

The Practice and Legitimacy of Border Control

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Abstract: *This article interrogates the widely held, but rarely defended, view that states wield legitimate power over potential immigrants when and because they refrain from violating their human rights. I reconstruct a strong argument for this view, which turns on a claim about the limited power states claim over migrants. Drawing on recent empirical work, I show how this argument is inapplicable to the border regimes of a set of wealthy democracies. These regimes are characterized by a practice that is coordinated and extraterritorial in a way that undercuts the case for holding them to a minimal legitimacy standard. By participating in this practice, these states wield significant power over potential immigrants. I argue that this power exposes potential immigrants to novel risk, which in turn triggers a demand for the satisfaction of a higher standard of legitimation.*

In November 2019, the EU Member States decided that Frontex, the European Border and Coast Guard Agency, would command its own standing corps (EU 2019). In the words of the agency's then-executive director, this makes Frontex "the first uniformed law enforcement service of the European Union" (Frontex 2020). As the standing corps builds to an initial 10,000 officers by 2027, the external borders of Europe will increasingly be enforced by an organization that derives its authorization from a coalition of states, but which represents none of them directly. Frontex is but one part of the EU's "Integrated Border Management" (IBM) strategy, which seeks to move border controlling functions away from Europe. To do this, the EU incorporates cooperation on border control into its external relations, most famously with Turkey in 2016 (Reslow 2018). The EU is not an anomaly in this regard. Throughout the Global North, powerful states aim to move their

border controlling functions away from their territories (FitzGerald 2019; Gammeltoft-Hansen 2011; Longo 2018; Shachar 2019; 2020). This necessarily involves other states. The contemporary practice of border control is characterized by coordination and by extraterritorial enforcement.

The various techniques that make up contemporary practice make the border regimes of participating states more effective. They thus make the intended outcomes of those regimes—how many and which migrants successfully cross borders—more robust. This makes contemporary practice relevant for assessments of justice in migration, understood as the rightful distribution of benefits and responsibilities brought about by global migration. However, theories of justice do not settle which agents are entitled to exercise power to bring about that distribution; that is the task for theories of legitimacy. Institutions wield legitimate power if there

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are weighty moral reasons for compliance and noninterference with their rules, even when the distribution of benefits and responsibilities those rules bring about fall short of applicable standards of justice.¹ What, then, is the standard states must meet to confer legitimacy onto their claim to regulate migration?

This article has four aims. The first is to outline a general conception of legitimacy and to draw on it to systematize the normative debate on border control. The second is to reconstruct a case for a view that is widely held but rarely defended explicitly: that border control is rightly held to a minimal legitimacy standard, set at the nonviolation of human rights. The third is to offer an empirical argument which shows that the case for the minimal standard is inapplicable to the contemporary practice of border control. The fourth aim of the article is to offer a normative argument to the effect that contemporary practice involves exercises of power that trigger obligations to promote the human rights of migrants, as distinct from merely refraining from violating those rights.

The Concept of Legitimacy and the Debate on Border Control

States claim authority to make and enforce rules about who is entitled to cross their borders and settle on their territories. The primary subjects of this power are potential immigrants, who (by definition) stand outside the state's structures of authorization. In a world characterized by stark material inequality, this system of rights allocation by citizenship coupled with unilateral discretion over borders has an enormous impact on the global distribution of prospects for security and well-being. Political theorists have thus engaged in intense debate over whether the institution of border control can be justified. In the register of justice, authors have sought to identify the moral claims held by the relevant agents—usually understood as migrants, host states, and sending states—to assess different immigration rules (Ypi 2008, 391).² By contrast, legitimacy assessments of border regimes pertain, not to the content of their rules, but to states' standing as rule-making authorities in the domain of migration.

¹Thus, in my usage, the concept of legitimacy is moralized: it is definitionally tied to human interests we have reason to value (see Buchanan 2002, 689).

²This is a formal characterization, which different views fill out in different ways. For example, "open border" views hold that the claims of migrants systematically outweigh those of sending and host states. Most views also disaggregate the category of "migrant," principally by singling out refugees as subjects of special concern.

Generally, legitimacy assessments function to let us unify our stance towards the institutions that seek to regulate our interaction, despite pervasive disagreement over how that interaction should be regulated (Buchanan 2018). If an institution is legitimate, then its subjects have reason to comply with its rules, and outsiders have reason not to interfere with those rules, even when they fall short of applicable standards of justice. Legitimacy supplies weighty content-independent reasons for compliance and noninterference (Buchanan 2018, 57; Scherz 2021, 634). By upholding border regimes, states seek to regulate the actions of their citizens but also the actions of potential immigrants. A legitimate border regime would supply citizens and potential immigrants with moral reason to comply with immigration rules, and external agents with reason not to interfere with those rules. Legitimacy is thus pressing for the live issue of resistance to border regimes.³

As the democratic story goes, citizens have moral reason to comply with the state's directives when and because they are democratically authorized (Buchanan 2002). But what provides such moral reason for potential immigrants, who do not receive a democratic justification? To assess this question, we must introduce a substantive element to the definition of legitimacy. Institutions exercise power to change the status of agents—their claims, duties, powers, liabilities, and so on—within the domain they seek to regulate. Legitimacy confers moral status onto that power, turning "mere" social power into moral power (Applbaum 2010). An institution may be supremely powerful but still lack legitimacy. In that case, its subjects have good reason for complying with its rules (and outsiders for not interfering with them), but those reasons will be grounded in fear of sanctions for noncompliance (Buchanan 2018, 54). Since many institutions do not rely on coercion in the application of their rules, the relevant notion of social power is therefore broad.

Social power is the capacity to effect outcomes in the social world, despite others' resistance or with their assistance (Abizadeh 2021, 12). The extent of that capacity matters for legitimacy assessments. That the concept of legitimacy is essentially tied to normative power implies that the extent of an institution's social power is crucial for determining the standard it must satisfy to be legitimate (Scherz 2021, 635; cf. Applbaum 2010, 226). The more power an institution wields, the more demanding its standard of legitimation. The normative basis for this

³Consider, for example, the recent attempts by European governments to prosecute captains and crew on rescue missions in the Mediterranean (Sandven and Scherz 2022).

social power conception of legitimacy is the value of freedom (Scherz 2021, 635–36). When an institution deploys power to regulate a given domain, it poses a risk to individual freedom, both in terms of the options agents can reliably access and in terms of their capacity to influence the content of their option set.⁴ Therefore, the benefits of granting the institution the power to regulate must outweigh the associated risks. These comparative benefits should not only be calculated by reference to the noninstitutional alternative. They should also refer to *institutional* alternatives. It is directly relevant for the legitimacy of any institution if there is a path towards the creation of an institutional alternative with a superior distribution of risks and benefits. Legitimacy assessments are thus always contextual, requiring ongoing judgment of whether institutional arrangements can be altered to better secure individual freedom. This explains why states are generally under democratic standards of legitimation vis-à-vis their citizens. States claim competence over a vast range of sensitive domains and coercively enforce their rules, posing a risk to individual freedom that can, under conditions of relative stability, only be outweighed by granting citizens status as equal norm givers.

Many authors in the normative literature have approached the legitimacy of border control by asking if states have a “right to exclude” (Fine 2013). Most defenses of this right hold that it follows from an endorsement of the value of self-determination: even if states are constrained by the demands of justice in migration, citizens of those states have the right to make decisions about how to interpret and act on those demands. A shared approach between these defenses is that they locate the right to exclude in internal characteristics of the state, for example, in its national culture (Miller 2016), in its democratic character (Song 2019), in citizens’ ownership claims (Pevnick 2011), or in the relations that emerge from living under the same jurisdiction (Blake 2020). These accounts are thus state based, focusing on what states are (or could be). Their state-based nature give rise to an explanatory problem, however. Given that they seek to explain the legitimacy of power wielded by the state over people who stand outside its structures of authorization, they need to account for why legitimacy in the state-citizens relation carries over to the authority it claims over potential immigrants.

Javier Hidalgo has argued that none of the mainstream accounts of internal legitimacy supply potential

immigrants with reasons for compliance or noninterference with border law (Hidalgo 2015, 460–66). However, to infer from this inability of internal accounts that states cannot wield legitimate authority over nonmembers might be too quick. According to Caleb Yong, the legitimacy of border control flows from *international legitimacy*: states’ right to noninterference in international society (Yong 2018, 468). On this view, potential immigrants, as members of international society, have moral reason to refrain from interfering with the border regimes of a legitimate state by disregarding its immigration decisions.

The question is what confers international legitimacy. Yong favors the view that is operative in international law and legal practice, namely, that international legitimacy is enjoyed by states that protect the human rights of their members and respect the human rights of nonmembers (Yong 2018, 469–70). On this conventional view, states generate reasons for compliance and noninterference in their claim to regulate migration when and because they refrain from violating the human rights of migrants. Refraining from violating human rights is a baseline criterion of legitimacy because having one’s basic rights respected is an essential precondition for freedom and, plausibly, in the vast majority of contexts, it will be possible to regulate a given domain without violating these rights (Buchanan 2018, 59–60). Legitimacy thus entails a negative obligation to refrain from acting to violate human rights but does not generate positive obligations that put states on the hook for failing to prevent human rights violations beyond their borders (Wellman and Altman 2009, 148–49).⁵

This minimal nonviolation of a human rights standard demands self-restraint: it prohibits states from doing harm, but not it does not prohibit allowing harm to be done by others (Scherz 2021, 642–43; cf. Lafont 2010, 203). On this view, states’ border regimes are liable to noncompliance and interference insofar as they infringe on their negative duty not to violate migrants’ rights. Beyond this, however, the power states wield over migrants does not give rise to any further obligations. Thus, holding border control to the minimal standard can make calls for institutional reforms of the global governance of migration appear undermotivated. The legitimacy of each state’s border regime is tainted to the extent that it involves human rights violations, but the right response

⁴This general description of the relationship between power and freedom is compatible with both liberal and republican conceptions of the latter.

⁵I reconstruct what I take to be a stronger normative reason for holding this view below, but another that is sometimes offered is that the state system can deliver human rights most effectively when states only have positive obligations towards individuals within their jurisdictions (see Blake 2020, 71).

to this state of affairs is to insist that the state in question alters its behavior. Put differently: in the absence of violations of migrants' human rights, there would be no reason to be concerned with the imposition of border control.

This widespread view has received two important critiques. The first critique accepts that border control is rightly held to a nonviolation of a human rights standard but denies that it creates limited institutional demands. According to this critique, there is a human right to immigration which entails that any attempt to regulate migration is fundamentally in tension with a baseline criterion of legitimacy (Carens 2013, Chap. 11; Oberman 2016). The second critique rejects the appropriateness of the nonviolation of a human rights standard on the grounds that the coercive enforcement of border law triggers a demand for democratic legitimation (Abizadeh 2008; Lepoutre 2016). On this view, only democratic authorization from a global constituency could confer legitimacy onto states' claims to regulate migration. The arguments for the human right to immigrate and for democratic borders raise crucial challenges that all proponents of the state's right to exclude must address. However, both are controversial and contested. In the debate surrounding each, it can be easy to lose sight of the otherwise obvious point that neither argument is needed to challenge the minimal standard. But, given that the minimal standard rarely receives a positive defense, the reigning assumption seems to be that its appropriateness follows from successful objection to either of these critiques.⁶

Targeting this assumption, this article offers a legitimacy-based critique of border control that invokes neither the human right to immigrate nor the democratic objection to border control.

The Argument in Abstract

My argument proceeds in three steps.

- (1) Conceptually, a successful defense of the minimal standard must explain why the power states wield over migrants poses a limited risk to their freedom. One such explanation is that all states equally share outcome responsibility for the situation of migrants and, consequently,

that the power wielded by any single state does not impose a significant risk.

- (2) Empirically, it is not the case that outcome responsibility is equally shared between all excluding states. Wealthy democracies participate in a practice of border control by which they externalize and coordinate their border regimes, allowing them to exercise significant power far beyond their own jurisdictions. These expansive exercises of power expose migrants to novel risk for which only some states are outcome responsible.
- (3) Normatively, the power involved in contemporary practice triggers a demand for a higher standard of legitimacy. Contemporary practice, by its nature, creates an institutional structure where actors have both *reason* and *ability* to deflect responsibility for the rights of the migrants whose movement they control. Rectifying the risk imposed on migrants requires changing that institutional structure.

From these arguments, I will conclude that states are subject to a conditional legitimacy requirement: if they partake in contemporary practice, they are required to promote human rights. Morally, this puts participating states on the hook for allowing harms that they have not actively brought about. Practically, this moral responsibility translates into an institutional requirement to erect and maintain supranational institutions ensuring accountability and joint responsibility for the human rights of migrants. A possible response to this argument is that states could discontinue participation in contemporary practice and thereby avoid triggering the more demanding legitimacy requirements. As I will point out, however, states have good reason for avoiding this strategy.

Before I develop these arguments in detail, it is worth distinguishing my approach from an important line of argument developed by Gillian Brock (2020) and David Owen (2020).⁷ This critique holds that the best justification for the state system is to allocate responsibility for human rights and that the legitimacy of that system therefore depends on successful human rights protection. From this, it argues that the legitimacy of the state system as a whole and, by extension, of its constituent states is put under pressure so long as vulnerable migrants lack adequate protection. Therefore, the legitimacy of border control depends on contributions to the erection and

⁶On immigration as a human right, see Blake (2020, 37–45); Miller 2016 (49–56); Pevnick (2011, 86–96); and Song (2019, 94–98). On the democratic objection to border control, see Blake (2020, 45–47); Miller (2010; 2016, 70–75); Pevnick (2011, 47–51); and Song (2019, 70–71).

⁷See also Carens (2013, 195–96).

maintenance of supranational institutions that can ensure protection for vulnerable migrants.

While promising, this approach faces important challenges.⁸ For one, it faces a normative worry of explaining how system failure impacts constituent parts. Imagine a geographically isolated state that takes in far more than its fair share of refugees: why is the legitimacy of this state's border regime impacted by other states' failures to assist vulnerable migrants? As a tentative response to this problem, Brock argues that, although the legitimacy of all states' border regimes is impacted by the abysmal situation for vulnerable migrants, some hold "interim legitimacy" by way of their general contribution to human rights protection (2020, 60). More broadly, however, Brock and Owen face a conceptual worry: by grounding their normative proposals in *general* obligations to support the protection of human rights, it is not clear how these views can fault or vindicate the claims to authority made by *specific* states. It is states, not the system they constitute, that make and enforce rules. Thus, insofar as what is relevant for legitimacy assessments is claims to authority, appeal to the functioning of the state system cannot ground an assessment of current instantiations of border control without a bridging argument.

By contrast, my argument identifies the legitimacy problem for the regulation of migration with specific exercises of power. It therefore directly avoids the normative and conceptual problems faced by Brock and Owen's accounts.⁹ Moreover, my account differs in substantive terms from at least Brock's, who singles out Norway and Sweden as states that enjoy interim legitimacy (2020, 60). As I will argue, the Norwegian and Swedish contributions to Frontex entail that their border regimes involve illegitimate exercises of power.

The Case for the Minimal Standard Reconstructed

To recall, Yong holds that border control is subject to the minimal nonviolation of human rights standards. His argument is this. If states lost the right to control immigration, then they would be left unable to pursue their chosen policy goals, which shows that border control falls within the range of competences that is protected from

outside interference by international legitimacy (2018, 467–68). This argument is vulnerable to the objection that it erroneously treats border control as a purely self-regarding policy area. Unlike the state's domestic legal order, critics can object, border law directly targets outsiders and subjects them to power. Thus, to infer that border control should be protected by general principles of international legitimacy from the fact that control over border law impacts the state's ability to push its domestic agenda is to presuppose precisely what is at stake: that the power involved in border control poses no particular legitimacy challenge.

Yong's innovation is to provide a rejoinder to this objection. He argues that suggesting that there is a difference in kind between the state's domestic policies and its border regime is to assume the truth of cosmopolitanism, understood as the requirement that states are under obligations to treat everyone's interests similarly. But "if we instead hold, following internationalist views of global justice, that shared membership in a state is a morally significant social and political relation that grounds duties of justice that co-citizens owe specifically to each other, then there is a basis to resist the abovementioned assignment of duties" (2018, 471). Thus, Yong can argue that his critic's objection is, at best, conditional. It depends on the nontrivial task of defending cosmopolitanism against internationalism. If such a defense cannot be mounted, then it is irrelevant whether states directly target potential immigrants, since their responsibilities for satisfying the interests of citizens and outsiders are asymmetrical.

Given that the function of legitimacy assessments is to determine which institutions merit compliance and noninterference in their claim to regulate a given domain, Yong's appeal to a theory of justice has its limits. We should rather, I argued above, analyze the risks and benefits of empowering the relevant institution—in this case states' border regimes. To illustrate this point, consider an argument Yong makes by analogy with customs law: even if a state can be said to harm noncitizens unjustly by imposing an unfair tariff on import, it is implausible that noncitizens are therefore justified in smuggling goods onto the state's territory. This suggests, Yong argues, "that the international legitimacy of a state is not defeated whenever its political decisions threaten to unjustly harm outsiders" (2018, 470). Yong infers from this that the same goes for border control. But a different explanation is available. The enforcement of immigration law and customs law differ in terms of the power to which they subject outsiders. If this is true, then we can justify asymmetrical legitimacy assessments of the power states claim over outsiders through their import and border regimes, respectively.

⁸I am indebted here to the perceptive discussion in Sharp (2020).

⁹My argument is thus similar in structure to Christopher Bertram's (2018). However, Bertram identifies illegitimacy with the unilateral enforcement of power, which leaves his theory on controversial normative grounds, since it needs to explain why unilateralism is wrong in and of itself (Sharp 2020, 6).

Therefore, to serve its intended role of vindicating the minimal standard, Yong's argument needs a substantive explanation for why the power states wield over outsiders is sufficiently limited to fall under the general right to noninterference in international society. One powerful explanation of this sort can be derived from David Miller's (2010) influential argument that border controls are preventive, as distinct from coercive. Proponents of Yong's argument can thus draw on Miller's analysis to argue that states wield limited power over migrants.¹⁰

Miller cashes out the distinction between coercion and prevention by reference to option sets. Whereas prevention removes a restricted range of options from an agent's full set, coercion effectively reduces that set to one. Prevention thus hinders an agent from undertaking some "relatively specific" course of action, and coercion forces an agent to undertake a specific course of action (Miller 2010, 114). This means that prevention allows subjects to retain an adequate range of valuable options. Unlike coercion, therefore, prevention leaves room for a degree of independence from the will of the preventor and does not generate the same kind of responsibility as coercion. To utilize a concept Miller has developed elsewhere, a coercer is outcome responsible for the situation of the coerced because the coercer brings that situation about (Miller 2007, 87). For this reason, outcome responsibility often entails remedial responsibility when an outcome falls short of applicable standards of justice (Miller 2007, 100–101). States are generally remedially responsible for the situation of those who reside on their territories because those residents cannot but obey the state's coercively enforced laws.

The distinction between coercion and prevention applies, Miller argues, to border control. When states exclude, they remove one option from potential immigrants' full set. However, they do not make potential immigrants do anything else. Importantly, Miller argues that this remains the case also when those excluded lack an adequate range of valuable options. No state intends this result.¹¹ Each state can only be described as restricting access to its own territory, not any others'. As Ben Saunders puts this point, the "U.S.A. does not, for instance, seek to prohibit Mexicans from entering Guatemala, but only from entering the U.S.A." (2011, 71). Outcome responsibility for the situation of potential immigrants without an adequate range of options does

not fall on any one state. Instead, it is equally shared. On this view, the power states exercise over potential immigrants is importantly limited. States may exclude individuals who lack an adequate range of valuable options. But it is too quick to infer from this that border control is subject to a higher legitimacy standard. No state lays claim to competences that affect migrants' capacity for immigrating elsewhere. Outcome responsibility is shared because each state has left each migrant's other options unscathed. Because each state claims and exercises such limited power, international legitimacy is the right frame for evaluating border control.

On this view, states can still be charged with failing to discharge their fair share of collective obligations owed to vulnerable migrants.¹² But such failure does not imply an allocation of power that triggers a demand for a more stringent legitimacy standard. Instead, it entails that states should reform their border regimes so that their rules better cohere with justice in migration. The risk of granting each state regulatory competence in the domain of migration is thus, contrary to first appearances, not significant from the point of view of those exposed to that power. The rest of this article will show that, even if this argument were sound, it does not apply to the border regimes of most states in the Global North.

The Contemporary Practice of Border Control

The reconstructed case for the minimal standard turns on two core claims: each excluding state (i) removes only one option from potential immigrants' full set and (ii) does so without intending that other states also exclude. This explains why states exercise limited power over migrants, vindicating the appropriateness of the minimal standard for border control. This argument implies an analysis of border control as an activity where state power is constrained by jurisdictional reach, which is, in turn, constrained by territorial boundaries. However, what this argument misses is that border control has undergone a transformation that defies such conceptualization.

Over the last two decades, states have sought to decouple their jurisdictional boundaries from their territorial boundaries to increase their scope of action in

¹⁰Because many object to Miller's analysis of coercion (e.g., Abizadeh 2010), it is worth emphasizing that I am reinterpreting his argument as one about power.

¹¹There is no "collective intention to confine" individuals to their current state (Miller 2010, 117–18).

¹²Indeed, Yong (2018, 470) argues that such failure can amount to injustice of sufficient magnitude to undermine legitimacy. His ultimate assessment of contemporary border regimes might thus end up overlapping with mine. However, Yong's argument implies a prior account of fair shares in this domain, something over which there exists widespread disagreement, leaving that argument with less critical capacity than the one developed below.

the domain of migration. As Ayelet Shachar has demonstrated in her recent work, the border that is relevant to border control shifts in place and time depending on the state's particular interests (Hirschl and Shachar 2019; Shachar 2019, 2020). Many states let their borders “bleed inwards” by redefining large swaths of their territories as border zones for the purpose of tackling unauthorized immigration (Longo 2018, Chap. 2; Shachar 2020, 41–42).¹³ Further, and more distinctively, states externalize their border controlling functions, thereby pushing their jurisdictional borders outwards.

This shift towards the externalization of border control can be illustrated by the European Union's IBM strategy. A set of guidelines ordered by the European Commission describes IBM as follows:

Simply put, [IBM consists in] *what* should be done (border control, risk analysis, crime intelligence, detection and investigation of cross border crime), (...) *how* this should be done (through coordination, coherence, inter-agency cooperation and international cooperation), and (...) *where* it should be done (European Commission 2010, 20, emphasis in original).

The “where” is comprised by the “four-tier access control model,” described as “the core of IBM” (European Commission 2010, 20). That model seeks to track “the movement of third-country nationals from the point of departure in countries of origin, all throughout transit, and up to their arrival in the EU” (Moreno-Lax 2017, 3). At each juncture, the EU deploys so-called remote-control techniques to frustrate unauthorized movement towards Europe.

Important remote-control measures include the imposition of uniform visas, required for accessing the Schengen Area, even when the purpose of entering is to change flights at an international airport; the imposition of carrier sanctions, which make transport companies liable for the visa status of their passengers; and operations at the external border, coordinated and—after the introduction of the standing corps—run by Frontex (FitzGerald 2019, 164–68). In addition, the EU places “immigration liaison officers” in third countries. Although the status and mandate of these officers is somewhat vague, they administer visa applications (typically by overseeing the operations of private contractors) and advise transport companies and governments on

European “immigration priorities” (Moreno-Lax 2017, 133–42).¹⁴

Further, and crucially, the EU partners with third countries to create “migration compacts,” especially in so-called transit countries. Migration compacts involve the transfer of financial resources, political benefits including visa facilitation schemes, and operational assistance in exchange for agreements to host refugees and asylum seekers and to assist in the facilitation of returning migrations from Europe (Reslow 2018). Contracting states also agree to take action to shut down known migration routes on their territories. This is why the EU's neighboring partners are sometimes described as “buffer states” (FitzGerald 2019). The best-known migration compact negotiated to date is the 2016 EU-Turkey deal, which has become the model for how the EU intends to advance its interests in migration control. These agreements blur the lines between migration and other policy domains, making conditionality an important part of border control. European states, acting in combination or unilaterally, rely on wider foreign policy tools when negotiating migration compacts and, conversely, consistently put migration on the agenda in their foreign affairs more generally (Reslow 2018, 395).

The main characteristics of IBM are not local to Europe. They form the cornerstone of current attempts to manage and control global migration throughout the Global North. Different states emphasize different elements to suit their geographical location (FitzGerald 2019; Gammeltoft-Hansen 2011). We can generalize from these elements to articulate a common practice, with two main characteristics. First, efforts to move border control beyond the border mark a shift from a primary concern with controlling immigration towards controlling migration. States are acting to control movement *towards* their territories. Second, reliance on these strategies means that border control has become a distinctively collaborative enterprise. States work together to increase their collective capacity to control migration towards their territories, and they work with other states through agreements where interests in border control are exchanged with general foreign-policy interests. These characteristics of the contemporary practice of border control directly conflict with the two claims grounding the normative case for the minimal standard.

Under contemporary practice, it is not true that each state only acts to remove one option from migrants' full set. By impelling buffer states to close down migration

¹³Representing the limit case, Australia now defines its entire territory as a border (Shachar 2020, 40).

¹⁴Some argue the threat of sanctions renders this advising activity coercive law enforcement (Moreno Lax 2017, 134; cf. Blake 2020, 101–102). Since my argument does not turn on coercion, I leave this issue to one side.

routes, by imposing uniform visas for transferring flights and carrier sanctions, and by introducing immigration liaison officers and offering operational assistance in the border regimes of third countries, states are not only acting in ways that hinder access to their own territories. They make it more difficult for migrants to reach other states as well. To take Saunders' example from above, while it may be true that the United States does not act to prevent Mexicans from entering Guatemala, the opposite is not the case: "buffering" migration from Central America in Mexico is one of the most important priorities in US border control (FitzGerald 2019, 131). The same is true of US efforts to frustrate migration from Caribbean states, where aggressive coastal patrolling has often prevented individuals from "from leaving their own island countries to go *anywhere*" (FitzGerald 2019, 71, emphasis in original). Participants to contemporary practice do not remove single, but several, options from migrants' full set.

Nor is it true that states enforce border control without intending that other states do the same. The Schengen Area countries' collaboration is the paradigm example, but third-country collaboration is central to the border regimes of Australia, Canada, South Africa, and the United States (FitzGerald 2019; Gammeltoft-Hansen 2011; Longo 2018; Shachar 2020). The creation of common border-controlling strategies, and the posting of migration liaison officers, ensures that each participating state is fully aware of the others' priorities. Indeed, when states build common institutional infrastructures—Frontex's uniformed enforcement unit representing the limit case—the participating states unify their priorities. Consequently, each holds *participatory intention* to uphold the border regimes of its collaborators. Under one description, each state seeks to uphold its own border regime. Yet, each state's means of so doing makes irreducible reference to collaboration, giving rise to the distinctively participatory intention of doing one's part of a collective endeavor (Kutz 2000, 81–82). They act collectively to enforce each other's border regimes.

These characteristics of contemporary practice amount to more than the valid point that immigration policy is not set in a vacuum and that states are able to predict the consequences of their border regimes (Lepoutre 2016, 323). They also undermine the claim that, in the case where migrants find themselves without an adequate range of valuable options, all states share responsibility for this outcome. As Miller argues, outcome responsibility is demarcated by a "standard of reasonable foresight: an agent is outcome responsible for those consequences of his actions that a reasonable person would have foreseen, given the circumstances" (2007, 96). In a

world where, since 1994, "annual refugee resettlement flows as a percentage of the global refugee population have never exceeded 1%" (FitzGerald 2019, 3), all states who uphold restrictive border regimes are able to foresee that doing so systematically leads individuals to lack an adequate range of valuable options. However, a subset of those states, namely participants to contemporary practice, incur a larger share of that outcome responsibility.

The uneven allocation of outcome responsibility arises because of the function of contemporary practice. The immediate explanation for why states externalize and coordinate their border regimes is that it makes those regimes more effective. The further explanation for this efficiency, however, is directly tied to human rights obligations. A crucial migration-related human right is the right to seek asylum. Returning migrants at the border amounts to a violation of the principle of *non-refoulement*, which is a strong norm of the human rights regime.¹⁵ States that aim to signal allegiance to the human rights regime are thus careful not to violate the principle. However, compliance is costly. Because the system of sovereign statehood assigns responsibility for human rights protection by territorial presence, states are obliged to receive and adjudicate the claims of anyone who invokes their right to seek asylum. This translates into a further duty of hosting asylum seekers while their applications are pending. These duties explain the appeal of contemporary practice: by frustrating migration before it reaches their territories, states avoid triggering a set of costly norms. This practical function serves two further political functions. First, it allows governments to respond to anti-immigration sentiments in their domestic constituencies while, second, allowing the same governments to signal continued compliance with the human rights regime.

The effect of contemporary practice has been to impose further risk onto migrants. Participating states bring about circumstances where vulnerable migrants are exposed to a perverse incentive: remain in your state of origin or in a buffer state with limited capacity (or willingness) to protect your rights or set out on increasingly dangerous routes to apply for asylum once territorially present in a state that can offer such protection (FitzGerald 2019; cf. Human Rights Council UN 2020, 11). This perverse incentive is an essential feature of the contemporary regulation of migration, and it is created by externalized and coordinated border control, thus imposing a novel and additional risk onto migrants. Legitimacy assessments that present border control as

¹⁵According to an influential argument, *non-refoulement* has acquired the status of *jus cogens*, making it an international legal norm from which no derogation is permitted (Allain 2001).

a territorially bounded activity miss—and function to disguise—this risk. Recognizing its presence requires a reinterrogation the legitimacy standard for the border regimes implicated in contemporary practice.

The Insufficiency of the Minimal Standard

The externalized and coordinated nature of contemporary practice does not only raise questions of legitimacy, as I have defined it above. As the site of control expands beyond territorial borders, states are effectively creating zones of overlapping jurisdiction. This poses a direct challenge to standard conceptions of sovereignty. Delineating who has *de facto* authority where and over whom as borders are shifting requires detailed conceptual, legal, and normative analysis.¹⁶ I cannot do justice to this vital set of issues raised by the contemporary practice of border control here. However, this section will show that the presence of unclarity and disagreement over questions of authority is of direct relevance to a legitimacy assessment of contemporary practice. As I will argue, the externalization and coordination of border control subjects migrants to unaccountable power and prohibits the taking of responsibility. This triggers a demand for a higher standard of legitimacy, set at the promotion of human rights.

A central reason why contemporary practice is effective is that the externalization of border control is not only territorial, but also bureaucratic. States delegate competences to administer border control to other states, as well as to private contractors, often resulting in situations where migrants are subject to private actors who are “subcontracting” for other private actors with contracts to enforce the border regime of one state on the territory of another (UN 2020, 13–14; Gammeltoft-Hansen 2015). Vulnerable migrants generally lack the financial and diplomatic resources that allow for the contestation of maltreatment at the hands of border guards or administrative officers (Sager 2017). The dispersion of delegated authority involved in contemporary practice exacerbates this powerlessness by creating barriers to attributing legal responsibility for rights violations. Under international law, states are in principle responsible for actors exercising governmental authority and for actors directly under the control of the state (UN General Assembly 2001, Arts. 4–8). However, as the delegation of authority involves the conferral of administrative discre-

tion, there is always room for contestation by the contracting state that the contractor has stepped outside the bounds of their mandate. Thus, states rely on legal contestation to avoid taking responsibility when migrants suffer human rights abuses (Gammeltoft-Hansen 2015, 210–11).

The effect of this dispersed delegation is not just to shift legal responsibility from states to private corporations. As Shachar (2019, 141) notes, the many layers of discretion and the multiplicity of actors involved in contemporary practice make it difficult to attribute legal responsibility at all. These actors often operate in an environment in which their power is effectively unchecked, which in turn gives rise to another perverse incentive. Each actor has reason to minimize sufficient human rights protection: contracting private parties and third countries have reason to minimize financial costs, and externalizing countries have reason for minimizing the political costs associated with sheltering asylum seekers. Moreover, each actor is *able* to evade legal responsibility for human rights violations. This unaccountability poses a challenge to the appropriateness of the minimal standard, for the following reason.

Accepting the minimal standard is to endorse the claim that, in cases where no human rights are violated, the institutional environment under evaluation displays no characteristics that are worrying from the point of view of legitimacy. This implies that human rights violations observed within that environment can be conceived as contingencies that can be rectified by changes in the internal procedures of implicated actors. This analysis is unsatisfactory when it comes to border control because it misses the extent to which the structure of our current institutional arrangements generates human rights violations. Again, given the incentives to which actors are exposed, each has reason to minimize efforts to secure human rights and, given the unaccountability of their power, they can often evade legal responsibility for failures to respect human rights. This means that, in the counterfactual case where no migrants had their rights violated, contemporary practice would still expose migrants to an ongoing risk because the nonviolation of their human rights would, in a weighty sense, be insecure. Their human rights would be *unreliably* respected. Rectifying this unreliability requires the satisfaction of a more demanding standard of legitimacy.

This claim can be motivated by way of analogy. An important argument for holding states to democratic standards of internal legitimacy is that democracies are generally better at satisfying human rights than other regimes (Christiano 2011). Yet to endorse this argument is not to say that delivering human rights is all that

¹⁶For an excellent example of such an analysis, see Shachar (2019, 2020). For another, which also theorizes the deterritorialized modes of control states exercise through their reliance on big data, see Longo (2018).

matters. Instead, it is to hold that, given our concern with human rights, and our knowledge of the risks associated with nondemocratic forms of government—which can be explained by reference to the incentive structures inherent to such regimes—we should insist on democratic institutions. Thus, even in the (unlikely) case where an autocratic regime satisfactorily delivered human rights, citizens would still be exposed to undue and ongoing risk because the satisfaction of their rights would be dependent on the goodwill of their current ruler. Independent goodwill is an unreliable form of protection, if only for the simple reason that their successor might be less kindly inclined towards their subjects (Christiano 2011, 157).

This normative logic extends beyond the democratic state. Many defend the permissibility of making institutions with highly complex decision-making mandates, such as central banks, independent from direct democratic control (see van 't Klooster 2020). However, these arguments do not reduce to the claim that central banks are legitimate, so long as they refrain from violating citizens' socioeconomic rights. Given the significant power entailed by their competences, central banks must be constrained by institutional checks that ensure that they reliably protect those rights. This moral requirement translates into an *institutional* requirement to introduce suitable accountability mechanisms for the bank's operation, ensuring that reliable protection of socioeconomic rights does not depend on the virtue of the bank's leadership. Only by subjecting powerful institutions to predetermined and regular external checks—which credibly threaten to change the terms and conditions of their power—can we have confidence in their reliable protection of rights (Downey 2021, 313).

By symmetry, therefore, once states increase the power they wield over migrants by externalizing and coordinating their border regimes, they trigger positive obligations to set up institutions with the power to hold them *accountable* for the impact those regimes have on human rights. In the absence of such institutions, migrants are exposed to undue and ongoing risk, even when their rights are respected. To alleviate the risks engendered by contemporary practice, information about the structure and extent of states' arrangements must be transparent and freely available (Grant and Keohane 2005, 30). Thus, a minimal institutional requirement is the creation of a monitoring body with the mandate and resources required for disentangling the webs of delegation in contemporary practice. For example, Brock suggests along these lines the creation of a new office within the International Organization for Migration (2020, 216). Such a strengthening of informational accountability would allow for a continuation of the posi-

tive move towards the international legal concept of *effective control*, which assigns responsibility for human rights by reference to de facto authority rather than territorial jurisdiction—as was ruled in the European Court of Human Rights' landmark 2012 *Hirsi Jamaa v. Italy* judgment (Shachar 2019, 138).

Further, and crucially, ensuring legal accountability requires that the novel institutions states create to control their borders receive legal personalities that make them legally accountable for their human rights performance (Lafont 2010). The most striking case in point is Frontex, which, despite its new mandate to enforce law through its own uniformed personnel, cannot be held liable in front of a court. The only official pathway through which migrants can hold Frontex to account is an internal "complaints mechanism," which is overseen by the agency itself (Fink 2020). Ensuring accountability for the power the Schengen Area countries wield over migrants requires that the institutions to which they delegate power can be held liable for their conduct.

This argument about legal liability points to a further, and more demanding, implication of my account. Although it is essential to hold Frontex, and the myriad private contractors enforcing border control, liable for their human rights performance, these institutions are not states. Consequently, they cannot perform the most important function for delivering justice to migrants whose rights have been violated: admission to a state in which their human rights are respected. One response to this problem would be to try to trace chains of delegation in order to identify the state that is liable for any human rights violation. Yet, this ignores the essentially collective aspect of contemporary practice. When several agents act in combination, an individualistic "liability model" can leave significant gaps and thereby fall short of ensuring that all implicated take responsibility for the outcomes they have produced (Pettit 2007; Young 2011). For complex collective action, with many layers of discretion and several implicated agents, it is only to be expected that there is no single state to which we can attach "full" responsibility for rectifying the situation when a migrant's rights have been violated. Indeed, as Philip Pettit notes, it is possible for groups of agents to organise their actions in ways that ensure that none of them can be held fully responsible for the outcome produced (2007, 196–97).

Alleviating the risk to which migrants are exposed under contemporary practice therefore also requires that states erect institutional structures that make them take joint responsibility for the rights of migrants over whom they exercise power. To return to the European example, one way to satisfy this requirement would be to rectify the asymmetry that currently characterizes the

European border regime by providing the European Union Agency for Asylum comparable executive powers to those enjoyed by Frontex, thus enabling the agency to distribute responsibility for asylum seekers between Schengen countries. The principled point is that mechanisms for taking joint responsibility should always follow institutionalized collective action. This suggestion is appropriate, moreover, because states that partake in contemporary practice hold participatory intention. When agents form such intention by acting under formalized rules constitute a practice, they thereby become constituent parts of that practice. This confers *constitutive* responsibility: when you share responsibility with others for constituting the same thing, then it is also appropriate to hold you all responsible for the thing that your actions constitute (Goodin 2019, 42). This explains why individual states still bear responsibility for a specific outcome that is overdetermined by contemporary practice (say the outcome would have happened even if this state had not contributed resources) or one to which they cannot be said to have caused (say the outcome is explained by the actions of other constituent members). By constituting themselves with other states, they take on responsibility for the outcomes that can be expected to follow from their so constituting themselves (Bazargan-Forward 2017, 333).

That participants to contemporary practice are under positive obligations to create institutional accountability and joint responsibility shows that they are subject to a higher standard of legitimacy than is required by the minimal account. Even if—counterfactually—there were no human rights violations under our current institutional arrangements, the unreliable nature of the protection offered would still be detrimental to the legitimacy of those arrangements. Participation in contemporary practice triggers positive requirements for each state to *promote* migrants' human rights, not merely refrain from violating them. By adopting a distinct promotion standard, I follow Buchanan and Scherz, the latter of whom defines it as requiring institutions to “ensure that they do not undermine human rights related to their institutional purpose, (...) against the background of a reasonable effort to acquire knowledge about the risks involved” (Scherz 2021, 643; cf. Buchanan 60–61). If this sounds overly demanding, making the legitimacy of border control dependent on contributions to general human rights promotion abroad, it is worth emphasizing that the requirement is domain specific. Thus, in the present case, it applies to migration-related human rights. Further, against the opposite suggestion that the promotion standard is too indistinct to generate any new obligations, my analysis has demonstrated that

counteracting the perverse incentives that currently undermine the protection of migrants' human rights requires institutional responses. Thus, that the border regimes of the wealthy democracies of the Global North are subject to the promotion standard presents novel, and more stringent, legitimacy requirements.¹⁷

The likely response to this argument is, of course, that my account implies that states could choose to discontinue their participation in contemporary practice and thereby avoid incurring these positive obligations. The straightforward answer to this response is, simply, yes. Its permissibility follows directly from the power conception of legitimacy. However, as my argument has emphasized, the politics of immigration is characterized by biases that make it relatively easy for politicians to trade human rights compliance for votes from anti-immigration segments of their constituencies. Thus, to render defensible this strategy of self-restraint, states should legally constrain their incumbent government's capacities to violate its *negative* human rights obligations towards migrants (Hidalgo 2019, 99–100).

Notice also that the joint responsibility argument provides grounds for another rejoinder. I have argued that states incur obligations to create mechanisms for taking joint responsibility for the outcomes they produce when they constitute themselves in a common practice. This could provide an apt opportunity for the states that incur these obligations. One of the most frequently cited reasons for why states engage in externalized border control is that, unless they do so, they would be overburdened with asylum applications that they would, given the principle of *non-refoulement*, be obligated to adjudicate. This argument has some force when it is coupled with a claim about the unfair allocation of such responsibility, given the host state's geographical location. Think, for example, about Greece and Italy's shouldering of Europe's asylum seekers (Bauböck 2018).¹⁸

¹⁷An anonymous reviewer points out that we are approaching a world in which *all* states are involved in coordination to reduce mobility and suggests that, even in a world where all states share outcome responsibility, the nonviolation standard would be insufficient for the reasons I have outlined. I agree. However, in this case, I think that also the promotion standard will be insufficient for conferring legitimacy onto border control. As even Miller concedes (see n11 above), a collective intention to control movement shared between all states would entail sufficient power to trigger a demand for democratic standards of legitimacy.

¹⁸This example also illustrates why I write that this argument has *some* force. Although Greece and Italy shoulder a disproportionate share of the burdens associated with migration in Europe, that share is small compared to that shouldered by states in the Global South. Thus, a fairness argument likely provides further and independent normative grounds for multilateral institutional responses to global migration.

However, if states worked in a constructive manner to institute common institutions for taking joint responsibility for the migrants over whom they exercise power, then the concern about fairness could be addressed directly. In other words, the fact that states are currently under positive obligations to create institutions for promoting migrants' rights provides a strategy for tackling one of the reasons why states engage in contemporary practice in the first place.

In response, an objector could point out the obvious, namely, that creating positive forms of integration presents collective-action problems that states are unlikely to overcome (Eilstrup-Sangiovanni 2021). Whatever the merits of the empirical premise of this response, its normative credentials are weak. If used in an argument "from feasibility" to demonstrate the inevitability of the status quo, it reduces to the perverse claim that wealthy democracies should be exempt from respecting legitimacy requirements because their citizens would prefer not to.

Concluding Remarks

Discourse around migration in Western democracies is highly moralized. Many publicly question the intent and character of unauthorized migrants, as well as those who work to assist them. The analysis offered in this article implies that such attitudes of blame and resentment, and their institutional expression in the criminalization of migration, are misplaced. So long as states externalize and coordinate border control without institutionally securing accountability and joint responsibility, they fail to generate reasons for compliance and noninterference with their border regimes. Thus, at a practical level, my argument offers a principled case for why citizens of Western democracies should direct their political sympathies towards activists assisting migrants in the Mediterranean or in the deserts along the US-Mexico border and not towards those who, in a symmetrical fashion, have started engaging in vigilantism with the aim of enforcing their state's border regime.

At a theoretical level, my argument provides further evidence that normative political theory is vulnerable to constraints imposed by methodological nationalism (Sager 2016). Conceiving of border control as a territorially bounded activity risks missing, disguising, and ultimately naturalizing significant exercises of state power over vulnerable persons. If a central task for political theory is to subject such power to interrogation and critique, then conversations about the legitimacy of border con-

trol cannot proceed by taking a standard devised for individual states, acting independently, and applying it to a context where those conditions do not obtain.

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