not slow down the departure, they would ensure their bags were not left behind. The promise of a bag delivered and precious possessions secured becomes a form of leverage (HMIP 2018a: 7) and sometimes betrayal.

However, there is something about the image of people being woken in the night and hurried towards a waiting plane that necessarily exceeds any discussion of deportation as a process states seek to speed up.⁴ It is an image that summons disturbing associations with secret police, renditions, and mechanisms which govern through fear and surprise. The image of a power that acts unannounced with suddenness and resolve, which capitalizes on drowsiness, obscurity and confusion. My point here is not to make a facile likening of the immigration authorities and the secret police. That said, precisely because it does seek to grasp power at the level of its operations, devices, mechanisms and affects, a microphysics of deportation enables us to see resonances and resemblances across very different domains. Theorists of military strategy and geopolitics (Virilio, 1986) as well as studies in the political anthropology of power (Canetti, 1973) have long recognized how speed itself is a weapon, a property that can be engineered, and whose efficacy relies not just on its capacity to inflict actual damage on the adversary, but its power to generate fear and to demoralize. A fuller account of the micro- as well as the macropolitics of deportation would do well to incorporate such insights into its framework, broadening the conceptual vocabulary which migration studies uses to think about power.

Conclusion

I will make just two points in conclusion.

First, I have argued there is a whole political logistics to deportation. This is made visible by bringing the concept of microphysics to bear on the topic. Taking the case of enforced and escorted removals from the UK, I have shown that this logistics is vividly and graphically documented in the inspection reports. Hitherto largely

⁴ This power of surprise was greatly enhanced by the Immigration Act 2014. After 2015 the UK government instituted a 'removal window' which was a three-month period in which someone could be removed without notice. Before the window opens there is a period of notice when you are told you are liable to removal but during which you can make a challenge. For people on charters this notice period is set at five working days (see <https://www.righttoremain.org.uk/toolkit/removal.html>). Before 2015 the procedure was quite different. The government was legally obliged to issue 'removal directions' which specified a time, date, and flight number.

ignored, inspection reports offer researchers a trove of information regarding the mechanisms and procedures of deportation. These mechanisms, techniques, and operations of deportation have been largely overlooked by political scientists, who have tended to ask questions about the *why* more than the *how* of deportation. A focus on the *how*, a focus on these operations and logistics, and in particular the relationship of these operations to aviation, underscores that deportation is an enormously complicated, and in some ways quite delicate procedure. It is underpinned by an enormous investment in technologies, personnel, knowledge, as well as force.

This is not to say that deportation *is* a technical procedure and nothing more. Microphysics is not a claim that these practices are simply instruments that are applied with predictable outcomes and effects. Each operation, whether it is the reserve, the power of surprise, a new form of restraint, the charter flight itself, or the technology of inspection reporting that now shadows it, answers to existing problems, obstacles, blockages and dilemmas while raising new ones. Each one operates in a field of struggles, forces, and counter-forces. There is a play of order and disorder in all of this. Given its associations with flight, but also its power as a metaphor, it might be appropriate to speak not just of the microphysics but the *turbulence* of deportation.

Second, this focus on microphysics can speak to questions about the ethics of deportation. I have not done so sufficiently in this paper, but I will draw out this point here. One way to read the reports would be in terms of the ethicalization of deportation. What do I mean by this? I mean that rather than treat ethics as something that is universal, or purely deliberative, we can be quite empirical and study the way in which particular domains of practice are brought under the sign of the ethical (Collier and Lakoff, 2005; Osborne, 1994). For example, there is the rise of research ethics as something that has reconfigured the way scholars work in universities, or fair trade coffee as a way in which the consumption of certain beverages has been ethicalized. It is a matter of attending to forms, rationalities and transformations. The inspection reports show how ethical considerations have been inscribed into the practices of deportation. For example, in the regulations and inspections, there is the insistence that the use of mechanical restraints should be a proportionate use of force, and that proportionality should be governed by an individualized risk assessment and monitoring of the subject.

What is at stake in this ethicalization of deportation? That is a question I don't have space to unpack here other than to insist that it is not a question of making deportation somehow fairer, softer, or more acceptable to the public. What I will say, however, is that an adequate answer would have to acknowledge that it is mirrored by an ethicalization of resistance and opposition to deportation. The fact that anti-

deportation has become not just an activity, but an identity, attached to a whole ethos of how to protest, where to protest, when to protest, and what to protest confirms this (Nyers, 2003). So does the fact that this ethics is attached, no less than the removals themselves, to a whole set of material practices. On 28 March 2017, 15 protestors managed for the first time to stop a UK deportation flight. They did this by breaking through the perimeter of Stansted airport and attaching themselves to the Titan Airways Boeing 767-300 that was scheduled to take 60 people to Nigeria, Ghana and Sierra Leone. If waist restraint belts feature prominently in the ethicalization of deportation, it was a different kind of restraint that underpinned this protest: the protestors used metal tubing to lock themselves to the undercarriage of the plane. It took the police 10 hours to detach this human anchor. Arrested, tried and facing sentencing on aviation terrorism-related charges they have become the ‘Stansted 15’, a collective figure of direct action and conscientious objection that has given a rather different kind of visibility to the charter flight than the inspection report.

Postscript: Response to Derek Denman

I am extremely grateful to Derek Denman for a set of comments that have very eloquently identified some important theoretical, political and ethical assumptions underpinning my paper, while raising some provocative and valuable questions (Denman, 2019; in this volume). Let me speak briefly to two issues he raises before attempting to answer one of his questions.

First, Denman offers a much richer, philosophically informed account of some of the stakes of microphysics than I have managed in the paper. I agree with him that a microphysics should start not with big questions and concepts like ‘sovereignty’ or ‘the border’ but with immersion in what he calls sense-data. It entails a commitment to the empirical understood as an ethos, a responsibility of the scholar to grapple with a world that is conceptually inexhaustible and radically multiple, and therefore one that calls for a degree of modesty on the side of ‘theory’ and ‘theorists’. It is not a matter of dismissing the big concepts and questions that animate debate, whether in migration studies or elsewhere, but of registering, as he puts it, ‘a whole material apparatus that must be accounted for to understand these macro-political domains’. And not just registering, but forging provisional and situated concepts out of that material. This is what I have tried to do, for example, in my discussion of the power of reserve. Future analysis could usefully read the power of reserve in terms of what Marx, in his use of factory inspection, wrote about the relay system. Factory bosses used the relay system – which was essentially the genesis of shift work - to ensure their looms and their mines, their fixed capital did not lie idle. It is a line of inquiry that would open up questions about the political economy of deportation, about the economics of the deportation machinery, a topic that has hitherto been insufficiently engaged by scholars.

Second, Denman describes microphysics at one point as an analysis of ‘the workings of power smaller than the scale of the subject’. I find this a tremendously helpful observation. It is, of course,

to be understood not in quantitative terms: as though one is interested in units that are somehow smaller than humans. Rather, it is an appeal to think on the scale of forces, affects, elements, and relations that both traverse and compose us, our desires, our identities, our motives and our interests. It is a call to take seriously little things. At one point Denman asks what my reading of the inspection reports reveals about informal practices, about practices and procedures that appear in no law or manual. One of these appears very briefly in my paper. It is the way in which people being expelled often experience great anxiety about the whereabouts and fate of their luggage. We imagine deportation as a removal of people from a territory. Yet, from a logistical and also a very human point of view, it is also about the movement of goods, or better, objects that are always more than goods: things that are possessions, treasures, valuables, repositories of memory, and so much else. Incidents involving the misplacing of these goods, or promises to ensure they make it onto the plane, occasionally surface in the reports, and in other testimonies. Get on the plane quietly and we will make sure your things will be OK. But will they? What micropolitics of expulsion plays out around the handling of these treasures? It is not uncommon when visiting today's museums of immigration – like the one at Ellis Island – to encounter the display of immigrants' luggage. These suitcases, pictures, toys, blankets, pots and pans tell a poignant story about the people who moved. I suspect the luggage of the deported is no less a material and psychic repository of hopes and fears, promises and betrayals, and one path to a more human understanding of today's expulsions.

Finally, Denman asks a very specific question about airplane pilots and the pivotal role they sometimes play in determining whether someone will be deported on a particular flight or not. He cites Jörg Luyke, a journalist who claims that stories about significant numbers of German pilots refusing to fly deportees from Germany to Afghanistan were inaccurate. The journalist claims that, contrary to earlier reports, the pilots were acting not on the basis of political conscience but professional duty, that is, out of concern for flight safety. It is an interesting situation, one that actually speaks to themes of ethics and migration. For if a pilot takes what we might call an 'ethical' stand, if she or he refuses to fly the deportee out of humanitarian concern, she or he quite likely faces professional and perhaps legal sanction. To cite aviation security as a reason to refuse the deportee, on the other hand, might well be a way to circumvent such an outcome. I don't know whether pilots, taken as a social group, are more or less sympathetic to the plight of deportees than the public at large. But I do imagine that, like the public at large, they are capable of *strategic* action. My point is this: might we not find here a kind of micropolitics, one that resembles James Scott's 'everyday resistance' in locating its efficacy precisely in the avoidance of highly prominent political acts and visibly 'ethico-conscientious' identities? Now, the ethical action we identify with the conscientious objector, the one who refuses to buckle in the face of unjust laws and actions, is important for the signal it sends to a watching public. It is important for its power to inspire other similar actions; to instantiate other possibilities. But it would be a mistake to deem this the only form of resistance to deportation. One possible political ethos for microphysics is precisely to register the more molecular ways in which the regime of deportation is shot through with uncertainty, subversion, reversal, and hesitation.

References

- Adey P. (2010) *Aerial life spaces, mobilities, affects. RGS-IBG book series*. Chichester; Malden, MA: Wiley-Blackwell, xii, 283 p.
- Anaïs, S. 2015. *Disarming Intervention: A Critical History of Non-Lethality*, Vancouver: UBC Press.
- Anderson B, Gibney M and Paoletti E. (2011) Citizenship, Deportation and the Boundaries of Belonging. *Citizenship Studies* 15: 547-563.
- APT (Association for the Prevention of Torture) 2012. *National Preventive Mechanisms: Monitoring the Forced Deportation Flights of Migrants*. March.
- Bahcecik, Serif. 2011. *From “Infamy” to “Capacity Building”?: The Shifting of Anti-Torture Strategies and the Problem of Torture in Turkey*. PhD Thesis. Ottawa: Carleton University.
- Belcher O and Martin L. (2013) *Ethnographies of Closed Doors: Conceptualising Openness and Closure in US Immigration and Military Institutions*. *Area* 45: 403-410.
- Blue E. (2015) *Strange Passages: Carceral Mobility and the Liminal in the Catastrophic History of American Deportation*. *National Identities* 17: 175-194.
- Bosworth M. (2014) *Inside Immigration Detention*, Oxford: Oxford University Press.
- Bridle, J. 2015. *What they don't want you to see: The hidden world of UK deportation*. The Guardian. January 27, 2015.
- Canetti E. (1973) *Crowds and power*, Harmondsworth, Eng.: Penguin Books.
- Collier SJ and Lakoff A. (2005) *On Regimes of Living In: Ong A and Collier SJ (eds) Global assemblages: technology, politics, and ethics as anthropological problems*. Malden, Mass.: Blackwell Publishing, 22-39.
- Collyer M. (2012) *Deportation and the Micropolitics of Exclusion: The Rise of Removals from the UK to Sri Lanka*. *Geopolitics* 17: 276-292.
- Council of Europe (Parliamentary Assembly) 2002. *Recommendation 1547 on the Expulsion Procedures in Conformity with Human Rights and Enforced with Respect for Safety and Dignity* (Jan. 2002) p. §13.ix.d.
- CPT (European Committee for the Prevention of Torture) 2003. *Deportation of Foreign Nationals by Air*. CPT/Inf(2003)35-part.
- CPT (European Committee for the Prevention of Torture) 2013. *Report to the Government of the United Kingdom on the Visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 22 to 24 October*. CPT/Inf (2013) 14. Strasbourg: Council of Europe.

- Coutin S. (2015) Deportation Studies: Origins, Themes and Directions. *Citizenship Studies* 41: 671-681.
- De Genova N. (2002) Migrant "Illegality" and Deportability in Everyday Life. *Annual Review of Anthropology* 31: 419-447.
- De Genova N. (2013) Spectacles of Migrant "Illegality": The Scene of Exclusion, the Obscene of Inclusion. *Ethnic and Racial Studies* 36: 1180-1198.
- De Genova N and Peutz N. (2010) *The Deportation Regime: Sovereignty, Space and the Freedom of Movement*. Durham: Duke University Press.
- Denman D. (2019) Comment on William Walters: The Microphysics of Deportation. In Hoesch M and Laube L (eds) *Proceedings of the 2018 ZiF Workshop "Studying Migration Policies at the Interface between Empirical Research and Normative Analysis"*. ULB Münster (miami.uni-muenster.de), 187–190. doi: 10.17879/95189424097
- Deutsche Welle. 2017. 'Things to know about deportations in Germany. June 5. <https://www.dw.com/en/things-to-know-about-deportations-in-germany/a-39119049>.
- Drotbohm H and Hasselberg I. (2014) Deportation, Anxiety, Justice: New Ethnographic Perspectives. *Journal of Ethnic and Migration Studies*.
- Ellermann A. (2008) The Limits of Unilateral Migration Control: Deportation and Inter-state Cooperation. *Government and Opposition* 43: 168-189.
- European Commission. 2017. Commission Recommendation (EU) 2017/2338 of 16 November 2017 Establishing a Common "Return Handbook" to be used by Member States' Competent Authorities when carrying out Return-Related Tasks. Official Journal of the European Union L339: 83-159.
- Fekete L. (2005) The Deportation Machine: Europe, Asylum and Human Rights. *Race and Class* 47: 64-91.
- Fekete L. (2011) Accelerated Removals: The Human Cost of EU Deportation Policies. *Race & Class* 52: 89-97.
- Foucault M. (1977) *Discipline and Punish: The Birth of the Prison*, London: Allen Lane.
- FRA (European Union Agency for Fundamental Rights) 2018. *Forced Return Monitoring Systems*.
- Gammeltoft-Hansen T. (2013) The Rise of the Private Border Guard: Accountability and Responsibility in the Migration Control Industry. In: Gammeltoft-Hansen T and Sørensen NN (eds) *The Migration Industry and the Commercialization of International Migration*. London: Routledge, 128-151.
- Gibney M and Hansen R. (2003) Deportation and the Liberal State: The Forcible Return of Asylum Seekers and unlawful Migrants in Canada, Germany and

- the United Kingdom. *New Issues in Refugee Research Working Paper* (UNHCR) 77.
- Gidley B. (2004) Doing Historical and Archival Research. In: Seale C (ed) *Researching Society and Culture (2nd Edition)*. London: Sage, 249-264.
- Gill N. (2009) Governmental Mobility: The Power Effects of the Movement of Detained Asylum Seekers around Britain's Detention Estate. *Political Geography* 28: 186-196.
- Gilroy P. (1993) *The Black Atlantic: Modernity and Double Consciousness*, Cambridge, Mass.: Harvard University Press.
- Gusterson H. (1997) Studying Up Revisited. *PoLAR: Political and Legal Anthropological Review* 20: 114-119.
- Hiemstra N. (2013) 'You Don't Even Know Where You Are': Chaotic Geographies of US Migrant Detention and Deportation. In: Moran D, Gill N and Conlon D (eds) *Carceral Spaces: Mobility and Agency in Imprisonment and Migrant Detention*. Bristol: Ashgate.
- HMIP (HM Chief Inspector of Prisons) 2011a. Detainees Under Escort: Inspection of Escort and Removals to Jamaica. March 24-25. London: HM Inspectorate of Prisons.
- _____ 2011b. Detainees Under Escort: Inspection of Escort and Removals to Nigeria. April 20-21. London: HM Inspectorate of Prisons.
- _____ 2011c. Report on an Announced Inspection of Tinsley House Immigration Removal Centre. February 7-11. London: HM Inspectorate of Prisons.
- _____ 2012. Detainees Under Escort: Inspection of Escort and Removals to Afghanistan. June 2. London: HM Inspectorate of Prisons.
- _____ 2017. Detainees Under Escort: Inspection of Escort and Removals to Jamaica. March 7-8. London: HM Inspectorate of Prisons.
- _____ 2018a. Detainees Under Escort: Inspection of a Third Country Unit Removal to France, Austria and Bulgaria. January 17. London: HM Inspectorate of Prisons.
- _____ 2018b. Detainees Under Escort: Inspection of Escort and Removals to Pakistan. February 14-15. London: HM Inspectorate of Prisons.
- Johnson J. (1988) Mixing Humans and Nonhumans Together: The Sociology of a Door-Closer. *Social Problems* 35: 298-310.
- Kalir B. (2017) Between "Voluntary" Return Programs and Soft Deportation: Sending Vulnerable Migrants in Spain Back "Home". In: Vathi Z and King R (eds) *Return Migration and Psychosocial Wellbeing*. New York: Routledge, 56-71.

- Kalir B and van Schendel W. (2017) Nonrecording States Between Legibility and Looking Away. *Focaal* 77.
- Kanstroom D. (2017) The "Right to Remain Here" as an Evolving Component of Global Refugee Protection: Current Initiatives and Critical Questions. *Journal on Migration and Human Security* 5: 614-644.
- Khosravi S. (2009) Sweden: Detention and Deportation of Asylum Seekers. *Race and Class* 50: 38-56.
- Khosravi S. (2018) *After Deportation: Ethnographic Perspectives*. New York: Palgrave.
- Lecadet C. (2018) Post-Deportation Movements: Forms and Conditions of the Struggle Amongst Self-Organising Expelled Migrants in Mali and Togo. In: Khosravi S (ed) *After Deportation: Ethnographic Perspectives*. New York: Palgrave, 187-204.
- Leerkes A, van Os R and Boersma E. (2017) What Drives Soft Deportation? Understanding the Rise in Assisted Voluntary Return Among Rejected Asylum Seekers in the Netherlands. *Population, Space & Place*: 1-11.
- Maillet P, Mountz A and Williams K. (2017) Researching Migration and Enforcement in Obscured Places: Practical, Ethical and Methodological Challenges to Fieldwork. *Social and Cultural Geography* 18: 927-950.
- Makaremi C. (2018) Deportation and the Technification of Force: Violence in Democracy. *Technosphere Magazine*, January 15, 2018. <https://technosphere-magazine.hkw.de/p/Deportation-and-the-Technification-of-Force-Violence-in-Democracy-ngjuok8Rb5q1U7ae54VHwp>.
- Medical Justice. (2008) *Outsourcing Abuse: The Use and Misuse of State-Sanctioned Force During the Detention and Removal of Asylum Seekers*, London.
- Mezzadra S and Neilson B. (2003) Né qui, né altrove – Migration, Detention, Desertion: A Dialogue. *borderlands e-journal* 2.
- Monahan T and Fisher J. (2014) Strategies for Obtaining Access to Secretive or Guarded Organizations. *Journal of Contemporary Ethnography*: 1-28.
- Mountz A. (2011) Understanding State Mobilities Through an Ontology of Exclusion. *Mobilities*: 317-334.
- Nyers P. (2003) Abject Cosmopolitanism: The Politics of Protection in the Anti-Deportation Movement. *Third World Quarterly* 24: 1069-1093.
- Osborne T. (1994) Sociology, Liberalism and the Historicity of Conduct. *Economy & Society* 23: 484-501.
- Peutz N. (2006) Embarking on an Anthropology of Removal. *Current Anthropology* 47: 217-231.
- Phoung C. (2005) The Removal of Failed Asylum Seekers. *Legal Studies* 25: 117-141.

- Pirjola J. (2015) Flights of Shame or Dignified Return? Return Flights and Post-Return Monitoring. *European Journal of Law and Migration* 17: 305-328.
- Podeszfa, Leana and Vetter, Friederike. 2013. Post-Deportation Monitoring: Why, How, and By Whom? *Forced Migration Review* 44: 68-69.
- Presner T. (2007) *Mobile Modernity: Germans, Jews, Trains*, New York: Columbia University Press.
- Pro Asyl. 2007. Documentation of the European Conference: Monitoring Forced Returns / Deportations in Europe. Schwalmstadt: Plag.
- Radio Sweden. 2014. Deportees Given Illegal Forced Injections. October 24, 2018. <https://sverigesradio.se/sida/artikel.aspx?programid=2054&artikel=6000012>.
- Rappert B. (2012) States of Ignorance: The Making and Remaking of Death Tolls. *Economy & Society* 41: 42-63.
- Rediker M. (2007) *The slave ship: a human history*, London: John Murray.
- Salter M. (2007) Governmentalities of an Airport. *International Political Sociology* 1: 49-66.
- Schuster L and Majidi N. (2013) What Happens Post-Deportation? The Experience of Deported Afghans. *Migration Studies* 1: 221-240.
- Squire V. (2015) *Post/humanitarian border politics between Mexico and the US : people, places, things*, Basingstoke; New York: Palgrave Macmillan.
- Virilio P. (1986) *Speed and Politics*, New York: Semiotext(e).
- Walters W. (2016) Flight of the Deported: Aircraft, Deportation, and Politics. *Geopolitics* 21: 435-458.
- Walters W. (2017) The Microphysics of Power Redux. In: Bonditti P, Bigo D and Gros F (eds) *Foucault and the Modern International*. New York: Palgrave, 57-76.
- Walters W. (2018) Aviation as Deportation Infrastructure: Airports, Planes, and Expulsion. *Journal of Ethnic and Migration Studies* 44: 2796-2817.

Comment on William Walters: The Microphysics of Deportation

Derek Denman¹

Department of Ethics, Law and Politics, Max Planck Institute for the Study of
Religious and Ethnic Diversity, Göttingen

Abstract

This paper comments on a talk given by William Walters at the 2018 ZiF Workshop “Studying Migration Policies at the Interface Between Empirical Research and Normative Analysis”, September 2018, in Bielefeld. Walters’ paper is available under doi: 10.17879/95189425134.

Keywords

Deportation; Michel Foucault; empiricism; deportation resistance

DOI

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I was thrilled when Lena Laube and Matthias Hoesch asked me to comment on William Walters’s work. I have long admired his creative mode of inquiry that is engaged with and informed by, but never constrained by, Foucault’s political thought. This is a fascinating and tremendously rich paper continuing this mode of inquiry. It seeks to correct the sense one gets from much of migration studies that border crossings are material, yet deportations are not, and in doing so, it gives us a sense of the texture of power at its most elemental.

The first part of my comments will focus on how the paper speaks to questions that structured the workshop, that is, the relation between the field of the empirical and the normative. I suggest that the paper, through its focus on the microphysics of

¹ Email: denman@mmg.mpg.de

deportation, proposed by Walters and building on the work of Foucault, implicitly approaches these questions in a novel, productive way. This part of my comment is intended more as a framing that I hope can contribute to discussion. I will follow that with a few questions about what the paper means for migration studies and the ways it can inform the politics of deportation resistance.

Empiricism

I want to suggest that what we find in this paper is a kind of empiricism from a different philosophical tradition than what has implicitly framed many of the conversations thus far. A microphysics of deportation does not posit a notion of “theory” that is subsequently to be checked against a reified “reality,” and then seek to bridge the chasm between these seemingly incommensurable domains. Rather, microphysics might be described by the philosopher Gilles Deleuze, influenced by Hume, Spinoza, and James, as a kind of *radical empiricism*.² Rather than separate “theory” and “reality,” radical empiricism attends to the specificities of *sensations* and *stimuli* fundamental to the phenomena of experience. It builds concepts from this sense-experience, albeit sometimes provisionally and experimentally. These concepts are not without ethical commitments, that is, if we understand ethics to mean our way of being in a complex, turbulent world that often resists systematization. *Data here is sense-data*, that is, the specific ways that bodies of detainees are handcuffed, moved through the plane, and strapped to seats—what Walters calls the political anatomy of deportation. Sense data further includes the gestures, postures, training, and interactions of the escorts. Finally, it entails the way that space and time are organized at their most granular level, as departure, arrival, and reserve. It is an account of the workings of power smaller than the scale of the subject. It registers the sensations of discomfort, fatigue, distress, confusion, and fearfulness, which Walters characterizes eloquently as “seizing but also calming, hurting but also soothing” (164). Notions of sovereignty, the State, and exclusion are replaced by a focus on techniques, logistics, and infrastructures. That is not to say that the prior terms are irrelevant; rather, it is to suggest that sovereign power and exclusion are subtended by a whole material apparatus that must be accounted for to understand these macro-political domains.

This kind of empiricism is not only an accounting of sensation but also an inquiry into the documents that define the body of the deported as an object of

² See Gilles Deleuze, *Pure Immanence*, trans. Anne Boyman (New York: Zone, 2001). Gilles Deleuze and Félix Guattari, *What is Philosophy?* trans. Hugh Tomlinson and Graham Burchell (New York: Columbia University Press, 1994).

government. The reading of these reports offered by Walters is significant in a few ways that I want to highlight.

First, reports capture informality. We see the events and relations that possibly are not supposed to exist—subject to regulation and/or prohibition—yet prove constitutive to the very process of deportation. The reports offer a glimpse not only into the letter of written law, but the ways in which administrative procedures are maintained through consistent informal interactions and even, potentially, small legal transgressions. A question to Walters here: What did you find in terms of informal practices? Did you come across particular informal routines that were not prescribed, nor located in other official documents, but repeatedly appeared in inspections? Of particular interest would be repeated acts of misconduct by guards and escorts that were officially prohibited but under a microphysical approach inseparable from the air deportation process.

Second, the reports cannot be taken at face value. Their anodyne language of so-called “restraint” conceals force and containment working at an intimate level. Furthermore, they have absences that need to be investigated as well. Specifically, the absence of structural racism, and indeed, the fundamental incapability of the reports to address it. Instead of seeing racism inhabiting the entire deportation proceeding, the reports reduce it to an interpersonal interaction corrected through revised training and recruiting practices.

Normativity and Ethics

Faced with reports that do not fully disclose the condition they describe, Walters gives us a sense of what to do when our data set may be haunted by ideology, hegemony, or governmentality. He suggests reading reports in the “particular register” recommended by Marx in *Capital* for reviewing the reports of factory inspectors (168). By doing so, we would see the concept of a “forced removal” in a different light, as what Walters, in an earlier version of his paper, calls “the materialization of struggles over the right to remove and the right to remain”.

This brings me to my next question. For Marx, the working day gave us a glimpse into the relation between collective labor, a protagonist of sorts for Marx, and collective capital, its opponent. We can look at the ways in which the day has been subdivided into work, rest, and leisure to see not only the specific relations of any particular worker to their boss but also the condition of labor in its entirety. For Walters, the “right to remain” is placed in this position. My question here is if Walters has given us a new protagonist in the pursuit of migration justice, that being the “right

to remain.” This is not a single subject or individual, just as collective labor is irreducible to any particular laborer. Instead, the “right to remain” would be something like the aggregate of all the power relations driving against the possibility of deportation. A related question might be how do we “scale up” from the microphysics provided? How do we decipher the conditions of power at macro-scales?

Finally, I have a question about the role of pilots in deportation resistance. The paper closes with the spectacular example of the “Stansted 15” attaching themselves, as a human anchor, to a deportation flight. The other moment in recent memory when deportation flights became visible was through reporting in December 2017 on German pilots who refused to carry out deportations to Afghanistan. This was first characterized as an organized act of resistance to the German deportation regime, but follow-up reporting clarified that there was no evidence that this number was any higher than the normal level of refusals by pilots to transport passengers who appear agitated and might lose control during the flight.³ While not the act of civil disobedience it was first reported to be, the story did reveal the fragility of air deportations and, what Walters calls in the paper, the cabin as “a delicate environment that calls for active management” (174). Determinations regarding this delicate environment are made by pilots. While the story of a large-scale political action turned out to not be accurate, it did reveal that the pilot is a critical node in the infrastructure of deportation. So the question is: Is this a possible site of resistance to air deportation or was this a false hope?

³ Jörg Luyken, “No, German Pilots aren't Defying Their Government by Refusing to Deport Asylum Seekers,” *The Local*, December 7, 2017, <https://www.thelocal.de/20171207/no-german-pilots-arent-defying-their-government-by-refusing-to-deport-asylum-seekers>.

The Ethics of Resisting Deportation

Rutger Birnie¹

European University Institute

Abstract

Can anti-deportation resistance be justified, and if so how and by whom may, or perhaps should, unjust deportations be resisted? In this paper, I seek to provide an answer to these questions. The paper starts by describing the main forms and agents of anti-deportation action in the contemporary context. Subsequently, I examine how different justifications for principled resistance and disobedience may each be invoked in the case of deportation resistance. I then explore how worries about the resister's motivation for engaging in the action and their epistemic position apply in the specific context of anti-deportation action and consider in what circumstances there is not merely a right but a duty to resist deportation. The upshot of this argument, I conclude, is that the liberal state ought to respond to anti-deportation action not by criminalising disobedience and resistance in this field, but rather by creating legal avenues for such actors to influence deportation decision-making.

Keywords

Deportation; anti-deportation; disobedience; resistance; right to resist; duty to resist

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In the evening of Monday July 23rd 2018, 21-year old Swedish student Elin Ersson boarded a Turkish Airlines flight from Gothenburg to Istanbul, but once on board remained standing in the aisle and refused to sit down. She had in fact no intention of travelling to Turkey, but she had bought a plane ticket that morning, after finding out that a 26-year old Afghan asylum seeker would be deported on this plane from Sweden to Kabul via Istanbul. As it turned out, the young Afghan in question was

¹ Email: rutger.birnie@eui.eu.

not on the plane, but an older Afghan man in his 50s was on board for deportation (Anderson and Karasz 2018; Crouch 2018b). Elin declared that she would not sit down nor leave the plane until the man was removed from the flight, starting a Facebook livestream to broadcast the standoff (Ersson 2018). She initially faced mostly criticism from cabin crew as well as other passengers. A British man can be heard in the video telling her “I don’t care what you think” and to sit down as she is delaying the flight and “frightening the children”—to which Elin defiantly responded “I don’t want a man’s life to be taken away just because you don’t want to miss your flight” and “he is not safe in Afghanistan, (...) it’s not right to send people to hell”. Others can be heard yelling “shut up” and “these are the rules of your country”. Eventually, she also garners support—from a Turkish man who voices his agreement and a football team near the back of the plane that stands up in solidarity. When a flight attendant announces that the Afghan man will be taken off the plane, there is applause. When the plane departs with a two-hour delay, both the Afghan man, the three security personnel guarding him, and Erin are back in the terminal.

While the man’s deportation was called off for the moment, he remained in custody and was deported at a later date, possibly on a specially chartered flight. Ismail Khawari, the 26-year old whose deportation Elin originally tried to prevent, turned out to have been deported on a different flight the next day (Hakim 2018). Meanwhile, Elin has become somehow of a social media sensation. Her Facebook video had been viewed 4.7 million times by the end of the week and versions of the video on YouTube and news websites added significantly to that view count. While she declares in the video that what she was doing is “perfectly legal” and that she had “not committed a crime”, in October Swedish prosecutors announced they would prosecute Elin “for crimes against aviation law” at Gothenburg district court, where she is now facing a fine and up to six months in jail (Crouch 2018a).

Elin’s actions are one example of many attempts to resist or frustrate deportation proceedings that are considered manifestly unjust by those engaged in them. A variety of actors have increasingly sought to challenge deportation decisions taken by national immigration control bureaucracies and national government’s deportation policies and their implementation more widely. These include would-be deportees themselves and ordinary citizens, but also civil society organisations, representatives of local authorities, and the receiving states to which they seek to send their deportees. Their acts of resistance can take the form of public contestation, non-cooperation, active frustration, or violent resistance. How should we morally evaluate such acts and the agents that engage in them? Can such anti-deportation resistance be

justified? If so, how and by whom may, or perhaps should, unjust deportations be resisted?

In this paper, I seek to provide an answer to these questions. There is a small but growing literature on the morality of resisting migration controls generally (Cabrera 2010; Hidalgo 2015, 2016; Yong 2018). However, this literature has thus far focused primarily on a) the rights of migrants *themselves* to evade or resist controls, not that of other actors; and b) the right to resist *entry controls* specifically, leaving aside the specificity of resisting deportation. This paper makes a novel contribution to this literature by having a narrower focus when it comes to the policy but a broader focus when it comes to the *agents* of resistance. The narrower focus is relevant because of deportation's distinctiveness from entry controls. Unlike the would-be immigrant, the would-be deportee is already present and as such has a different standing vis-à-vis the state that enforces migration control. The broader focus on different agents is necessary for the same reason, as the would-be deportee not only has different standing vis-à-vis the state but also vis-à-vis the other agents I wish to focus on here—ordinary citizens, local communities and destination states on whose cooperation the deporting states relies.

The paper is also a contribution to the debate on the justification of disobedience and resistance to state laws and dictates generally. Contributions to this debate often focus on specific types of action, most notably under the headers of “conscientious objection” and “civil disobedience”, each supposedly neatly distinguishable and with their own justifications and restrictions. However, precise distinctions between such categories are difficult to maintain when we seek to apply it to a real-world case of disobedient action, such as deportation resistance. Often, such action can potentially invoke more than one type of justification, blurring the lines between categories established in the abstract by normative theorists. Most notably, the justification of different types of action may, even if the goal of the action is broadly the same, vary between the different *agents* which may be involved in the action. This brings to the fore the problem of the one-size-fits-all approach to justifying resistance and disobedience dominant in academic debates. Instead, this paper will argue that in order to defend a normative framework for disobedience in the real world, we need an agent-sensitive account of justified resistance.

The paper starts by describing the main forms and agents of anti-deportation action in the contemporary context. Subsequently, I examine how different justifications for principled resistance and disobedience, namely a necessity defence, a moral communication defence and a personal integrity defence, may each be invoked in the case of deportation resistance. I then explore how worries about the

resister's motivation for engaging in the action and their epistemic position apply in the specific context of anti-deportation action and consider in what circumstances there is not merely a right but a duty to resist deportation. The upshot of this argument, I conclude, is that the liberal state ought to respond to anti-deportation action not by criminalising disobedience and resistance in this field, as many states have done, but rather by creating legal avenues for such actors to influence deportation decision-making.

Forms and agents of anti-deportation action

There are several ways to distinguish between types of anti-deportation action. The first, and perhaps most obvious distinction is between legal and illegal types of action. Only the latter are arguably in need of a specific justification, but it is important to note that the distinction between ordinary political action and principled but unlawful disobedience is of course entirely relative to a given country's laws and policies—and there is wide variation in how states approach this. Nonetheless, the trend seems to be going in the direction of increasing criminalisation of deportation disobedience. A growing number of states are introducing laws that make it possible or easier to impose criminal sanctions on those resisting their own deportation or those helping others to do so. Of the 28 EU member states, for instance, 25 explicitly penalise irregular stay and 10 prescribe imprisonment as a punishment for non-cooperation with an obligation to leave the territory (European Union Agency for Fundamental Rights 2014: 5). Facilitating irregular entry is punishable in all EU states except Ireland, though most either require that those engaged in the facilitation have a profit motive or exempt certain forms of “humanitarian assistance” (or both).² However, eight EU states criminalise all forms of assistance, including humanitarian and non-profit assistance (European Union Agency for Fundamental Rights 2014: 11).

Another way of distinguishing within the category of anti-deportation action is by looking at the precise forms it takes. There are broadly three forms of anti-deportation action: public contestation, non-compliance and active resistance. Examples of public contestation include demonstrations, political or media interventions. These can be engaged in by would-be deportees themselves, such as when “deportables” go onto the streets to protest their deportability. One example

² Austria, France and Malta exempt assistance provided to family members. France additionally exempts the provision of legal advice. Germany exempts persons who carry out “specific professional or honorary duties”. The United Kingdom exempts persons who act on behalf of an organisation that aims to assist asylum seekers and does not charge for its services (European Union Agency for Fundamental Rights 2014: 11).

are the 2006 protest marches in several US cities against proposed legislation which would raise penalties for illegal immigration and classify undocumented immigrants and anyone who helped them enter or remain in the US as felons. The most high-profile of these marches came on May 1st of that year and was nicknamed “a day without immigrants”, when many undocumented Latino immigrants quit their job for a day to highlight the extent of their collective contribution to US society. These and other such peaceful protests ordinarily remain within the boundaries of the laws of liberal democracies. However, sometimes protest strategies by those vulnerable to deportation can include unlawful actions, such as the occupation of buildings. The first time the *sans-papiers* movement in France received worldwide media attention was in 1996 when the government ordered special police forces to break down the doors of a church in Paris to expel those *sans-papiers* who had been staging a hunger strike inside (Freedman 2008). More recently, a collective of failed asylum seekers in the Netherlands have occupied and squatted several public spaces and buildings since 2012 in protest against their deportability, including setting up tents in the streets and parks of Amsterdam and (visibly) squatting in an empty church, a garage, a warehouse, a former bank, a former arts academy, a school, flats and office buildings around the city (Wij Zijn Hier 2018). Such protests are also often instigated or facilitated by those who are not themselves subject to deportation, including friends and family members of the would-be deportee, schools, employers, work colleagues, neighbourhood associations, churches and other religious groups, migrant support groups and activist networks or organisations. Sometimes such protest does not have the state or wider society as its audience but rather private companies that profit from the detention and deportation industries, as in the case of the boycotts of Codex (a catering company) and Lufthansa (an airline) (Nyers 2003: 1081).

Non-compliance with deportation law, secondly, may include both evasion of authorities tasked with implementing removals and refusal to cooperate with such proceedings. Non-compliance occurs, of course, when deportees themselves do not obey the obligation to leave and make efforts to hide from the authorities to avoid detection. But it may also take the form of service providers who do not act on their obligation to ask for or pass on information about residence status as they are required, or public officials refusing to cooperate in effectuating a deportation order, such as when mayors order municipal police forces not to use their powers of arrest to detain those under an order to leave—or even actively help those targeted for deportation to go into hiding, as the mayor of the Dutch town of Weert did with a Syrian family in 2016 (“Burgemeester Weert helpt vluchtelingengezin onderduiken” 2006). While this regularly happens in specific cases where a mayor or local council

disagrees with the deportation of a particular individual or family, non-cooperation of a lower political level with a higher one is also sometimes adopted as policy. Sanctuary cities and states in the US are the best-known example of this, but similar practices are found in other countries. When the German federal government passed the *Übermittlungspflicht* law requiring all public institutions to report on the legal status of those they came in touch with, several *Länder* including North Rhine-Westphalia, Berlin, Hamburg and Hessen issued ordinances exempting elementary and high schools and hospitals and doctors from this law (Lebuhn 2013: 44-45).

Active resistance, lastly, would be the best characterisation of deportees or others acting using physical force or the threat of force (at least as defensive force) to try and prevent their deportation. Would-be deportees who physically resist their arrest or deportation obviously fall under this header, but so do people who refuse to allow a plane carrying a deportee to take off, either as fellow passengers (such as Elin Ersson) or by chaining themselves to the aircraft or runway, as activists at Stansted airport in the UK did last year (Taylor 2017). Another example is the shutting down of pre-deportation detention centres (as has happened to Via Corelli in Milan and Campsfield House in England) (Nyers 2003: 1081). Forceful or active resistance is, at least in its violent variant, universally outlawed.

Three justifications for resistance and disobedience

There are good reasons for insisting that there is a general duty to obey the law in mostly just political orders, even if we disagree with any particular laws. Some emphasise that such political obligation derives from a natural duty to uphold institutions that are (at least mostly) just (Rawls 1999), others from our membership in political communities governed by laws (Horton 2010) or from the benefits we derive from the law as a system of mutual cooperation (Dagger 1997), and still others from the procedural (Christiano 2008) or epistemic (Estlund 2008) legitimacy of laws that are the product of democratic procedures. However, nearly all authors believe that there are limits to this political obligation and that there are conditions under which laws may be broken. As a type of action which breaks a particular state law or injunction for principled reasons but is distinguishable from revolutionary action in its more limited aims (in that it aims at changing particular parts of the system rather than overthrowing it), this category of permissible law-breaking is usually discussed under the header of “civil disobedience”, a term coined by Henry David Thoreau in his 1848 (1996) essay justifying his refusal to pay a state poll tax he believed the US government used to finance its war with Mexico and enforce the Fugitive Slave Law. The case for civil disobedience, and for limiting its justification to very specific

circumstances and types of action, was elaborated by John Rawls in his 1971 *Theory of Justice*. While elements of Rawls' account have been criticised by political theorists since, and alternative accounts have been defended (Feinberg 1979; Raz 1979; Morreall 1991; Lefkowitz 2007; Brownlee 2012), Rawls' definition of civil disobedience remains highly influential.

There are at least three grounds on which principled law-breaking can be justified: grounds of necessity, moral communication, and personal integrity. Each will be discussed in turn below, along with their applicability to the case of anti-deportation action.

Necessity

The argument from necessity focuses on situations in which disobedience to laws or legal dictates may be the only way to prevent harm to vital interests or violation of fundamental rights. For such a situation to occur, it is not enough that a law or its implementation is merely unjust. Rather this injustice must be of a certain gravity and certainty. It must be, in Rawls' phrasing, a "substantial and clear injustice" and there must be "a lot at stake" (1999) for disobedience to be justified. But this way of justifying disobedience also implies certain restrictions on when and how it may be used to prevent or redress the injustice. It must be, first of all, a *proportional response* to the injustice in question, and it must be a *last resort* after other, legal, avenues of seeking redress have been exhausted. However, the last resort requirement must be sensitive to the circumstances of the sufferer of the injustice. As A. John Simmons writes, "the most pressing moral causes are often those most intransigently opposed by those in power, leading inevitably to intolerably long delays in the pursuit of legal means of redress" (2003: 56). Relatedly, in cases where the victims of the unjust law or policy are members of groups within society who are persistently marginalised in different spheres of life, this gives additional weight to the particular injustice suffered by an unjust law (Rawls 1999: 312).

Do cases of deportation reach the "substantial and clear injustice" threshold? There is of course widespread disagreement on this. Some believe all deportations are rights-violating and an unjustified exercise of political power (De Genova 2002; Walters 2002) while others insist that the state has broad discretionary powers to order non-nationals to leave the territories they control (Blake 2010; Miller 2016). Elsewhere, I have argued that deportation regularly (but not inevitably) risks violating fundamental rights, both through its end-result and through its execution. I have also argued that the right to stay in a place where one is a long-term and permanent resident and has extensive ties is a fundamental right limiting deportation practice

(Birnie 2019). While this not a fully-accepted part of the human rights cannon, some principles in international human rights documents and to some extent in state practice do support such a right. This right should be taken alongside more established human rights. The most notable of these is the right not to be returned to a situation where one faces an acute and serious threat to life, liberty or wellbeing, an integral part of the international asylum system meant to guarantee that political and war refugees are not sent back to their demise. Another prominent one is the right to family life, which covers not only the right to privacy but also the preservation of family unity, which forbids deportations which break apart family units, and thereby protects for instance parents of children with a right to stay from deportation. These two rights are familiar enough from human rights practice and constitute formal legal limits on states' power to deport—albeit ones not always respected in practice. When any of these three rights are in play, disobedience and resistance can be justified ways of seeking to prevent the territorial removal from taking place.

What adds to the case for disobedience here is that deportation is, in practice at least, usually an *irreversible* act. Once a deportation has been successfully carried out, it is exceedingly difficult for the deportee to seek redress and return to the deporting country, even when her deportation turns out to have been unjust. Given the speed with which many countries now carry out deportations and the increasingly limited possibilities of challenging a deportation order pre-removal, the last resort requirement must be interpreted very loosely in the case of deportation.

Rights violations may also occur in the *execution* of a deportation. For instance, the use of excessive force, the practice of detaining would-be deportees for long and sometimes indefinite periods of time, and the separation of families in the deportation procedure may constitute a violation of fundamental rights in certain circumstances. In those cases, resistance or disobedience may be justified when the aim is not so much to prevent the deportation itself, but rather to stop the injustices committed as part of the highly coercive deportation procedure. Relatedly, disobedience may be justified even when it is not aimed at preventing a deportation per se but rather seeks to alleviate and protest the unjust effects of *deportability*. The logic behind sanctuary cities, while being sometimes explicitly about defending the right to stay, often is (also) specifically justified with reference to the marginalising effects of deportability, and as such can be (and is) defended without reference to a right to stay.

Moral communication

A second way of justifying law-breaking and disobedience is by defending it as a way of communicating moral concern. The aim of such communicative disobedience is to

convey disavowal or condemnation of a particular law or policy and draw public attention to it, with the ultimate aim of instigating a change in the law or policy. It can thus be justified as a way of contributing to the overall justness of the polity and system of laws. As Rawls writes, “the social value of principled disobedience is that it acts as a stabilising force in society by inhibiting departures from justice and correcting departures when they occur” (1999: 336). In confronting state authorities openly, principled disobedients force them to justify their conduct in controversial policy areas (Brownlee 2007: 179). Moreover, against critique of actions by an individual or minority group against laws which enjoy the approval of a democratic majority, the moral communication argument emphasises that principled resistance to specific laws or injunctions can contribute to, rather than threaten, the democratic legitimacy of a liberal state. Disobedience can play a vital role in democratic processes, as a way of getting a particular issue which has been stalled or silenced on the political agenda (Markovits 2005; Smith 2011), or of addressing the imbalance of political power between minorities and majorities (Lefkowitz 2007; Brownlee 2012). Indeed, for Kimberly Brownlee the communicative value of disobedience is that it contributes “centrally to the democratic exchange of ideas by forcing the champions of dominant opinion to reflect upon and defend their views” (2012: 22).

It is perhaps not immediately clear how deportation resistance can be justified on grounds of moral and democratic communication. If, as Daniel Lefkowitz (2007) has argued, rights to principled disobedience are derived from the right to political participation, and seen as an extension of this right in the sense that is a right to continue contributing to the democratic debate even after a certain law has been decided on by a majority, it is not clear that those who are explicitly defined as non-members of the political community (exemplified by their deportability) can have that right. However, precisely because they lack access to many of the regular channels of political voice available to full citizens, those subject to deportation rely on irregular ways of getting their voices heard *more* than citizens and legal residents, and they may *more* justifiably rely on disobedient action as a counterbalance to their marginalised status. Moreover, as would-be deportees might be unjustly excluded from that community, the possibility of communicative disobedience is of democratic value to both them and those who speak up in their favour. Anti-deportation action frequently challenges precisely the democratic exclusion of long-term residents by challenging the state’s definition of belonging and membership (Anderson et al. 2011). Anne McNevin interprets acts of contestation by irregular migrants themselves as the “new frontier of the political—that moment of confrontation and destabilization when one

account of justice competes with another to shape what we think of as ‘common sense’ justifications for particular status hierarchies” (2011: 5).

Personal integrity

A third argument concerns what is more commonly discussed under the header of “conscientious objection” and is about whether people’s personal conscience should be accommodated by allowing them not to live up to formal expectations, either as subjects of the law or as occupants of official positions. The aim of allowing disobedience on this account is not (mainly) to prevent or correct injustice or contribute to the moral or democratic conversation, but rather to protect the sense or personal moral integrity of the disobedient herself—to, as Joseph Raz put it, “protect the agent from interference by public authority” (1979). When those in official positions responsible for executing governmental decisions with which they fundamentally disagree make a deliberate decision not to discharge the duties of their office, this is also known as what Joel Feinberg (1979) has referred to as “rule departure”. While such acts involve dissociation from and condemnation of certain policies or practices, they are not necessarily communicative or even public. Following Rawls, we may distinguish two kinds of conscientious non-compliance: conscientious refusal with a more or less direct legal injunction or administrative order, when authorities are aware of the breach of the law, order or injunction, and conscientious evasion, when the act is covert (1999).

When it comes to deciding on the justifiability of top-down order refusal, a distinction should be drawn between those working for agencies whose main purpose is to enforce immigration law and those working for organisations which have an entirely unconnected purpose. In recent decades, deportation has been increasingly “outsourced” by national authorities to actors whose core tasks do not encompass deportation enforcement, including schools, hospitals and other service providers, regular police forces, local authorities, private actors such as airlines and their crew, and in some cases private citizens with a “reporting duty” (Aliverti 2015). All such actors may have a right to refuse to be made complicit in the state’s deportation efforts, which cannot be legitimately expected from them given their job description. Moreover, their role in deportation enforcement may directly conflict with, or undermine their capacity to fulfil their core functions. For instance, police efforts to combat crime are undermined by their duty to report those with an irregular status as this prevents the latter from reporting crimes or assisting in criminal investigations.³

³ A helpful analogy here is with doctors refusing to assist in carrying out death sentences since this conflicts with the Hippocratic Oath.

Having now discussed the three justifications which may be invoked to resist deportation, I turn to three questions which I believe to be central to the normative evaluation of acts of deportation disobedience. First, what if the three different motivations corresponding to the three justifications outlined above conflict? Second, how can the argument for justified deportation disobedience respond to what could be called the epistemic objection? Third, when is it merely permissible to resist deportation and when, if ever, is there a duty to do so? Each of these questions is discussed in turn below.

Motivation and communication

Often, the three arguments outlined above are assumed to be complimentary and mutually reinforcing. Particularly, the notion that the “clear and substantial injustice” and communication requirements must both be satisfied for disobedience to be justifiable, as Rawls seemed to argue, is one that remains dominant. On such views, resistance cannot be justified when motivated by purely self-interested reasons, and the disobedient must therefore prove “conscientiousness” through publicity of their actions and non-evasion of any punishment which is prescribed for the disobedient act. What sets principled disobedience apart from militant or radical action, then, is that it is aimed at moral persuasion rather than coercing change, making the communicative element all-important to disobedience’s justification. Conscientiousness requires that a certain level of seriousness, sincerity and moral conviction is demonstrated, as well as a consideration of the interests of society as a whole, not just individual ones: they must, in Rawlsian terms, provide public reasons for their action. These “fidelity to law” requirements of publicity and non-evasion are also meant to sharply distinguish principled disobedience from ordinary law-breaking, with only the latter being characterised as acting wholly self-interestedly.⁴

But, as others have already noted, there is actually a fundamental tension between necessity and communication defences of disobedience, as they point at different motivations for engaging in the disobedient action and different-level ultimate goals which imply possibly contradictory strategies, namely directly preventing grave injustice on the one hand and achieving structural change on the other. It is unfair to demand those facing substantial injustice themselves to prove

⁴ The ultimate goal of disobedience based on protecting the personal moral integrity of the disobedient is different still, namely to evade complicity in injustice. A similar conflict can occur between the aim of preventing an unjust deportation and the self-interested motive on the part of those not themselves victims of unjust deportation, who wish to protect their own moral integrity by not cooperating with the dictates of the national deportation authorities.

that their motivations are not wholly self-interested (which they may well be), let alone that they abide by publicity and non-evasion requirements. When the goal of disobedient action is to avoid severe injustice (rather than, say, to gain unfair advantages), whether one is motivated only by one's own wellbeing and not by society's as a whole is irrelevant. Often, in order to be an effective way of preventing harm to vital interests, such action must be the opposite of public: covert, done without exhausting legal avenues for contesting the laws in question, and evading punishment.⁵ As Simmons writes, "the aim of paradigm civil disobedients (...) has just as often been simply to affect directly social practices, to frustrate evil, or to avoid complicity in wrongdoing; and these aims require neither public performance of illegal acts nor acceptance of legal penalties for disobedience" (2003: 43).

In the case of deportation action, the fact that the different ultimate goals require strategies that are often contradictory comes out clearly. To prevent deportation from happening, would-be deportees themselves and those who support them directly (by hiding them or shielding them from immigration authorities) must usually keep their action hidden in order for them to be successful. In this sense, the deportable are in a particular situation compared even to others facing systemic injustice and marginalisation. Monica Varsanyi (2008) contends that the constant vulnerability of irregular migrants to the whims of sovereign power when they make themselves public as rights-seizing subjects distinguishes their claims from the claims made by other marginalised groups whose formal citizenship status is not in question. As she writes "it is one thing for homeless individuals or protesters to struggle and fight for their rightful space and place in the city. The challenges they face are certainly dire at times, but these individuals do not, on the whole, face the added and very real possibility of deportation when attempting to claim their rights. (...) If [undocumented residents] come forward and claim their rights due to them, they may only gain a pyrrhic victory: a win accompanied by a deportation order" (Varsanyi 2008: 40). Ellerman also notes that acts of noncompliance by those on the polity's margins rarely amount to collective acts of civil disobedience (2010: 408). Being at risk of serious injustice has strong marginalising effects which mean that requirements

⁵ The point about the tension here is not captured by Brownlee's comprehensive discussion of the topic. She does distinguish between civil disobedience (as law-breaching for the purpose of communicating our condemnation of a law of policy and, in the case of direct civil disobedience, for the purpose of not lending ourselves to the wrong we condemn) both from what she calls "assistive disobedience", which is acting for the purpose of aiding what one sees as a suffering being "openly and non-evasively because this will communicate opposition to laws" (2012: 28) and from "personal disobedience" as conscientious objection. But Brownlee's claim that assistive disobedience is necessarily communicative leaves out an important category of non-communicative assistive disobedience (in which some anti-deportation efforts may fall).

to abide by strict rules of “conscientiousness” are out of reach or directly contradict the aims of the disobedience.

Therefore, would-be deportees will often resort not to the communicative actions considered the archetype of justified disobedience but rather to what James Scott calls “the weapons of the weak”, non-organised forms of everyday resistance in situations of serious marginalisation concerned with immediate, de facto gains rather than public and symbolic goals and often using passive forms of noncompliance, evasion and deception, such as “foot dragging, dissimulation, desertion, false compliance, pilfering, feigned ignorance, slander, arson, sabotage” (1985: xvi).⁶ Feasible acts of resistance for would-be deportees are often limited to hunger strikes, self-mutilation, suicide attempts, physical struggle, escape, destruction of identity documents, adoption of false identities, concealing their irregular status from employers and public officials, or mutilating fingerprints to make them illegible (Broeders and Engbersen 2007: 1598; Ellermann 2010: 408).

The use of such non-organised, non-public strategies by deportation disobedients is not, I contend, more morally suspect than their public, communicative counterparts. What is more, it would be immoral for outside supporters to advertise the position of would-be deportees in order to convince others of the injustice of their deportation—even if to change minds and laws, such communication and publicity is indispensable. This puts those wishing to resist unjust deportations in a bind.⁷ The dilemma is not purely academic. Much real-world deportation resistance is not easily categorisable as either aimed at solving individual cases or a focus on structural (legal) change. Often the two aims are combined when the contestation of deportation in individual cases is accompanied by arguments against deportation that apply to a larger category of people, even if this argument can be made more or less explicitly. Even within the category of anti-deportation action focused on individual

⁶ Scott writes: “the most subordinate classes throughout most of history have rarely been afforded the luxury of open, organized, political activity. Or, better stated, such activity was dangerous, if not suicidal. Even when the option did exist, it is not clear that the same objectives might not also be pursued by other stratagems. Most subordinate classes are, after all, far less interested in changing the larger structures of the state and the law than in what Hobsbawm has appropriately called ‘working the system....to their minimum advantage’” (1985: xv). He goes on: “everyday forms of resistance make no headlines” so the publicity requirement is not met, but also claims that “just as millions of anthozoan polyps create, willy-nilly, a coral reef, so do the multiple acts of peasant insubordination and evasion create political and economic barrier reefs of their own. It is largely in this fashion that the peasantry makes its political presence felt” (xvii).

⁷ The problem of not distinguishing properly between the different goals and strategies of disobedience based on necessity and on communication, respectively, comes out well in the discussion between Luis Cabrera and William Smith on the morality of illegally crossing borders (Cabrera 2010; Smith and Cabrera 2015).

cases we can then draw a distinction between what Bader and Probst (2018) call “personifying” and “exemplifying” protests, between those aimed primarily at preventing an individual deportation and those who, rather, use their action in the individual case in order to achieve a broader change in public opinion and the law.⁸ Some, following the traditional account of justified disobedience, have criticised the former type of action for focussing on the deservingness of individual would-be deportees or even on protecting specific categories (such as long-term residents, nationals from unsafe countries, families with school-going children) at the expense of the larger goal of ending all deportations (Maira 2010: 322). The *sans-papiers* and other anti-deportation campaigns have sometimes been criticised (McNevin 2006; Walters 2008; McNevin 2011; Tyler and Marciniak 2013; Barker 2015) for reinscribing and reinforcing the territorial and membership boundaries against which they should struggle. But this seems to put an unfair burden on those seeking to stop immediate rights-violations. In those cases in which the aims of preventing immediate injustice and that of achieving structural change conflict, it is important to establish that the priority always lies with necessity and the individual threatened with deportation rather than with moral communication and structural change (or, indeed, protecting personal integrity of those running the risk of complicity with injustice). Looking at the deportation case, the common assumption that disobedience aimed at communication is easier to justify than other types of disobedience⁹ is wrong and possibly dangerous.¹⁰

⁸ Which form of anti-deportation action is more common is unclear. In their longitudinal analysis of anti-deportation protests in Germany, Austria and Switzerland (1993-2013), Ruedin, Rosenberger and Merhaut (2018: 111) have found that their dominant form is as what they call “solidarity protests organised on a local level focusing on individual solutions rather than social or legal change of the migration and border regime”, with “little evidence of diffusion or transnational mobilization”. Yet the protests they studied are largely within the boundaries of the law, and there is some evidence that law-breaking anti-deportation action more often invokes the need for structural change.

⁹ Brownlee, for instance, insists that from a moral perspective communicative disobedience is easier to justify than non-communicative disobedience because the willingness to run certain risks in order to communicate our convictions to others is evidence of our sincerity of our moral conviction, what she calls “the communicative principle of conscientiousness” (2012: 29). This is problematic when the main risks involved are carried by those whom we are assisting (as in the case of deportation resistance). According to Brownlee, “although intervening, thwarting and sabotaging are potential ways to honour our convictions in the short run, ultimately, on their own, they do not take other people seriously as reasoning moral agents with whom we can discuss the merits of our cause and whose conduct we should try to change through reasoned argument” (2012: 42-43).

¹⁰ However, what does seem problematic is the invoking of what I believe are morally arbitrary features of the deportable: their level of cultural or social integration, their contribution to the community, etc. This does serve to strengthen an integrationist logic which has adverse effects for others.

The epistemic problem

One challenge to those who believe that resistance is justified when it is aimed at redressing a “clear and substantial injustice” is to ask simply: clear to whom? How does the disobedient know that their interpretation of the situation as unjust is the right one? Especially when such laws have been the outcome of legitimate democratic procedures, it may seem unlikely that the judgement of individuals should be trusted over that of the democratic community as a whole or its political or bureaucratic representatives—and it might be anti-democratic to do so in any case. This epistemic question also came up in the case of Elin’s airplane protest. When a passenger complained that she was preventing many people from reaching their destination, Elin replied “but they’re not going to die, he’s going to die”, to which the man replied “how do you know that?” (Elin responded “because it’s Afghanistan”). Political scientist Andreas Heinemann-Grüder also commented disapprovingly on Elin’s actions: “She wasn’t familiar with the concrete case. Was the Afghan in danger? Where in Afghanistan was he being deported [sic]? Not all parts of the country are dangerous” (Oberhäuser 2018).

In response, we should start by noting that the strength of the epistemic objection varies with the precise aim of the disobedient act. I noted earlier that anti-deportation action can be found on a spectrum between those contesting individual case decisions and those who seek to demonstrate their belief that all deportations are illegitimate. The former do not (necessarily) contest the abstract principles or general rules of the deportation regime, but only how the executive authorities have used their discretionary power to decide on an individual case. Therefore, they are not discarding the democratic right of the community to decide on its laws and thus are not facing this objection. As I noted earlier, classical defences of civil disobedience either require or praise when disobedience is aimed at changing laws rather than the outcome of individual cases—and may thus find it easier to accept deportation resistance with more all-encompassing rather than with more limited aims. But from a democratic egalitarian perspective, saying that the discretionary interpretation of the law in a particular case was wrong seems less intrusive than saying that a democratically formulated law is unjust, and thus *easier* to justify.

We could also point out that certain actors are in a better epistemic position to know the (in)justice of a particular deportation. Those with direct relationships to the deportee may well have a better understanding of the individual circumstances of the would-be deportee than the democratic majority. Anti-deportation protests are often organised locally, and local communities may have a better understanding of who deserves to stay, who is well integrated, who would be harmed by deportation than

executive bureaucratic agencies which purportedly implement the abstract preferences of the national electorate. Moreover, even if we accept the epistemic value of democratic procedures to decide on the law, it is not clear where this leaves the argument when disagreement occurs between different levels of democratic government, in other words when democratically elected and accountable local governments or the democratically elected national governments of the countries to which the would-be deportee is destined to be sent frustrate deportation proceedings based on perceptions of justice and belonging that conflict with those of the democratically elected deporting government. Some have argued that the emancipatory and progressive potential of local conceptions of belonging and membership should lead us to empower urban communities to challenge national monopolies in immigration enforcement (Bauböck 2003; Lebuhn 2014).

This does not, however, yet justify the involvement in deportation resistance by those like Elin Ersson who do not know much about the individual circumstances of the deportee whose removal they are trying to prevent. Here we can again turn the epistemic argument on its head, though, by pointing out that deportation is a particularly murky policy field in which the full effects of the law and its implementation are not well understood by the general public. In such circumstances, disobedience and resistance may well be necessary strategies to render the effects of deportation visible, to reveal the extent to which deportation is not a “routine administrative process” but rather, as William Walters describes it, “a site where sovereignty is (violently) performed, either the state negotiating with the subjects (thereby recognising them as subjects) or the state as armed bodies of men smashing down church doors, seizing, arresting, pacifying, terrifying, removing bodies in full display of the public” (2002: 287).

A duty to resist deportation?

So far, I have assumed that the question of just resistance is about permissibility and impermissibility. The vast majority of theoretical discussions also take this as the core question. However, we should use more fine-grained distinctions in considering the moral status of anti-deportation action. It can not only be forbidden and (merely) permissible but also laudable and even obligatory. There are hints in the literature that “[d]eliberate conscientious or principled law-breaking, by virtue of its apparently laudable motive, appears to be itself laudable (unlike law breaking that is merely self-interested or malicious)” (Simmons 2003: 50), but precise analyses when disobedience is actually laudable rather than merely excusable remain rare.

In the case of deportation resistance, it is clear which category of action is laudable, namely that in which disobedients incur significant risks to prevent the deportation of others or publicise their own unjust deportability. Especially when those who are themselves at risk of deportation do engage in public and communicative action, despite thereby putting themselves at risk, this may be seen to contribute not to the *justifiability* of their action (as I argued earlier) but to its *laudability*. In very material ways, becoming visible and demanding rights “expose irregular migrants to the full force of state border controls” (Tyler and Marciniak 2013: 152). Those who protest while being held in pre-deportation detention centres, for instance, are sometimes fast-tracked for deportation. And by coming out of the shadows of irregularity, those in the *sans-papiers* and similar movements put themselves at considerably increased risk of deportation. Etienne Balibar wrote that “French citizens of all sexes, origins and professions, are greatly indebted to the ‘*sans-papiers*’ [for] breathing life back into democracy” (2000).

The more difficult question is whether deportation resistance is ever obligatory. While most authors writing on principled disobedience mention that in certain circumstances there may not only be a right to disobey but in fact a duty to do so,¹¹ few of them specify when those conditions hold, and why and when a right to disobey turns into a duty to do so. In the deportation case, I want to suggest that there may be an obligation to resist and disobey for at least three types of actor. First are those whose actions are *instrumental* to the successful execution of an unjust deportation. These include the agents of the deportation machine, such as street-level bureaucrats and specialised police forces, as well as “enlisted” service providers, such as local officials, school and hospital employees, and (perhaps particularly) those private companies who benefit financially from the deportation system. The general public is also increasingly “enlisted” in the policing of immigration through legal obligations to monitor, report and refrain from interacting with irregular residents (Aliverti 2015), a process through which the actions (and non-actions) of ordinary citizens have become directly implicated in unjust deportation regimes. In those cases, the regular individuals in question may be under an obligation at least not to comply with such requirements. Javier Hidalgo (2016) goes even further by arguing that citizens of states that enforce unjust immigration restrictions have duties to actively disobey legal

¹¹ Rawls writes (in the context of unjust warfare and the right of conscientious refusal of draftees): “if the aims of the conflict are sufficiently dubious and the likelihood of receiving flagrantly unjust demands is sufficiently great, one may have a duty and not only a right to refuse” (1999: 334-335). Raz writes: “civil disobedience is sometimes justified and occasionally is even obligatory” (1979: 262).

obligations imposed on them by the state to refrain from interacting with unauthorised immigrants.

Second, those who by virtue of their institutional position have specific *responsibilities* towards the would-be deportees arguably have a duty to make efforts to stop their unjust deportation. Particularly, local authorities and destination countries come to mind here. Local political communities must generally comply with national dictates, but also have protection duties towards all those who are considered local citizens, and the conception of citizenship on the local level is, unlike national citizenship, based purely on residence (Bauböck 2015). Therefore, mayors and local councillors would have not only a right but a duty to disobey top-down deportation orders and to shield local residents from unjust deportation efforts. Those states to which deportation states seek to send their deportees have a legal duty to international legal duty to accept back their own nationals, but they also have a duty to protect the fundamental interests of their citizens, which includes efforts to protect their right to stay in their place of residence when this is beyond the confines of the national territory.¹² There is a difficulty that origin states face important epistemic limitations, as they are far removed from the case, and may be guided by mixed motivations, as they have a strong interest in keeping out unwanted, “unreformed” criminals or public security risks and ensuring the flow of remittances of citizens working abroad, which may cloud their judgement. In any case, when destination states simply frustrate deportations on other grounds than the injustice of the deportation (i.e. pretend not to believe the deportees are their nationals), this is unlikely to work towards changing the unjust laws and practices in the long term. Moreover, setting the precedent of barring entry to your own nationals risks leading to an infringement of the right to return to one’s country of nationality. Rainer Bauböck has therefore argued against applauding the practice of refusing to accept one’s own nationals as an appropriate response to unjust deportations, and that destination states must instead use diplomatic means to lobby for the rights of their nationals to stay in their country of residence (2009: 486). Of course, poor countries are not always in the best position to do this. Therefore, while intentional identity denial on the part of destination states is potentially problematic as it may render someone effectively stateless, in those cases where individuals themselves deny being from the country in question, the destination state could have a policy of non-cooperation (foot-dragging) with deportations that is permissible, laudable, or even obligatory.

¹² Here it is important to clearly contrast between deportation and extradition, as the latter concerns mainly the rights of states to try and punish those who committed crimes in their jurisdiction, and the obligation of other states to reasonably facilitate this.

Third, a more general (and necessarily weaker) duty of citizen and non-citizen residents to resist the unjust deportation of their co-residents may be grounded in the *associative* duties they have towards their fellow residents. Republican theory, with its emphasis on good citizenship as consisting in a “vigilant commitment to holding the state to its domination-reducing aims, while preventing it from becoming a source of domination itself” (Lovett and Pettit 2009: 23) may provide insights here. On such an account, we could argue that individuals have moral reasons to engage in anti-deportation activism not just for their friends, neighbours and colleagues, but because they share in the responsibility to keep their state’s power non-dominating, both because they themselves enjoy a non-dominated status in this state and because domination in one area might spill over into others and thus start affecting them. On Philip Pettit’s account, non-domination is a common good which “no one in a society enjoys unless everyone enjoys it” (1999). Matthew Hoye has on these grounds made the case that members of a political community have a duty to “stand up” for their fellow residents threatened with deportation in the interest of communitarian/republican liberty and non-domination “for immigrants and citizens alike” (2017: 164).

Concluding thoughts

In this paper I have argued that differently situated agents have different moral rights and duties to resist unjust deportations. An agent-sensitive normative framework for anti-deportation action must take into account the justifications which any particular agent may rely on and their motivation for engaging in the action, their epistemic position, and relationship to the injustice and its victim. I have tried to sketch what such a framework would look like. By way of conclusion, I want to consider what the arguments in this paper imply for how the state should respond to resistance from these diverse actors.

The first implication is that the state should listen to such signals and take them seriously, since some of these actors are epistemically better placed to judge whether someone’s individual circumstances indicate that they have a moral right to stay. States should design the deportation regime in such a way that there are legal and regular ways of contesting deportation for a variety of actors. One example which could be emulated by other countries are the Hardship Commissions in Germany. The second is that the state should refrain from punishing disobedience harshly or even at all, since the state must recognise that deportation decisions have far-reaching consequences and it therefore must operate on the assumption that opposition comes from a place of deep and often justified moral conviction. Moreover, to some extent

the state should welcome such resistance as “the activism of non-status immigrants and refugees is re-creating citizenship in ways that demands recognition and support, not criminalisation and securitisation” (Nyers 2003: 1090). Thirdly, the state must design its rules and policies in a way that does not place unnecessarily heavy burdens on people in official capacities, so it cannot incorporate school, hospitals and other service providers in its deportation enforcement regime. Brownlee has rightly argued that “when many office-holders refuse to perform certain tasks, and appeal to the very spirit of their office to legitimate their refusals, this signals that the minimum moral burdens principle may not be satisfied and that revision of the office or institution may be required” (2012: 116). If there is widespread dissatisfaction among those who have been made agents of the enforcement state, the state should take this seriously.

References

- Aliverti, Ana. (2015). Enlisting the Public in the Policing of Immigration. *British Journal Of Criminology*, 55(2), 215-230.
- Anderson, Bridget, Gibney, Matthew J., & Paoletti, Emanuela. (2011). Citizenship, Deportation and the Boundaries of Belonging. *Citizenship Studies*, 15(5), 547-563.
- Anderson, Christina, & Karasz, Palko. (2018, July 25). Swedish Student Blocks Afghan’s Deportation by Refusing to Sit Down on Flight. *The New York Times*. Retrieved from <https://www.nytimes.com/2018/07/25/world/europe/elin-ersson-afghanistan.html>
- Bader, Dina, & Probst, Johanna. (2018). Saving the Deportee: Actors and Strategies of Anti-deportation Protests in Switzerland. In Sieglinde Rosenberger, Verena Stern, & Nina Merhaut (Eds.), *Protest Movements in Asylum and Deportation* (pp. 141-160). Cham: Springer International Publishing.
- Balibar, Etienne. (2000). What We Owe to the *Sans-Papiers*. In Len Guenther & Cornelius Heesters (Eds.), *Social Insecurity* (pp. 42-43). Toronto: Anansi.
- Barker, Vanessa. (2015). Border Protests: The Role of Civil Society in Transforming Border Control. In Leanne Weber (Ed.), *Rethinking Border Control for a Globalizing World: A Preferred Future* (pp. 133-152). London: Routledge.
- Bauböck, Rainer. (2003). Reinventing Urban Citizenship. *Citizenship Studies*, 7(2), 139-160.
- Bauböck, Rainer. (2009). The Rights and Duties of External Citizenship. *Citizenship Studies*, 13(5), 475-499.

- Bauböck, Rainer. (2015). Three Levels of Citizenship in the European Union. *Phenomenology and Mind*, (8), 66-76.
- Birnie, Rutger. (2019). *The Ethics and Politics of Deportation in Europe*. (PhD thesis), European University Institute, Fiesole.
- Blake, Michael. (2010). Equality without Documents: Political Justice and the Right to Amnesty. *Canadian Journal of Philosophy*, 40(sup1), 99-122.
- Broeders, Dennis, & Engbersen, Godfried. (2007). The Fight Against Illegal Migration: Identification Policies and Immigrants' Counterstrategies. *American Behavioral Scientist*, 50(12), 1592-1609.
- Brownlee, Kimberley. (2007). The Communicative Aspects of Civil Disobedience and Lawful Punishment. *Criminal Law and Philosophy*, 1(2), 179-192.
- Brownlee, Kimberley. (2012). *Conscience and Conviction: The Case for Civil Disobedience*. Oxford: Oxford University Press.
- Burgemeester Weert helpt vluchtelingen gezin onderduiken. (2006, May 13). *Trouw*. Retrieved from <https://www.trouw.nl/home/burgemeester-weert-helpt-vluchtelingen-gezin-onderduiken~ab5ce4d0/>
- Cabrera, Luis. (2010). *The Practice of Global Citizenship*. Cambridge: Cambridge University Press.
- Christiano, Thomas. (2008). *The Constitution of Equality: Democratic Authority and Its Limits*. Oxford: Oxford University Press.
- Crouch, David. (2018a, October 19). Swedish student who grounded deportation flight faces prosecution. *The Guardian*. Retrieved from <https://www.theguardian.com/world/2018/oct/19/elin-ersson-swedish-student-video-grounded-deportation-flight-prosecution>
- Crouch, David. (2018b, July 26). Swedish student's plane protest stops Afghan man's deportation 'to hell'. *The Guardian*. Retrieved from <https://www.theguardian.com/world/2018/jul/25/swedish-student-plane-protest-stops-mans-deportation-afghanistan>
- Dagger, Richard. (1997). *Civic Virtues: Rights, Citizenship, and Republican Liberalism*. New York: Oxford University Press.
- De Genova, Nicholas. (2002). Migrant 'Illegality' and Deportability in Everyday Life. *Annual review of anthropology*, 31, 419-447.
- Ellermann, Antje. (2010). Undocumented Migrants and Resistance in the Liberal State. *Politics & Society*, 38(3), 408-429.
- Ersson, Elin (Producer). (2018). Deportation from Gothenburg to Afghanistan. [Facebook Live video] Retrieved from <https://www.facebook.com/elin.k.ersson/videos/10155723956991274/>

- Estlund, David M. (2008). *Democratic Authority: A Philosophical Framework*. Princeton: Princeton University Press.
- European Union Agency for Fundamental Rights. (2014). *Criminalisation of Migrants in an Irregular Situation and of Persons Engaging with Them*. Vienna: FRA.
- Feinberg, Joel. (1979). Civil Disobedience in the Modern World. *Humanities in Society*, 2(1), 37-60.
- Freedman, Jane. (2008). The French “Sans-Papiers” Movement: An Unfinished Struggle. In Wendy Pojmann (Ed.), *Migration and Activism in Europe Since 1945* (pp. 81-96). New York: Palgrave Macmillan.
- Hakim, Abdel Bari. (2018, July 26). The man whose deportation Elin Ersson tried to prevent. *Deutsche Welle*. Retrieved from <https://www.dw.com/en/the-man-whose-deportation-elin-ersson-tried-to-prevent/a-44841129>
- Hidalgo, Javier. (2015). Resistance to Unjust Immigration Restrictions. *Journal of Political Philosophy*, 23(4), 450-470.
- Hidalgo, Javier. (2016). The Duty to Disobey Immigration Law. *Moral Philosophy and Politics*, 3(2), 165-186.
- Horton, John. (2010). *Political Obligation*. Basingstoke: Palgrave Macmillan.
- Hoye, J. Matthew. (2017). Neo-republicanism, Old Imperialism, and Migration Ethics. *Constellations*, 24(2), 154-166.
- Lebuhn, Henrik. (2013). Local Border Practices and Urban Citizenship in Europe: Exploring Urban Borderlands. *CITY. Analysis of Urban Trends, Culture, Theory, Policy, Action*, 17(1), 37-51.
- Lebuhn, Henrik. (2014). Urban Citizenship, Border Practices and Immigrants’ Rights in Europe: Ambivalences of a Cosmopolitan Project. *Open Citizenship*, 4(2), 12-21.
- Lefkowitz, David. (2007). On a Moral Right to Civil Disobedience. *Ethics*, 117(2), 202-233.
- Lovett, Frank, & Pettit, Philip. (2009). Neorepublicanism: A Normative and Institutional Research Program. *Annual Review of Political Science*, 12(1), 11-29.
- Maira, Sunaira. (2010). Radical Deportation: Alien Tales from Lodi and San Francisco. In Nicholas De Genova & Nathalie Peutz (Eds.), *The Deportation Regime: Sovereignty, Space, and the Freedom of Movement*. Durham: Duke University Press.
- Markovits, Daniel. (2005). Democratic Disobedience. *Yale Law Review*, 114, 1897-1952.
- McNevin, Anne. (2006). Political Belonging in a Neoliberal Era: The Struggle of the Sans-Papiers. *Citizenship Studies*, 10(2), 135-151.

- McNevin, Anne. (2011). *Contesting Citizenship: Irregular Migrants and New Frontiers of the Political*. New York: Columbia University Press.
- Miller, David. (2016). *Strangers in Our Midst: The Political Philosophy of Immigration*. Cambridge, MA: Harvard University Press.
- Morreall, John. (1991). The Justifiability of Violent Civil Disobedience. In Hugo Adam Bedau (Ed.), *Civil Disobedience in Focus* (pp. 130-143). London: Routledge.
- Nyers, Peter. (2003). Abject Cosmopolitanism: The Politics of Protection in the Anti-Deportation Movement. *Third World Quarterly*, 24(6), 1069-1093.
- Oberhäuser, Notker. (2018, July 26). Deportation protester Elin Ersson: 'Too much emotion — too few arguments'. *Deutsche Welle*. Retrieved from <https://www.dw.com/en/deportation-protester-elin-ersson-too-much-emotion-too-few-arguments/a-44841640>
- Pettit, Philip. (1999). *Republicanism: A Theory of Freedom and Government*. Oxford: Oxford University Press.
- Rawls, John. (1999). *A Theory of Justice (Revised Edition)*. Cambridge: Harvard University Press.
- Raz, Joseph. (1979). *The Authority of Law: Essays on Law and Morality*. Oxford: Clarendon Press.
- Scott, James C. (1985). *Weapons of the Weak: Everyday Forms of Peasant Resistance*. New Haven: Yale University Press.
- Simmons, A. John. (2003). Civil Disobedience and the Duty to Obey the Law. In R.G. Frey & Christopher Heath Wellman (Eds.), *A Companion to Applied Ethics* (pp. 50-61). Malden: Blackwell Publishing.
- Smith, William. (2011). Civil Disobedience and the Public Sphere. *Journal of Political Philosophy*, 19(2), 145-166.
- Smith, William, & Cabrera, Luis. (2015). The Morality of Border Crossing. *Contemporary Political Theory*, 14(1), 90-99.
- Taylor, Diane. (2017, March 29). Arrests as Stansted anti-deportation protesters lock themselves to plane. *The Guardian*. Retrieved from <https://www.theguardian.com/world/2017/mar/29/arrests-as-stansted-anti-deportation-protesters-lock-themselves-to-plane>
- Thoreau, Henry David. (1996). *Thoreau: Political Writings* (Nancy L. Rosenblum Ed.). Cambridge: Cambridge University Press.
- Tyler, Imogen, & Marciniak, Katarzyna. (2013). Immigrant Protest: An Introduction. *Citizenship Studies*, 17(2), 143-156.

- Varsanyi, Monica W. (2008). Immigration Policing Through the Backdoor: City Ordinances, the "right to the City," and the Exclusion of Undocumented Day Laborers. *Urban Geography*, 29(1), 29-52.
- Walters, William. (2002). Deportation, Expulsion, and the International Police of Aliens. *Citizenship Studies*, 6(3), 265-292.
- Walters, William. (2008). Acts of Demonstration: Mapping the Territory of (Non-) Citizenship. In Engin F. Isin & Greg M. Neilsen (Eds.), *Acts of Citizenship* (pp. 182-207). London: Zed Books.
- Wij Zijn Hier. (2018). Geschiedenis van Wij Zijn Hier. from <http://wijzijnhier.org/tijdslijn/geschiedenis-van-wij-zijn-hier/>
- Yong, Caleb. (2018). Justifying Resistance to Immigration Law: The Case of Mere Noncompliance. *Canadian Journal of Law & Jurisprudence*, 31(2), 459-481.

Comment on Rutger Birnie: The Ethics of Resisting Deportation

Susanne U. Schultz¹

Bielefeld Graduate School in History and Sociology, University of Bielefeld

Abstract

This paper comments on a talk given by Rutger Birnie at the 2018 ZiF Workshop “Studying Migration Policies at the Interface Between Empirical Research and Normative Analysis”, September 2018, in Bielefeld. Birnie’s paper is available under doi: 10.17879/95189423213.

Keywords

Liberalism; disobedience; resistance; right to resist; duty to resist; anti-deportation

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Rutger Birnie tries to fill an important gap between normative approaches to resisting deportation and their empirical analysis by combining both. As migration research is increasingly confronted with moral dilemmas when requested for political guidance, and deportation constituting a particularly contested phenomenon herein, such engagement is very timely and needed. Still, it presents a balancing act, which is achieved quite successfully in some instances, building on a rich knowledge of the subject matter. While in other instances, the argumentation ought to be more convincing and empirically detailed.

The paper aims large. It tries to sketch out a normative framework on how to morally evaluate the acts and agents of resisting deportation to eventually provide recommendations for “sending” states. The agents referred to are deportees

¹ Email: Susanne-schultz@uni-bielefeld.de.

themselves, ordinary citizens, but also civil society organizations, representatives of local authorities, and the receiving states, which are supposed to accept their alleged nationals. The acts of resistance and disobedience described thus range from public contestation, non-cooperation and active frustration, as well as violent resistance. By linking in a “small but growing” body of literature hereto, the paper suggests to develop an “agent-sensitive account” in order to evaluate if an anti-deportation resistance against “unjust deportations” is justified as well as to better assess the agents implementing it. Thereby the text broadly follows the definition of John Rawls (1999) spelling out the resistance against deportations as generally justified when the administrative intervention reaches a “substantial and clear injustice” threshold.

Within the field of deportation studies, which in itself is deeply morally loaded, it is highly contested when, and if, such threshold is reached. As Birnie outlines “some believe all deportations are rights-violating and an unjustified exercise of political power (De Genova, 2002; Walters, 2002), while others insist that the state has broad discretionary powers to order non-nationals to leave the territories they control (Blake, 2010; Miller, 2016)”. In a similar vein, Clara Lecadet (2013) has summarized that expulsions are an engine of internal debate for liberal societies “seeming one of the principal sources of division, dissensions, and polemic, not only fostering political debate, but also community and humanitarian commitment as well as academic critique.” (p. 143). Birnie’s text perfectly links in this analysis, even by going beyond the internal to a partially trans- and international dimension.

The text argues clearly and in a well-structured and traceable manner. Rawls’ definition, which is complemented by a range of topical political theorists and philosophers, is said to remain highly influential despite of all criticism. After translating three different justifications of civil disobedience – “necessity”, “moral communication”, and “personal integrity” – to the case of deportations, the core argumentation addresses three main questions: how these justifications conflict; the role of the “epistemic position”; and eventually an attempt to outline a potential duty to resist deportations.

This main part, for example, aptly depicts the everyday resistance of would-be-deportees with James Scott’s “weapons of the weak” (1985). Still, the presentation seems to pause sometimes, first, with broadly showing (agents’) dilemmas of the motivations to resist and potential needs to publicly communicate, providing aspects and indications without fully permeating them. I will detail shortly. Not least, this is due to the brevity of the text format. The epistemic question, secondly, addresses the assumption that certain actors and positions evaluate a “clear and substantial injustice” superiorly. While some are said to argue that the local positions of urban

communities should receive more importance over the national authority in the evaluation and execution of deportations as they can better judge the individual position of a deportee, Birnie eventually cuts the discussion, referring to deportations as “a particularly murky policy field in which the full effects of the law and its implementation are not well understood by the general public”. So, even if the Swedish student Elin Ersson, who serves as a guiding example, does not know about the individual circumstances of the deportee’s case, it would be necessary to publicize the potentially questionable and violent state practice. This point is well taken, but it seems to supersede the epistemic objection when relativizing its own specific empirical knowledge; unless, we consider the acknowledgement of the complicated politics of deportations as particular. Thirdly, Birnie aims to provide “more fine-grained distinctions” for the moral evaluation of anti-deportation action, particularly as regards the conditions for a duty to disobey an unjust deportation. The condition that a deportation can, according to Rawls, be considered unjust is prerequisite for this point. The argumentation, which is again illuminating, suggests at least three types of actors: those who are “instrumental” for the successful execution of a deportation; those who have specific “responsibilities” towards the would-be deportee; and those who have “associative” duties towards their fellow residents. The difficulties and necessity to sufficiently undergird with empirical detail an agent-sensitive normative framework on anti-deportation resistance appear yet clearer. The sketch of the transnational dimension and the supposed receiving end of the deportee remain particularly vague. Thus, the state of destination of a deportee is not only constituted by its government as presented in the text, but likewise a (transnational) civil society – even if relative to a political system – and the broader population. In fact, the latter is playing an increasingly active role in resisting deportations. For example, individuals of the Malian diaspora in Europe started Facebook campaigns and finally mass protests at Bamako airport hindered an airplane with two deportees on board to land in early 2017 (Bendix, 2018). Obviously, this (transnational) actor diversity adds to the complexity of anti-deportation action. However, their role should be mentioned to complement the picture and framework outlined, the more as civil society and individual actors are central in the text. Not least, one would otherwise repeat that still too little is known about the societies where deportees are deported to (cf. Lecadet, 2013). In sum, more empirical lining of the complex entanglement of actors, legal issues and moral dilemmas involved, would help to better grasp the rapid sequence of points to understand how a true agent-sensitivity might concretely translate in its practical implementation. Only with the necessary empirical baseline knowledge the proposed program can actually be realized. If not, it risks losing its

potential, remaining a theoretical reflection, detached from its empirical subject-matter.

In itself, these steps towards an actor-sensitive, normative framework for anti-deportation resistance, including the advice to the political level to enable more legal ways for such action, are a laudable endeavor to bring clarity to a mined field. Normative orientation is highly needed as the paradigm of deportation is becoming ever more self-evident and contested at the same time. In doing so, the author himself obviously cannot stand away from partial judgments such as eventually valuing the threat for the individual deportee higher than a call for a potential structural change, or by characterizing deportations as a “particularly murky policy field”, which could also be taken as a thought-terminating cliché. Eventually, this underlines the evidence to the moral load of the phenomenon as well as the ever more value of its reflection and clarification.

References

- Bendix, D. (2018). *Jenseits von Externalisierung und Integration. Refugee-Aktivismus und postkoloniale Dezentrierung der Kritik globaler Ungleichheit*. Working Paper der DFG-Kollegforscher_innengruppe Postwachstumsgesellschaften, 3, Jena. http://www.kolleg-postwachstum.de/sozwmmedia/dokumente/WorkingPaper/WP+3_18+Bendix.pdf
- Blake, M. (2010). Equality without Documents: Political Justice and the Right to Amnesty. *Canadian Journal of Philosophy*, 40(sup1.), 99-122.
- De Genova, N. (2002). Migrant 'Illegality' and Deportability in Everyday Life. *Annual Review of Anthropology*, 31, 419-447.
- Lecadet, C. (2013). From Migrant Destitution to Self-organization into Transitory National Communities: The Revival of Citizenship in Post-deportation Experience in Mali. In B. Anderson, M. Gibney, & E. Paoletti (eds.). *The Social, Political and Historical Contours of Deportation. Immigrants and Minorities, Politics and Policy* (pp. 143–158). New York: Springer Science + Business Media.
- Miller, D. (2016). *Strangers in Our Midst: The Political Philosophy of Immigration*. Cambridge, MA: Harvard University Press.
- Rawls, J. (1999). *A Theory of Justice (Revised Edition)*. Cambridge: Harvard University Press.

Scott, J. C. (1985). *Weapons of the Weak: Everyday Forms of Peasant Resistance*.
New Haven: Yale University Press.

Walters, W. (2002). Deportation, Expulsion, and the International Police of Aliens.
Citizenship Studies, 6(3), 265-292.