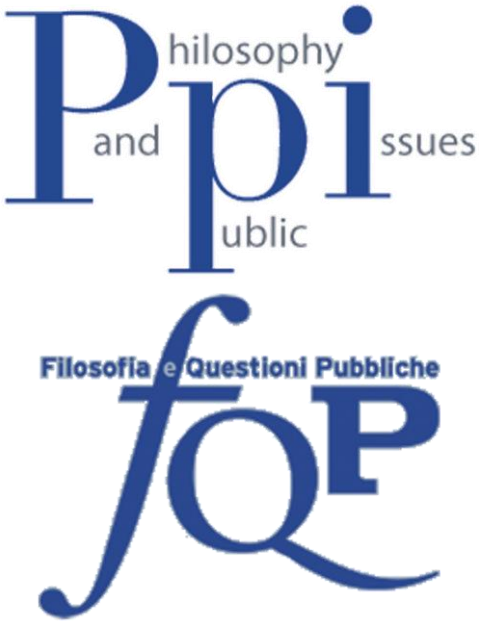
SYMPOSIUM

MIGRATION AND JUSTICE FOR PEOPLE ON THE MOVE



REPLIES TO CRITICS

BY

GILLIAN BROCK

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Replies to Critics

Gillian Brock

I am grateful for the excellent questions that contributors have posed for my account of migration injustice. In my response I aim to address their important critiques and thereby develop the project further, hoping to show how my account can considerably assist in reducing migration injustice in our contemporary world. Contributors have offered stimulating reflections on the overall approach, along with important questions concerning more specific policy issues and strategies. I structure my response so that I start with criticisms about the framework and address specific concerns about policy thereafter. To help orient readers, here are the questions I aim to cover in this essay.

We start with a set of fundamental questions about my approach, raised by Chris Bertram (2021), focusing on these three:

(1) Does my view presuppose the division of the world into discrete national states?

(2) Do I eschew utopian thinking and collapse the more ideal and more realistic perspectives together rather than keeping them separate?

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(3) Does my view provide no vantage point from which to question the state system?

We then move on to the issue of whether we should prefer another framework, that of republican internationalism, as David Owen (2021) suggests. In responding we need to address questions about the power of the human rights practice, but first we should tackle the question of how to identify what is part of the practice, an issue raised by Chris Bertram. It is only then that we can address the strengths and weaknesses of my approach compared with republican internationalism. So in section two we consider these four questions:

(4) Should we endorse republican internationalism and prefer it to other options? (David Owen)

(5) Do we have credible reasons to suppose that the framework for our international order of states can be adequately modified by normative constraints? Can our human rights practice play the necessary role? (David Owen)

(6) How do I discern what our human rights practice is? (Chris Bertram)

(7) Can we reasonably expect the construction of a binding global regulatory regime as a way to secure the provision of public goods (such as orderly, safe, and regular migration or refugee protection) any time soon? (David Owen)

We are then in a position to address some of the questions that Chris Bertram and David Owen have raised concerning *the Global Compact for Safe, Orderly and Regular Migration*, such as:

(8) Does my account of the human rights practice fail to provide migrants with protections to their basic interests? (Chris Bertram)

(9) Is the Global Compact a progressive agreement? (David Owen and Chris Bertram)

(10) Am I too sanguine about the prospects for justice for migrants based on the regime presented by the Global Compact? (Chris Bertram)

(11) Are states' commitments to the Global Compact agreements of little value for achieving migration justice? (Chris Bertram)

(12) Does the Global Compact ignore migrants' voices? Does my account privilege the views of the sedentary populations in states at the expense of migrants' own views? (Chris Bertram)

In Section 4 we move on to questions about the positions I adopt concerning specific migration issues, starting with whether we should endorse a policy of open borders.

(13) Is there a human right to immigrate? (Javier Hidalgo)

(14) Should I endorse the open borders position? (Javier Hidalgo)

(15) Are states obliged to make room for as many stateless people as they can (consistent with other commitments)? (David Owen)

In Section 5 we discuss my treatment of unauthorized migrants, focusing on Matthew Lister's central question:

(16) Should I adopt a strategy of arguing for the 'generic unauthorized' rather than adopting a case-based approach?

Section 6 tackles Patti Tamara Lenard's arguments concerning obligations to absorb costs associated with resistance, sanctuary and welcome, focusing on her questions:

(17) Can we require all citizens to absorb significant costs to reduce immigration injustice?

(18) Are sanctuary policies better understood as about resistance or welcome?

In the final section we cover Luara Ferracioli's arguments dealing with family separation and migrant labourers' human rights, and address the question:

(19) Should parents who are labour migrants be permitted to bring their children when they work in host countries?

I

Fundamental Methodological Challenges

Does my view provide no vantage point from which to question the state system? Do I eschew utopian thinking and collapse the more ideal and more realistic perspectives together rather than keeping them separate?

In order to address these questions let us retrace some of my early steps in the book. I begin with a position that will seem

plausible to many among my target audience, namely the idea that states have a right to self-determination. I also introduce an idea that I anticipate many readers will share, which is that members of a state have a right to decide what is best for them and that every state has the right to adopt policy that concerns itself almost exclusively with the wellbeing of its citizens over others (a position often referred to as "compatriot favoritism").[1] If every state has the right to self-determination, its citizens would seem to be free to determine their economic, social and political affairs, and to manage them in ways that rightfully privilege citizens' wellbeing. Because I expect many readers hold these views, I begin a search for a justification for state's rights to self-determination within the state system, which can also yield a justification for compatriot favoritism. I first discuss one crude attempt at justification because it fails instructively. Consider this argument:

> *Premise 1*: States should have the right to decide what is in their citizens' interests and to make policies and laws on the basis of their perception of those interests and their own views of what is good for citizens.
>
> *Premise 2*: Everyone belongs to some state or other, so all persons have a government committed to advancing citizens' interests and respecting their human rights, ensuring the persons on their territory can enjoy relevant freedoms and opportunities characteristic of a good life in their home state.
>
> *Conclusion*: So, these arrangements are fair (Brock 2020, 34-37).

This argument is not strong because *Premise 2* is clearly false in our contemporary world. All persons do not live in a state

[1] For more on this position see, for instance, Brock 2002. For good recent discussion of the issues suggesting the position is incoherent see Ypi 2013.

governed in such a way as to respect their human rights and advance their interests, assisting them to enjoy core freedoms and opportunities. If they did indeed do so, many people would not seek to migrate away from such situations. Might the argument be strengthened and an improved version made to work?

Before we begin trying to marshal a new defense, we should note that there is an important burden of proof issue. The justificatory challenge can change depending on our starting point. This affects who has to make an argument to whom. So, since we must begin again, we should not start from the assumption that states are justified natural units. Rather, the question we must ask is: how can we justify a world carved up into states (the state system)? This question must be answered before we can decide whether states' self-determination rights are defensible. And our justification needs to be made in terms that everyone, including and especially those excluded from the state can appreciate as compelling. We will need to adopt a perspective that is mutually acceptable to both insiders and outsiders.

What vantage point can we assume that will be justified from a standpoint that both insiders and outsiders can support? Following John Rawls, I have explored a way to answer this question in several places.[2] And an accessible entry point into this perspective is to ask: If people did not know whether they would be insiders or outsiders of particular communities, what kind of justification for the state system might they find compelling? If it were the case that all persons have a government committed to protecting and promoting their interests and human rights, ensuring the persons on their territory can enjoy freedom and opportunities characteristic of justice, as *Premise 2* describes, the view might be plausible. In the absence of such a state of affairs (with adequate

[2] Cf. Brock 2009. See especially Chapter 3.

provisions for failures), those substantially disadvantaged by such international arrangements have no reason to find such justification for either the state system or compatriot favoritism robust. Importantly, privileging the interests of fellow members when others fail to have their basic human rights secured would remain undefended. So if we want to pursue this kind of argument strategy, one clear implication is that we must co-operate in a host of cross-border activities, policies and institutions that have as their aim securing good arrangements that can deliver on human rights and other aspects of justice. A justification along these lines will require that we fulfill many international responsibilities, as a requirement of enjoying self-determination and the *defensible* right to privilege our compatriots' interests.

I then go on to make these ideas more usable for action-guiding policy in our world. In our actual world, human rights discourse is fundamental to the public morality of world politics and a key lens through which international policy has been developed. So understanding how human rights function in our contemporary international practice is important, an issue about which I have more to say below. For now I hope to have addressed at least the questions concerning the role of ideal theory in my approach and challenged the idea that I have no vantage point from which to question the state system.

I hope also to have addressed the concern that I have presupposed the division of the world into discrete national states. The argument outlined above starts from a place that will engage well with the intended audience. Beginning with the observation that we find ourselves in a world of states with presumptive self-determination rights should not strike anyone as particularly controversial, because it merely describes the status quo. However, in searching for a compelling argument for these common assumptions I take readers on a journey that challenges many sets

of assumptions that go along with that worldview. As I show, there is no plausible justification for readers' default assumptions unless we also accept a range of human rights related requirements. These include requirements that involve contributing to resilient communities that are human rights sustaining. So, this is essentially a strategic decision: by starting with common assumptions shared by my audience, I believe my arguments will have widest impact.

II

Should we prefer an alternative framework such as Republican Internationalism?

David Owen wonders: Do we have credible reasons to suppose that the framework for our international order of states can be adequately modified by normative constraints? Can our human rights practice play the necessary role? In order to answer these questions we must start with a prior question (one that arises in Chris Bertram's critique), namely, how do I discern what our human rights practice is?

I begin this synopsis by situating my account of our human rights practice in some context. Like Charles Beitz (2009), I argue that there is an important emerging political practice around human rights. Understanding how that practice operates in our contemporary world is key to understanding whether that practice can provide credible normative constraints on our international order of states. Our contemporary international human rights practice originates from the settlement of World War II and the adoption of key documents such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights (and these three documents are conventionally referred to as the International Bill of Rights). I summarize some

key features of that practice so we can best appreciate some core strengths necessary to addressing the central questions for this section.

(1). State failures to accord with human rights standards are grounds for international concern. That international concern can be variously expressed.

(2). There are several ways in which human rights ideas get implemented into progressive policy in our contemporary world. These different ways include through various accountability mechanisms and strategies of inducement, assistance, domestic engagement, compulsion, and external adaptation (Beitz 2009, 33). Here I draw attention only to a few points necessary for my rebuttals and elaborate on those concerning accountability (in point 3) and domestic engagement (in point 4).

(3). There are some fairly good regular channels available for calling states to account. The UN has a system of extensive reporting and auditing processes. Various UN human rights agencies require regular reporting. The treaty bodies review and audit reports that states are required to provide evidencing their compliance. Importantly, nongovernmental organizations have a significant role to play as independent sources of information that can also be used to judge compliance. The treaty monitoring systems *require* states to publicly account for their conduct (*ibid.*, 34-35). These formal, treaty monitoring systems play an important role in being accountable to external audiences showing the international community how particular states are performing in relation to international standards.

(4). The pathway of domestic engagement is probably one of the most under-rated mechanisms for progressing the human rights agenda. As we have seen in countless instances, when local actors understand that there is an unfulfilled human right within

their state, this can mobilize domestic actors to challenge and remedy the situation. Mobilizing domestic political agents can be strengthened through transnational coalitions.

(5). Human rights offer rules and standards, but they do so much more than that. Human rights also function as standards of aspiration offering ideals that can guide desirable political change. Along with the institutional and quasi-institutional apparatus there are also informal processes for propagating and implementing human rights (*ibid.* 42). I discuss some institutional and juridical aspects of our human rights practice below, but for now we must note that informal processes are also part of the practice.

(6). The primary bearers of responsibilities to respect and protect human rights are states, while the international community underwrites these responsibilities. So, government failure to discharge its first-level responsibilities can constitute the grounds for "appropriately placed and capable 'second-level' agents outside the state" to take action in several ways (*ibid.*, 109).[3]

(7) It would not be correct to say that human rights is an international regime, that is to say, a set of "implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations tend to converge" (*ibid.*, 43). It is not that because the human rights system lacks some of the features of a regime such as containing "institutional capacities for the authoritative resolution of disputes about the application of norms to individual cases and for the application of sanctions to agents that do not comply with authoritative interpretations of norms"

[3] The obligation to assist when human rights failures require action can vary according to particular relationships. Agents will have different responsibilities depending on their relationships. Appropriate remedies also require different capacities. The different interests human rights protect can also give different reasons to take action that may differ in urgency and strength.

(*ibid.*). The human rights system's capacities for adjudication and enforcement are uneven and sometimes weak.

(8). However, a range of political forms of action have developed both within and outside the UN system. The role of domestic agents and social movements is very important. Some of their human rights promoting activities are primarily persuasive and involve the support, coordination and mobilization of domestic political agents. Others rely on transnational coalitions of nongovernmental agents that are effective at public advocacy or communication.

(9) So, summarizing key points made so far, our human rights practice is not global law or a formal regime. As noted, human rights function as well as standards of aspiration. So they can be powerful bases of political criticism. They can also function as elements of a shared moral language, and ideals that guide efforts at political change by individuals and nongovernmental organizations. So they can be significant vehicles for redefining goals and political change. Any analysis of human rights that ignores the role they play as a common reference point in deliberation about political action and social criticism, omits important functions human rights have in contemporary political discourse. Considering all these points and reflecting on the many important ways in which human rights function in our contemporary world, it seems wrong to think of our human rights practice as primarily a form of global law, even if the original framers had hoped for such a model (an issue I expand on in sections below). Rather, as Sally Merry observes, reflecting on studies of human rights activism especially in Asia, "[i]nstead of viewing human rights as a form of global law that imposes rules, it is better imagined as a cultural practice, as a means of producing new cultural understandings and actions" (Merry 2006, 228-229).

(10). It is worth underscoring the power of human rights to bring about progressive change**.** Human rights discourse not only has been, but will continue to be, a discourse that proves highly effective in mobilizing domestic and international publics. Human rights discourse can be a very helpful mechanism by which we can reduce injustice in our contemporary world. In addition, progress on human rights is often most impressive in places where there are both strong regional human rights institutions and robust social movements. Domestic and international human rights advocacy is an important complement and catalyst to international agreements and institutions and other more formal mechanisms that, over time, can protect human rights gains. It is also worth noting that the UN periodic review system provides good opportunities for constructive engagement concerning improving human rights performance and the process also affords excellent opportunities for appropriate offers of assistance (capacity-building, technical, financial and so forth). And several of the other human rights-oriented agreements, mechanisms and real-world instruments constitute important opportunities for us to progress migration justice goals.

(11). So, in offering a succinct answer to the question of what is my method for discerning the practice, we might note that the practice has many disparate elements that all play valuable roles and engage diverse agents. Some parts of our human rights practice are more like law (some parts resemble soft law, while others are closer to hard law). Other parts are aspirational and provide goals. Still other parts play the role of well-supported vehicles for challenging cultural understandings. While we might start by examining the history of the practice, what it was intended to achieve, and looking at some of its formal and institutional mechanisms, we should not end there. Reviewing the history, the Bill of Rights and other core documents give us some insights. Attending to some of the more aspirational parts that serve as goals

gives us others. The institutional and formal features shed valuable light on some pathways for change, but so does looking at the inspirational activities of human rights advocates and NGOS. The constellation of forces associated with the human rights practice, including NGOs, social movements, journalists and other agents and agencies all have an invaluable role to play in bringing to fruition some of the goals and ideals of the UDHR and they are all part of the human rights practice in its contemporary manifestation. The practice clearly has many disparate elements. The institutional rules, while important, are sometimes less important than more informal processes and activities that can be important catalysts for changing hearts, minds and cultural understandings. The combined power of institutional agents, social movements, dedicated NGOS (and so forth) all contribute to processes that can become forces for positive change.

Having emphasized these eleven points about our practice, we are now in a position to move on to some of the key questions for this section, namely: Should we endorse republican internationalism and prefer it to other options? Is aiming at binding global law a better strategy than the position I endorse?

In order to appreciate my answers to these issues we might start with the fact that the original framers had hoped to implement something close to a model of binding global law. Let us understand some of how they thought this would work and what remains of that hope in our human rights practice, before we can entertain whether something more stringent is desirable or even feasible.

The original Human Rights Commission aimed to promote a declaration of human rights, draft a binding international convention and work out mechanisms for how the convention might be implemented. They envisaged that enforcement would occur at two levels. States would be the primary agents responsible

for ensuring human rights adherence in their territory and human rights requirements would be incorporated into domestic law or policy. A second level would deal with government failures; such failures would become a matter for international concern. A working group discussed several ways to implement international concern including through mechanisms of mandatory reporting, "petition and inquiry by special commissions or a special human rights court" (Beitz 2009, 24), and where violations had been found "public censure and 'extreme action involving reprisals and the use of sanctions'" (*ibid.*). The working group settled on a scheme that combined several elements including periodic reporting, monitoring, and adjudication, though the recommendations were not straightforwardly implemented. The practice in operation today currently includes several recommended features, such as reporting and monitoring elements and there are some provisions for complaints.

While the framers had in mind a juridical paradigm with human rights ideally becoming part of domestic law enforceable in domestic courts or woven into state policy, this ideal was at best only partially realized. They hoped that international monitoring for compliance by auditing state's self-reports would gradually have a normative effect over time. Some of the framers had hoped an international judicial capacity, such as a human rights court, would be instituted, to deal with disagreements between monitors and states, and assign any penalties that might be needed. However, this did not occur and monitoring agencies' powers were limited to consultation, reporting, and public censure. While those were the agreed arrangements some seventy years ago, it was hoped that in due course more robust forms of accountability might be put in place to incentivize better domestic compliance.

In fact our current global practice is quite complex. In some parts a juridical paradigm is in force, for instance in the regional

human rights systems which include human rights courts with legal coercive capacity to insist on compliance with rulings.[4] The European human rights court is a good example. And, importantly, various types of agents participate in human rights practice. UN human rights agencies are tasked with monitoring and reporting, while international organizations and nongovernmental agents (including social movement organizations and business firms) have a range of other ways of promoting the human rights agenda. Considering the vast number of agents involved in aspects of the human rights practice devoted to accountability, inducement, assistance, domestic contestation, engagement, compulsion, and external adaptation, we see a variety of ways in which our practice can assist with implementation and enforcement.

So turning now to the issue of whether we should prefer republican internationalism, while we might want to endorse this as a desirable goal to aim at, in this book I take seriously the issue of pathways to justice in our imperfect world. An important question in this work is how we would make progress in our actual world and how we should guard against the dangers that a system of global law might present. My approach is more credible in providing feasible pathways to realization and ultimately presents more safeguards against domination. I will also draw attention again to the fact that the original human rights commission had hoped for a global law paradigm, but this was not implemented. The fact that it was not is, I think, quite revealing. In my view, it is not as credible a pathway to secure human rights gains as what is on offer in the human rights practice toolbox. Reflecting on some of the human rights gains over the last 70 years, it is clear just how far we have come using this toolbox, even if there is more work to do to live up to the full promise of our human rights aspirations.

[4] *Ibid.*, 32.

III

Questions Concerning the Global Compact

Does my account of the human rights practice fail to provide migrants with protections to their basic interests? Let's consider how to address this question by turning to a policy agreement that I champion as going in the right direction, namely the *Global Compact on Safe, Orderly and Regular Migration* (henceforth, the Global Compact). Chris Bertram (2021) views the Global Compact as a fairly worthless agreement that ignores migrants' voices and from which little can reasonably be expected. I don't share this negative assessment. The compact was developed through a widely inclusive multilateral process. In 2017 a series of five thematic discussions on key topics was held and diverse participants included state agents, international and regional organizations, NGOs, members of the private sector, refugees, migrants and host community representatives.[5] Input from a wide range of stakeholders, including groups that represent migrants' interests, was both sought and received.

Let's examine some of the compact's content to gain perspective on what the agreement can achieve. My view is that the agreement's 23 principles constitute important commitments to reduce some key elements of migration injustice. The claim is that this welcome agreement can be a basis for making further gains, not that it represents perfection here and now. There is an available pathway for improving on its defects that would make it a good scaffold for further progress. Consider, for instance, these principles. Principle 5 commits to enhancing the availability and flexibility of pathways for regular migration. Principle 12 enjoins us to strengthen certainty and predictability in migration

[5] "The Global Compact on Refugees: UNHCR Quick Guide," September 2018 available online from www.unhcr.org

procedures. Principle 14 recommends that we enhance protection, assistance and cooperation throughout the migration cycle. Principle 23 affirms commitments to strengthen international cooperation and global partnerships for safe, orderly and regular migration. Principles such as these would offer important gains for migrants relative to their current option set and so are worthy of our support. The document establishes migration as a key international priority and lays out an agenda for further state cooperation.

Are states' commitments to the Global Compact agreements of little value for achieving migration justice? Chris Bertram believes that my view requires only weak promises to make good faith human rights-relevant efforts (for instance with regard to the goals of the Global Compact) and so does not have the force I claim for it. This view ignores a couple of key points. First, I argue that states have agreed to hold each other to account for their performance on the conditions articulated in the Global Compact. More generally, I have also argued that one of states' core contribution requirements is to hold each other to account for performance on their human rights commitments (*The Accountability Requirement*). And at various places in the book I argue that an important requirement necessary for state legitimacy is that states must commit to practices of accountability for their performance and treatment of migrants.

In addition, one of the central rights I champion is that migrants have a right to a fair process for determining their rights. They are also entitled to a full accounting for that determination. And, significantly, states will be held to account by multiple stakeholders for their performance as others judge the credibility of their human-rights compliance efforts. We discuss this key right further in sections below, but for now, notice that what I am proposing aligns very much with the compact's commitments: there will be

important channels for multiple states and stakeholders to hold states to account.

So, as I see it, the Global Compact presents an important opportunity to strengthen the international response to large migration movements that no one state can adequately address by itself. But whether or not it is ultimately successful depends largely on how implementation proceeds and the support it gets from the international community. In many ways we are at the beginning of a concerted effort by the international community to work towards desired outcomes "with a shared sense of direction, purpose and accountability. It is a working tool – forged in an environment of cooperative multilateralisms – that contains the building blocks for further progress towards more equitable and predictable sharing of burdens and responsibilities into the future".[6]

IV

Should we Endorse Open Borders?

Is a state obliged to make room for as many stateless people as it can, consistent with other commitments? Is there a human right to immigrate? Should I endorse the open borders position?

As Javier Hidalgo sees it, much of my argument about state's rights to self-determination assumes that there is no human right to immigrate. But if there is a human right to immigrate then my argument does not work. So is there a human right to immigrate? Should I endorse open borders?

Let me begin my response to this cluster of concerns by noting that our human rights practice acknowledges that we do have some important human rights that bear on the question of whether there

[6] *Ibid.*

is a human right to immigrate. Consider articles 13 and 14. They specify:

> 13 (1). Everyone has the right to freedom of movement and residence within the borders of each state.
>
> (2). Everyone has the right to leave any country, including his own, and to return to his country.
>
> 14. (1). Everyone has the right to seek and enjoy in other countries asylum from persecution.
>
> (2). This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Freedom of movement within the state is an important freedom, both in itself but also because of the ways in which it facilitates the fulfillment of other rights. But note that Article 13 (1) only covers freedom of movement *within the state*, not the freedom to move to one's preferred country. And this for good reason: our freedom of movement is importantly limited by other significant human rights. So consider in this regard, Article 29 which places some important limits on freedom of movement (as it does with all human rights). When limitations on freedom are needed to secure due recognition and respect for other rights and freedoms such as "just requirements of morality, public order and the general welfare in a democratic society", all human rights can be correspondingly limited. There are significant justifiable grounds for limiting freedom of movement within human rights practice, and this is the kind of argument I make in Chapter 9. So, my position is that important considerations may justifiably limit movement across borders. In responding to Hidalgo I would agree that there are important human rights to freedom of movement.

But I would also argue that that agreement does not pave the way for open borders. From within our human rights practice and from my own framework we can justifiably place important limits on such rights.

Hidalgo rehearses my sheer numbers argument in which I argue that we can justifiably limit immigration in the face of a large number of candidates wishing to migrate. Importantly, large numbers can disrupt plans to provide for citizens' basic human rights and the state can regulate the flow of migrants to discharge their duties to manage human rights fulfillment. Hidalgo characterizes my position as a lesser evil argument.

So, can the sheer number of people who wish to immigrate make it permissible for states to place limits on immigration? Does my "sheer numbers argument" work?

First of all, Hidalgo notes that defenders of open borders also endorse the sheer numbers argument. Open borders advocates agree that states may restrict immigration if that is necessary to avert sufficiently bad outcomes. In support he cites Carens who says "the state is obligated to admit as many of those seeking entry as it can without jeopardizing national security, public order and the maintenance of liberal institutions" (Hidalgo 2021, 60). Oberman expresses similar sentiments when he says limits on immigration are permissible when "the costs are particularly severe and there is no acceptable alternative means to address them" (Oberman 2016, 46).

Hidalgo believes that this is a problem for me because I aim to defend a position that occupies middle ground between the positions of those who advocate for open borders and their critics. So it looks like my argument can't be distinguished from an open borders position. We both seem to hold the view that states can restrict immigration for lesser evil reasons.

My response to Hidalgo is that this result reflects badly on the open borders position, since the label fails to describe the position adequately. As I have long thought, the open borders position is misnamed. It should be called the "more open borders than status quo" view. So, to my mind, the issue is about the grounds and processes for determining whether reasons reach the required justificatory threshold for limitations. Indeed, a central claim I make is that migrants have a right to a fair process for determining their rights. Since much hangs on what constitutes fair grounds to limit entry, migrants have a right to a fair process for determining those grounds in ways that can withstand robust accountability tests.

So now we might turn to a discussion of what are the relevant empirical consequences of increased immigration. These are often thought relevant to making limitation arguments. And here Hidalgo supposes that we might have different views on the evidence, which is why he imagines we would in practice settle on different verdicts as to whether immigration can permissibly be restricted. He then presents considerable evidence that immigration does not always yield the consequences feared. I largely agree with that line of argument and the evidence presented. But, by his own admission, Hidalgo does not pretend to have presented an exhaustive treatment of the relevant considerations. So pointing out the many cases in which increased immigration is benign, inconsequential or even positive, is not a conclusive line of argument. In concluding his argument he says that:

> The consequences of immigration are complex and some of these effects are negative. But the sheer numbers argument says that immigration restrictions are justified if immigration undermines the delivery of essential goods and services in a way that would threaten the human rights of citizens. Moreover, to

> satisfy this criterion, immigration must surely do more than strain certain public services or impose some costs on citizens. Instead, immigration must impose severe costs on a recipient society and *there must be no alternative way of mitigating these costs except by immigration restrictions*. And there's little evidence that rapid and large-scale increases in immigration have severe social costs of this kind or that we *lack good alternative means of addressing these costs*. I thus conclude that the sheer numbers argument generally falls short of justifying immigration restrictions in practice (Hidalgo 2021, 63-64, emphasis mine).

I disagree that for limitation arguments to work there must be no alternative way of mitigating costs associated with large numbers of immigrant admissions. At least I disagree that we must require this in order for migration policy to be justified in our contemporary world. In theory, truly inspirational leaders could mitigate many costs associated with migration. So there is a theoretical argument for no restrictions. But in practice inspirational leaders are rare and residual fears are common amongst ordinary people, no matter how much evidence is presented that immigration on balance creates many community net benefits. In practice we do have to take some account of "where people are at" if we want our immigration policies to be durable and stable. I would argue that increased immigration was an important factor in both the Brexit decision and the rise of Trumpism. And I would also argue that in both cases these decisions have resulted in regressive developments that are not conducive to justice, such as the weakening of democratic institutions, unjust migration policy and a climate in which undoing these injustices has become much harder, especially in a world where what counts as evidence is heavily contested. While we could imagine alternative futures and actions leaders could take to mitigate harms, these paths are not straightforward. Here we are

faced with some important real world constraints and maintaining Hidalgo's position in such a situation is unlikely to advance the open borders cause. In such a situation I maintain that the sheer numbers argument does indeed have force if we hope to reduce immigration injustices incrementally in our actual world.

So summarizing my response to Hidalgo I would emphasize that the open orders position advertises itself as one thing but really trades on ambiguities. Open borders advocates should abandon their misleadingly advertised position and endorse my view as more consistent with their position. What I think we can agree on is that there should be a right to a fair process for determining one's rights. I say more about the right to a fair process for determining one's rights below.

V

Unauthorized Migrants

Should I adopt a strategy of arguing for the 'generic unauthorized' rather than the case-based approach I adopt in considering fair treatment for undocumented migrants? In his subtle contribution, Matthew Lister (2021) wonders whether we should pursue a general account of how to respond to unauthorized migration that would apply to a large majority of cases or whether a more piecemeal approach focusing on particular cases is to be preferred.

As he describes my approach, I seem to focus primarily on five groups of people for whom I argue their status should be regularized, and the result is that we get only a partial account of fair treatment for the unauthorized rather than something comprehensive. An alternative to my favoured approach is to argue that some 'special' feature of being unauthorized grants them

immunity from removal and regularization of status. If a large enough percentage of the total unauthorized population shares the special feature then on grounds of administrative simplicity we could extend regularization to large classes of people in some general category. On this approach using a proxy like the passage of a specified amount of time stands in for the characteristic thought to be morally significant. A prominent scholar who adopts this strategy is Joseph Carens. He thinks that after 5 years unauthorized migrants are social members of a community, so using the passage of time as a proxy for regularization is better than enquiring into the specific details of particular unauthorized migrants' cases.

For all its strengths, Lister notes that there are also problems with this general strategy since it would seem to encourage more migrants to cross illegally thus exposing more to danger, for instance when parents take their children on long walks through deserts to cross borders in ways that aim to evade detection. Furthermore, if regularization policies become common, other restrictive measures are likely to be introduced such as issuing fewer visas for temporary admission or requiring large bonds from visa applicants. We must take account of the plausible undesirable consequences that might well accompany regularization programs and factor them in to the policies we argue are defensible.

He sees three possible ways forward in light of the complexity we face. The first is to focus on special cases, as I largely do. The second approach is to standardize regularization after a set period and just bite the bullet on negative consequences such as creating increased pull factors towards increased unauthorized migration and restrictive policy changes. A third approach is to opt for special treatment for select unauthorized migrants but also provide occasional randomly spaced amnesties for those who have been in the country for set periods, which would probably reduce pull

factors. He is unsure which path to choose but leans towards the second or third options. What is clear to him though is that unless we consider the generic case, and not just special ones, we are left with an unfinished account.

My preferred approach is to have something that is closer to judging individual cases on their merits rather than making blanket pronouncements about some imagined generic case. One of the central rights for which I argue is that migrants have rights to fair processes for determining their rights. This automatically means we are required to evaluate each case on its merits. In addition, in *Justice for People on the Move* I argue for at least 4 important contribution requirements that legitimate states must fulfill, the first two of which are particularly pertinent:

> A commitment to maintain an ethos conducive to respect for the practice of human rights, such as that everyone deserves to be treated with dignity and respect as an individual human being (*Ethos Requirement*).
>
> A commitment to practices of accountability (*Accountability Requirement*).
>
> A general commitment not to promote arrangements in which respect and protection for people's human rights is significantly worsened, ceteris paribus. So, in the absence of compelling countervailing reasons, states should reject policies in which protection for people's human rights deteriorates markedly, especially when such protections are reasonably secure (*Constraint Against Worsening*).
>
> A general commitment to show appropriate international concern as required by the practice, to undertake action when one is the agent capable and appropriately placed to have sufficient reason to act (*Commitment to Action Under Relevant Circumstances*).

Taking these requirements seriously requires us to be more sensitive to individual case features. The accountability requirement also has important implications for migrants; for instance, it can mean migrants must take responsibility for their past behavior and, in some cases, agree to appropriate restorative courses of action for any transgressions. Appropriate restorative acts can include community service or the payment of fines. In many cases I am inclined towards Michael Sullivan's position, which involves acknowledging service already provided to the community, such as in the form of military service or serving the community through essential work in education, healthcare, childcare and the like. In many cases such service is more than enough to make amends for any past transgressions.

This individualized approach also offers a more nuanced account of fair treatment towards the fifth category of cases I discuss, namely those who are akin to victims acting in self-defense in a failed state system situation. In such cases we cannot very well blame the undocumented for acting as they do and those who are denied opportunities to enter lawfully act permissibly when they enter anyhow. The third and fourth legitimacy requirements briefly described above might come into play in those cases since in many cases host countries have important obligations to absorb costs associated with not sending people back to suffer in miserably inadequate failed states in a failed state system.

VI

Obligations concerning resistance, sanctuary and welcome

There is much worth engaging with in Patti Tamara Lenard's rich analysis. She has usefully outlined several kinds of actions individuals and collectives could undertake to help inform discussion about how to fight immigration injustice. As she rightly

notes, these actions have various costs. And she argues that my emphasis on duties of welcome could impose more substantial duties than I seem to appreciate. Ultimately, she hopes to stimulate more discussion about costly actions that must be taken in defense of immigration justice, as a matter of justice.

As Lenard reads my text she believes I suggest that "citizens cannot be asked as a matter of course to resist 'unjust immigration law' because it can 'involve significant costs that we cannot always reasonably oblige particular citizens to absorb" (Lenard 2021, 69-70). But citizens often do undertake these costs. She suggests there is an inconsistency between my account of global immigration injustice and my view that citizens cannot be asked to bear significant costs in order to struggle against it. In particular, she argues that citizens are obligated to accept costs when governments pursue unjust immigration policies.

The reason I adopt a more tentative stance towards resistance obligations is that I am mindful that the distribution of costs of resistance can be highly inequitable. I do not think it is fair to oblige all citizens equally and quite unjust to do so oblivious to the demands this places on citizens who themselves may be suffering considerable disadvantage.

While I do give as one example of citizens' obligations in the local context that they ought to vote for political parties that support immigration justice, she assumes in her argument that this must entail voting for parties that want to *increase admissions*. And that frequently leads to the so-called progressive's dilemma: should we support more admissions or more expansionist redistributive policies? Often we cannot have both and supporting one often seems to work against the other.

In response to these charges I would draw attention to the fact that there are different ways political parties can support

reductions in immigration injustice, for instance by supporting better integration processes, stronger rights for labor migrants, programs to promote more inclusive communities and more tolerant, compassionate and respectful public dialogue concerning migrants. On my account migration justice is not all about increasing numbers of migrants but rather about pursuing a range of desirable goals including increasing accountability around migration decisions, playing one's part in international agreements, and especially holding each other to account for the commitments we make and the normative constraints embedded in the human rights practice. These are all ways of supporting migration justice that do not force us into the familiar false dichotomy of having to choose between more admissions or more robust redistribution among citizens (a familiar way in which the issues are juxtaposed). Even if we opt for more robust redistribution and stronger limits on numbers admitted, we can undertake many relevant actions that would help reduce migration injustices. For instance, I also argue that citizens can create welcoming spaces for newcomers in ways that do not affect robust redistribution.

As to the questions about what is included in the scope of welcoming duties, our duties of welcome would certainly extend to many kinds of solidarity actions to signal empathy with particular groups.[7] Lenard also wonders whether forms of "pro-active welcome action" are obligatory such as agreeing to privately

[7] Interestingly, some citizens with specific capacities may well be expected to do more. So as an example, those with professional skills such as medical, legal or educational skills may well be expected to assist needy migrants when they require help in areas that involve their professional expertise. Professional duties associated with welcome might be more stringent than those of ordinary citizens. But notice again that we must be mindful of the distribution of costs. While professional bodies and collectives can be expected to assist, unless there is a fair way to distribute costs among members, no individual teacher, lawyer or other professional is required to take on onerous costs in all cases.

sponsor refugees if something like the Canadian Private Sponsorship of Refugees Program is available. My understanding is that these programs can involve considerable costs so again we cannot mandate them irrespective of people's ability to absorb costs.

As I argue, citizens have obligations to take some steps in their local contexts that express their justice commitments, such as by showing hospitality to newcomers settled in their communities and partnering with others to build local inclusive communities. One relatively accessible way to assist in reducing migration injustice is by assisting efforts to create more inclusion of the migrants in our neighborhoods and nearby locales. These migrants are not abstract ideas – they are human beings towards whom we owe more in the name of creating welcoming communities.

Because resisting unjust immigration law can involve significant costs to particular individuals, we cannot always reasonably oblige particular citizens to absorb these. We need to be careful about over-generalizing in this domain. But as I also add: "if costs of resistance are fairly distributed among a set of citizens such as in a particular city, citizens may have obligations to play a role in collective efforts". I note some other scholars who have done a good job arguing these points.[8] And I choose to focus in that brief section on other obligations that I think are somewhat neglected. There are many ways citizens might support migration justice. The one I focus on can help to create the kinds of inclusive communities necessary to sustain a range of migration justice policies. I note that focusing on these obligations is just one among several important kinds of responsibilities. But I stress obligations to welcome newcomers in one's local environment as an important action in creating the kinds of inclusive communities we should

[8] For some excellent treatment of duties to resist unjust immigration law see, for instance, Hidalgo 2015 and 2016; and Bertram 2018, especially chapter 3.

endeavor to foster in seeking to promote justice on many levels, not only because it is a generally accessible pathway for action for many people but also because of its foundational role in supporting other policies conducive to migration justice.

Let's turn to another of Lenard's criticisms and ask: Are sanctuary policies better understood as about resistance or welcome? Looking at a range of cases in Europe and North America, we notice that sanctuary cities can refer to some quite diverse practices.[9] In North America the practices often centrally involve limits on cooperation with a national government aiming to enforce immigration law, frequently on grounds that cooperation limits make communities safer and protect basic rights better than policies of full cooperation. In Europe, the focus of sanctuary cities often lies elsewhere, namely in creating a welcoming environment, especially for those seeking safety, and positive community relationships.[10] The City of Sanctuary social movement began in Sheffield in 2005. It aims to create a culture in which virtues of hospitality and welcome are valued and in which immigrants, especially asylum seekers and refugees, are able to engage positively with local communities and made to feel that they can make a full contribution to those communities.[11].

Both dimensions of the sanctuary movement – resistance and welcome – are important. However, mindful of the distribution of costs issue, I wish to emphasize these local obligations that I believe are accessible for most citizens. There are also important organizations that are creating helpful structure for promoting a welcoming culture, such as Welcoming America, which now has chapters or similar partner kinds of organizations all over the

[9] See, for instance, Kagan 2018; also Motomura 2018.
[10] See for instance, Darling, Barnett and Eldridge 2010.
[11] See for instance, the City of Sanctuary website at: https://cityofsanctuary.org/

world.[12] Citizens have a key role to play in building resilient connections between newer immigrants and older residents, helping to reshape the boundaries of "us" and "them" in creating inclusive communities.

There is much more to say about citizens' obligations to bring about more just arrangements for people on the move. Citizens, after all, have important obligations to help create and support institutions that have credible prospects for bringing about justice. Here I have focused on local obligations that give expression to only some of our justice commitments, namely to build inclusive communities. Importantly, I don't pretend to undertake an exhaustive treatment of all the obligations citizens have. One can, after all, only take on so much in one book. But in future work I hope to consider more of the important challenges Lenard raises.

VII

Family separation and migrant labourers' human rights

While Luara Ferracioli generally approves of my strategy of working out which rights are non-negotiable in temporary labour migration arrangements and which are not, she thinks that the compromises I believe to be justified in the case of family life are not ones she thinks of as justified. In particular they ignore children's rights. She argues that separating parents and children is not a defensible temporary labour migration arrangement. She argues "that the right of children *not to be separated from* ***each*** *parent they are already in a valuable relationship with* creates stringent obligations on migrant workers, their employees, as well as host societies at large" (Ferracioli 2021, 32, emphasis mine). Ferracioli believes that states, workers and employers do wrong when they

[12] See the Welcoming America website at https://www.welcomingamerica.org/

"avoidably create a situation where children are left for a significant period of time without access to intimacy and affection from *each* of their parents". Such separation denies them access to one of the most important goods of childhood, namely, "a loving relationship with *all* of their competent parents, however many there are" (*ibid.*, 34). She argues that it is not reasonable for parents to accept jobs that require separation from their children such as a long-term research expedition in the Arctic. So long as there are other jobs parents can take up that don't require such separation then it is wrong for them to accept ones where separation must be endured.

Now this is all well and good, but the kinds of people and situations I have in mind in the chapter she targets are ones where at least one parent regularly has to work multiple jobs to make ends meet and may have little time at home to spend with their children, while also having inadequate funds to look after their family's basic needs. Their paltry wages mean they have inadequate funds for nutritious food and other basics. So then it becomes a question of which interests and needs to prioritize and I believe parents should have a large sphere of control over making that sort of decision, mindful of the interests and needs of their particular children and opportunities actually available to them. Of course, it is terribly unjust that they are faced with such poor options. But in Chapter 7 of *Justice for People on the Move* I have already dealt with the fundamental injustice issues and am examining what policies we might adopt *here and now* in the face of such injustices and very important real-world constraints, as we work towards a better situation.

In Ferracioli's view, it is not unjust that parents have some life choices closed off to them once they become parents. She thinks employees also have obligations to make structural changes to prevent separations. Being a parent is a "moral relationship that gives rise to stringent obligations on her part to protect and

promote the interests of her child, including the core interest that children have in enjoying on-going love and care from *each* of their competent parents" (*ibid.*, 38, emphasis mine). Indeed, in her view children have a right against all members of society that they do not avoidably contribute to situations in which their core interests are unprotected for significant periods of time. Even if children are competently cared for when their migrant worker parents take up jobs overseas, they will still suffer the "moral loss of not enjoying one of the core goods of childhood for a significant period of time: the good of a loving relationship with *each* existing competent parent" (*ibid.*, 39, emphasis mine).

Note that there is an assumption in this line of argument that a parent in another state must deprive her child of the good of a loving relationship, but I think this is a very big assumption that must be challenged especially given what we know about maintaining relationships in a world living with covid-19 (and plausibly having to live with it for some years to come). Over 2020 we have all learned many ways to connect and stay in touch with our nearest and dearest living in other households, be they next door or on the other side of the world. The technological innovations here are important to how we sustain our relationships with our closest family and friends.

Putting covid considerations aside, it is also worth mentioning that plenty of parents are physically present but not really emotionally available given their job-induced exhaustion. By contrast, other parents who spend large chunks of time away from their children are much more connected to them emotionally. I submit that being territorially present is not in fact as important as being emotionally present and currently there is no way employers or the state are in any position to regulate this well. There are no measures in place to ensure this good is available to citizen children who live in the same household as their parents, so it would seem

that migrants are being unfairly singled out for punishment following Ferracioli's reasoning.

While I might agree with Ferracioli that it may be problematic for agents to choose careers taking them away from their children for extended periods when decent alternative jobs are available, the problem is that for most of the migrants I am concerned about, those decent alternative jobs are not available. So what is a parent to do, here and now? If we take the "rights versus numbers" dilemma seriously, what are we to do? Ferracioli's view is that labour migrants should be able to bring their children with them. While she argues that temporary immigrants should be expected to cover some costs associated with family life this does not include costs associated with children's core rights, such as rights to health care and education. In her summary she says that host states may not decrease the

> … costs of temporary migration by putting children in a situation where they spend significant periods of time without one of their parents. The discussion does not vindicate the interests of temporary migrants to bring any family member with them and so it may well be that Brock is partly right. Still, I hope to have made it clear that no amount of savings or remittances justify placing children in the precarious position of lacking access to a loving relationship with ***at least one*** of her competent parents for significant periods of time (*ibid.*, 46, emphasis mine).

This summary contains a curious shift in the argument from requiring that every child must have access to *each* parent for the good of having a loving relationship with that parent, to a view which requires access to *at least one* parent. This is a departure from earlier statements of the position. So there would seem to be an important unclarity in the argument – is the requirement to have

access to *at least one* of the parents or *both*? If only one, the argument is less problematic. If both, the argument points in the direction of requiring too much, as I go on to explain.

If she does indeed mean both, the argument has the implication that since it is wrong to deny a child access to a loving relationship with *each* parent then it is wrong also if a temporary migrant worker cannot also bring her partner (or at any rate, the child's other parent), other children, her parents, her parents' parents, her siblings, her partner's siblings, and so on. Indeed, whole generations of families would need to migrate if one does so permissibly. Furthermore, she must have in mind that her argument applies only to dependent children or this would have implications for too many adults. At the very least the argument needs clarification. But, I submit, whatever force the argument might have had in early 2020, it has lost some of its punch in the face of predictions that covid will be with us for the foreseeable future. We can sustain emotionally rich relationships even when we are forced to reside on different continents. So a key premise in the argument needs additional defense.

In closing this response essay, I note that one common theme in several responses has been to show how human rights considerations can be blended with real-world constraints to produce normatively-informed policy that, if enacted, can make important contributions to reducing migration injustice here and now. We should continue to bridge the divide between ideal and non-ideal world theorizing, by further exploring the resources our human rights practice offers in aiming at a world that better instantiates justice.

University of Auckland

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