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WORKING PAPER

Debating responses to unauthorised immigrant residence

Rainer Bauböck, Julia Mourão Permoser, Martin Ruhs, and Lukas Schmid (Eds.)

European University Institute

Robert Schuman Centre for Advanced Studies

DILEMMAS

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'Dilemmas' is a joint initiative of the Migration Policy Centre and of the research project "Migration as Morality Politics" [FWF Grant V 743-G].

The project is coordinated by Martin Ruhs (European University Institute), Julia Mourão Permoser (University of Innsbruck), Rainer Bauböck (EUI and Austrian Academy of Sciences) and Lukas Schmid (Goethe University Frankfurt).

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Abstract

This working paper combines Lukas Schmid's article "Responding to unauthorized residence: on a dilemma between 'firewalls' and 'regularisations'" with three critical responses as well as a rejoinder by the author. Schmid argues that a set of liberal-democratic commitments gives conscientious policymakers strong reason to implement both so-called 'firewall' and 'regularisation' policies, thereby protecting unauthorised immigrants' basic needs and interests and officially incorporating many of them in society. He then explains that the background imperative of immigration control creates a dilemmatic tension between these policies, as regularisation is envisaged alongside the removal of the ineligible, which is in turn hindered by the implementation of firewalls. This creates a dilemma between the pursuit of two policy goals that are both underwritten by the same value commitments. Schmid concludes that the best way to mitigate this dilemma is to design regularisation policy in a way that leaves only a small number of unauthorised immigrants subject to removal. Antje Ellermann's response reflects critically on Schmid's understanding of firewalls, arguing that there is good reason to think that the presence of firewalls does not hinder the implementation of removals of unauthorised immigrants who are ineligible for regularisation. She concludes that, contrary to Schmid's argument, there is no true ethical dilemma between firewall and regularisation policy. Adam Omar Hosein's contribution argues that the tensions Schmid discusses arise only because of his adoption of widely shared assumptions about the proper basis for regularisation policies. He suggests they can be avoided by adopting a superior justification for regularisations: the 'autonomy argument.' In the last response, Cecilia Menjívar reflects on some constraints conscientious policymakers may face when dealing with ethically dilemmatic choices, such as a policy landscape of government agencies with conflicting goals as well as foreign policy and international obligations, all of which are rooted in anti-immigrant backlash and racism around the globe. The working paper concludes with a rejoinder, in which Schmid discusses the contributors' key points, outlines agreements and disagreements, and explores the bigger picture sketched by the working paper's discussions.

Keywords

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Kick-off Contribution

Responding to unauthorized residence: on a dilemma between 'firewalls' and 'regularizations'

Lukas Schmid (Goethe University Frankfurt)

Abstract

Residence of unauthorised immigrants is a stable feature of the Global North's liberal democracies. This article asks how liberal-democratic policymakers should respond to this phenomenon, assuming both that states have incontrovertible rights and interests to assert control over immigration and that unauthorised residence is nevertheless an entrenched fact. It argues that a set of liberal-democratic commitments gives policymakers strong reason to implement both so-called 'firewall' and 'regularisation' policies, thereby protecting unauthorised immigrants' basic needs and interests and officially incorporating many of them in society. It then explains that the background imperative of immigration control creates a dilemmatic tension between these policies, as regularisation is envisaged alongside the removal of the ineligible, which is in turn hindered by the implementation of firewalls. This creates a dilemma between the pursuit of two policy goals that are both underwritten by the same value commitments. Though it cannot be entirely dissolved, I argue that the best way to mitigate this dilemma is to design regularisation policy in a way that leaves only a small number of unauthorised immigrants subject to removal.

Do firewalls create social fog?

Antje Ellermann (University of British Columbia)

(Originally published [online](), on the 'Dilemmas website', on 10 September 2024)

Lukas Schmid's article "Responding to Unauthorised Residence: On a Dilemma Between 'Firewalls' and 'Regularisations'," explores the ethical dilemmas faced by policymakers as they seek policy solutions to the presence of unauthorised immigrants. Schmid's analysis is premised on two widely shared assumptions. First, as sovereign states, liberal democracies have the right to control immigration and face strong political incentives to do so. Second, despite states' interests in border control, effective immigration control remains an elusive policy goal. This tension makes unauthorised migration one of the most challenging issues for policymakers to address.

Schmid shifts our focus from the literature's emphasis on "hard" ethical dilemmas involving competing values to ethical dilemmas stemming from competing policy options rooted in the same ethical commitments. He identifies a dilemma between two key policy approaches to the presence of unauthorised migrants: firewalls and regularisations. Firewalls are policies that prevent organisations and institutions from cooperating with immigration enforcement, thereby allowing unauthorised immigrants to access essential services without fear of identification and deportation. Regularisations, on the other hand, grant legal status to unauthorised immigrants. Because of the state's vested interest in immigration control, regularisation programs are conditional and, often, time-limited, and go hand in hand with the expulsion of those migrants who do not qualify for regularisation. This is where Schmid identifies an ethical dilemma. Despite the importance of removal for the political viability of regularisation programs, strong firewalls create a "social fog" that impedes state efforts of locating and expelling unauthorised immigrants. Schmid then proposes mitigating this dilemma by designing regularisation programs that are continuous and have minimal conditions, thus reducing the need for extensive enforcement and allowing firewalls to function more effectively.

In my work on the ethics of migration ([Ellermann 2014](); [Ellermann and Goenaga 2019]()), I share the basic assumptions underpinning Schmid's article, which are driven by a commitment to developing policy prescriptions within the fundamental constraints of the current political order. I also align with the value commitments that support both firewall and regularisation policies. I am persuaded that Schmid's proposal to develop regularisation programs characterised by minimal conditionality and continuity over time is both ethically and politically desirable.

However, I remain unconvinced by the assertion of the ethical dilemma that underpins Schmid's article. Referencing Bommes and Sciortino ([2011]()), Schmid (2024, 2) argues that "firewalls ensconce unauthorised immigrants in a 'social fog' – a layer of protection that hides some of their traces from immigration law enforcement – which stifles efforts to forcibly remove those deemed ineligible for regularisation." In other words, Schmid asserts that the presence of firewalls hinders the implementation of removals of unauthorised immigrants who are ineligible for regularisation, thus threatening to undermine political support for regularisation programs.

Firewalls are designed to protect unauthorised immigrants from potentially hostile environments. By preventing private and public entities from reporting individuals without legal status to immigration enforcement officers, firewalls ensure that unauthorised immigrants can access essential services and public goods, such as housing, transportation, medical care, and public schooling without the risk of detention and deportation. However, recognising the power of firewalls in supporting the welfare of unauthorised immigrants does not mean that firewalls will necessarily hinder immigration enforcement efforts. While it is true that firewalls can obscure some aspects of unauthorised immigrants' lives from law enforcement, this does not automatically translate into a hindrance to the overall enforcement of immigration laws.

Schmid's argument suggests that immigration enforcement officers are more likely to identify and deport unauthorised immigrants in jurisdictions without firewalls compared to those with firewalls. However, this argument relies on an "all else equal" logic, which overlooks the crucial role of immigrants' agency in responding to immigration enforcement efforts. My research (Ellermann 2010) has demonstrated that, given the high stakes involved, unauthorised immigrants actively develop resistance strategies to evade detection and deportation in response to immigration enforcement efforts. In contexts that lack the safety provided by firewalls, unauthorised immigrants are not necessarily more detectable. Instead, they will adopt resistance strategies that increase their invisibility. This is a recurrent finding in the literature. For example, Engbersen and Broeders (2009) examine the impact of the removal of firewalls and the tightening of internal immigration controls in the Netherlands during the 1990s and 2000s. The Linkage Act of 1998, for instance, excluded unauthorised immigrants from access to social security benefits, housing, welfare, and medical care. The authors find that unauthorised immigrants developed a range of survival strategies. As they shifted their employment to the unregulated informal labour market, the growth of intermediary organizations facilitated the matching of unauthorised workers with jobs. A burgeoning "illegal paper market" enabled unauthorised workers to acquire fake documents and identities. Additionally, unauthorised immigrants increasingly made themselves unidentifiable by destroying all documentary evidence of their identity. This tactic ensured that, if apprehended, the Dutch state would be unable to deport them. Instead of reducing social fog, the dismantling of firewalls actually thickened social fog. Returning to the work of Bommes and Sciortino (2011, 221-22), cited by Schmid, they conceptualize "social fog" as the social structures produced by unauthorised immigrants to survive and "evade control and identification by hiding from the state in their modes of working and living." Rather than being the result of firewalling—policies that allow unauthorised residents to access essential services without the fear of being reported to immigration authorities—these structures emerge as immigrants hide their modes of working and living from the authorities, creating a layer of obscurity. It is the exclusion of unauthorised immigrants from resources and benefits that drives the creation of these alternative, "foggy" structures to ensure their survival.

Firewalls, by contrast, reduce social fog rather than thickening it. When children without legal status have the right to attend school, when unauthorised immigrants can access basic healthcare and housing, and when they can report crimes and labour violations without the fear of deportation, the need to hide in social fog is significantly reduced. The creation of firewalls facilitates a degree of visibility and integration, enabling unauthorised immigrants to participate in society more openly and securely. This participation, in turn, reduces the need for them to develop hidden, alternative structures.

If firewalls do not thicken the social fog that complicates immigration enforcement, then pursuing firewall policies and regularisation programs do not have to stand in tension with each other. Not only is there, as Schmid acknowledges, no "hard" ethical dilemma arising from conflicting values, but there may also be no "soft" ethical policy dilemma either.

Regularisations and firewalls are compatible if we grasp the best justifications for each

Adam Omar Hosein (Northeastern University)

(Originally published online, on the 'Dilemmas website', on 10 September 2024)

In his interesting and challenging paper, Schmid (2024) proposes that there is a serious tension between two familiar liberal policy approaches to the presence of unauthorised immigration, namely 'firewalls' and 'regularisations'. I'll begin by explaining the dilemma he proposes, considering some different potential sources of tension he exposes between the two policies. I'll argue that these tensions arise only because of some widely shared assumptions that Schmid makes about the proper basis for regularisation policies. I'll suggest that if we adopt an alternative, and in my view superior, basis for regularisation—what I call the 'autonomy argument'—Schmid's dilemma does not arise. His paper thus provides some indirect support for the autonomy argument, since it suggests that only that approach allows us to reconcile important liberal policies.

Definitions

Let me begin with a reminder of what 'firewalls' and 'regularisations' are. 'Firewalls' introduce separation between the institutions responsible for immigration enforcement and other institutions in society, such as schools, hospitals, employers, and so on. To see the purpose of the firewall, suppose that hospitals are required to investigate someone's immigration status when they access services and to report that status to immigration authorities. Those authorities may then use the reports to initiate removal proceedings against unauthorised migrants. This would plainly deter authorized migrants from accessing the hospitals, since doing so could result in deportation. The result is that the migrants will be denied the essential good of access to emergency health care. Non-migrants can also be impacted, since, for example, lack of access to vaccination on the part of migrants can create problems of public health. Firewalls block the flow of information between the relevant institutions and thus protect access to an essential good.

While firewalls are put in place to protect all unauthorised migrants, regularisations grant special protections to unauthorised migrants who are present for the longer-term. Regularisations provide these people with a 'right to remain' if they can demonstrate continued presence for a certain period and, perhaps, the absence of a criminal record, stable employment, and so on. That right to remain shields them from any risk of removal for at least some designated period of time (say, five years). The most robust regularisation programs, which I'll focus on here, provide access to a permanent status—such as 'permanent residence' or citizenship—that offers a permanent shield from removal.

What is the justification for regularisation? There are several possible arguments (Hosein 2014, 2016, 2019; Song and Bloemraad 2022), but here are two that play a crucial role in Schmid's discussion. One, the 'social ties' argument, says that regularisation is an appropriate recognition of the social bonds and contributions these migrants have developed (Carens 2013). The other, 'anti-subordination', argument says that there is something inherently unacceptable in a liberal society about having a permanent underclass of people whose lack of permanent status will always keep them separate from the mainstream of society (Fiss 1999). Regularisation is a means of bringing these people into the mainstream of society and out of second-class status.

The Dilemma Explained

On the face of it, both firewalls and regularisations reflect some familiar liberal values and so it is unsurprising that theorists and policy makers who endorse one of the policies tend to endorse the other as well. Yet, Schmid makes the challenging claim that the two policies are in fact in tension with each other, creating a dilemma for policy makers of which to support. Why does the dilemma arise? There are really two quite different kinds of tension presented by Schmid and I'll explain them in turn. The first tension arises due to the potential evidentiary burden of regularisations. To go through the regularisation process, and thus receive a right to remain, a migrant must prove that they meet the relevant criteria. Let's suppose that these criteria are relatively extensive—that they include showing not just continued presence but also stable employment and so on—on the grounds that a migrant must prove they have developed the social ties and contributions that would make them deserving of regularisation. This means, Schmid (2024, 13) argues, that the firewall may be threatened because

> "when authorities must assess the validity of a large number of diverse documents submitted by regularisation applicants – proof of residence and employment, language certificates, and so on – they may require access to databases that firewalls should have sealed off from their view, such as those of housing or education providers."

Let's call this the 'evidentiary dilemma': that regularisation may require state access to evidence that is sealed off by firewalls. It's a dilemma, we have seen, that arises on the assumption that the criteria for regularisation include having to prove various social ties and contributions: an assumption backed by the social ties argument for regularisation.

The second tension identified by Schmid is quite different. It arises, he argues, because a demand for regularisation of qualifying long-term authorized migrants tends to be accompanied by a demand for removal of those who do not qualify. As he puts it:

> "the idea is often that regularisation be applied to those whose presence is considered most beneficial or who are deemed most deserving, and that those ineligible (usually the bulk of unauthorised residents) will be dealt with through enforcement" (Schmid 2024, 12).

Thus, to regularise some, a policy maker must remove others. And such removals are made more difficult with a firewall in place that makes it harder to find those who are eligible for removal. Thus, regularisation and firewalls are in tension. Why exactly should a decision to regularise some people be accompanied by a demand to remove others? There is clearly no necessary connection between the two, so why does Schmid claim that they tend to go together? It could be that in political terms it's hard to push through measures granting rights to immigrants in some areas without also taking away rights in others. Liberalism here must be offset by harshness there. And in practice we do often see regularisation accompanied by removals. But if this is the only connection between regularisation and removals, it would not be a deep one that reveals any special tension between regularisation and firewalls. Lots of other liberal policies, such as better healthcare access for people on temporary work visas or an expansion of family migration opportunities, might also create a countervailing demand for increased enforcement and thus be in tension with firewalls. So, we should see if there is anything special about regularisation in particular that creates a tension.

Schmid suggests that there is indeed a deeper connection between regularisation and removals, namely that the very same values that support regularisation tend to also demand removals. He points in particular to the anti-subordination case for regularisation: "reasons for regularisations, such as the importance of avoiding the creation of subordinated castes, may often also be interpreted as reasons for removals". Why exactly would anti-subordination values tell in favor of both regularisation and removals? The rough idea, I take it, is that the presence of a subordinated class is a kind of blight on the social fabric that states must take pains to abolish. One way to abolish it is through regularisation—thus making sure that the unauthorised migrants present are no longer part of a

subordinated class—and another way to abolish it is through removals—thus making sure that the unauthorised migrants who might become part of such a class are no longer present at all. On this way of thinking, the goal, as Schmid (2024, 11) puts it, "is not primarily the welfare of the unauthorised but that of the liberal-democratic social order." The blight of subordination is to be prevented not because it is bad for or unjust to the migrants themselves but because it is a stain on a liberal society to have certain kinds of inequality present. Regularisation and removals might both be needed in conjunction to erase that stain and any potential for it. Let's call this 'the expulsion dilemma'.

The Dilemma Diffused

To summarize the most important findings of the previous section, we saw that Schmid's dilemmas both arise from particular understandings of the core arguments for regularisation. If we adopt a social ties/contribution argument for regularisation, then we are pushed towards wanting the state to collect more substantial information from migrants, such as their employment history, and thus violating firewalls. For as Schmid notes, weaker criterion for regularisation, such as sheer length of presence would not require such extensive documentation or confirmation from social institutions. It is the social ties/contribution argument for regularisation that drives the evidentiary dilemma. And if we adopt an anti-subordination argument for regularisation, then we are led to the expulsion dilemma, because both regularisation and removals might be needed to fully expel any trace of possible subordination. The question arises, then, of whether these arguments for regularisation—the social ties/contribution argument and the anti-subordination argument—are in fact the best arguments for the policy.

I don't have space here to explain the objections to these arguments that I have developed in full elsewhere (Hosein 2016, 2019).[1] But I will briefly indicate here some reasons for rejecting these arguments. And I will show that my preferred argument for regularisations, the autonomy argument, does not lead to Schmid's dilemmas.

The social ties argument suggests that an unauthorised migrant becomes more deserving of regularisation to the extent that they have developed social bonds and contributions, such as participating in neighborhood associations and in the economy. The thought is that having become part of society their belonging should be legally recognized and their contributions rewarded. This argument misses a crucial form of burden placed on unauthorised migrants. Precisely because of their unauthorised status, it can be difficult for them to form extensive social ties, to participate fully in the economy, and so on. For their very unauthorised status and vulnerability makes it difficult for them to become full participants in the receiving country. If you know that you are vulnerable to sudden removal at any time, it is reasonable for you to avoid putting down as many roots and (as noted earlier) to avoid any activities that might potentially draw the attention of the authorities. Firewalls can mitigate these dynamics but not quash them entirely, since even if there are not formal connections between immigration authorities and other institutions one is still always vulnerable to being discovered directly by the immigration authorities or reported informally by another member of society. The social ties argument fails to notice the burdens that may lead migrants to avoid social ties and instead holds it against them if they fail to make those ties.

The anti-subordination argument has the attraction of recognizing some of the burdens of precarity. The uncertainty unauthorised migrants face is precisely what makes them live in more in the 'shadows' and become a potential subordinated underclass. But the argument does not robustly justify regularisation. For reasons already seen, it says that both removal and regularisation are potential ways to remove the social 'stain' of having an underclass present. And these removals might be targeted on long-term unauthorised migrants as well as recent arrivals. So, the state has the option of choosing to prioritize removal as its preferred solution to the problem.

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1 See also, esp., Song & Bloemraad (2022) for a discussion of the full range of arguments.

My preferred justification, the autonomy argument, begins by recognizing the great burden of long-term precarity (Hosein 2014, 2016, 2019). Autonomy requires the ability to make plans, stretched out in time, in life. Humans can potentially 'hedge their bets', living with uncertainty for a certain period. But to live indefinitely under precarious conditions is destructive of autonomy. States owe it to long-term unauthorised migrants to secure the conditions for this autonomy. One reason is humanitarian: the sheer burden of living without autonomy. The other reason is that states make demands of those migrants, claiming a right to control everyone within their borders and compel them to obey the law. This control, which is more extensive the longer someone is present, can only be justified if it is offset by positive efforts to ensure the conditions for autonomy, including by granting a right to remain. Unlike the social ties argument, the autonomy argument thus treats mere length of presence as the key condition for regularisation: no-one should be left living in uncertainty beyond a certain length of time. So, there is no need for invasive inquiries into employment and so on. And unlike the anti-subordination argument, the autonomy argument treats this regularisation as something *owed to* the migrants, so it cannot be substituted with removals and need not carry with it any demand for removals at all.

Now, the autonomy argument may still *permit* the removal of some people who are not present for a substantial period. But that alone doesn't create any tension with firewalls. The two policies—regularisations and removals—would just put two somewhat independent constraints on the actions of liberal states with respect to unauthorised migrants.

In sum, the dilemmas Schmid identifies arise only if we assume certain arguments for regularisation. If we adopt my preferred argument, the autonomy argument, the apparent tensions between regularisation and firewalls start to dissolve. And perhaps this is further, indirect, evidence that the autonomy argument is the best one. No doubt many objections to that argument have occurred to the reader, but I hope to have addressed central ones elsewhere (2014, 2016, 2019).

Do liberal states facilitate or undermine ethical immigration policy?

Cecilia Menjívar (UCLA)

(Originally published online, on the 'Dilemmas website', on 23 October 2024)

In this article, Lukas Schmid (2024) thoughtfully outlines an ethical dilemma for immigration policymakers. He proposes an alternative approach to immigration policies in major immigrant-receiving countries. To build his case, he distinguishes (and explains the relationship) between "firewall" policies, which mitigate the harmful effects of internal immigration policies, and regularisation policies, which provide immigrants with secure legal status and thus broader access to societal benefits and less insecurity about their rights. He carefully delineates the pros and cons of each approach, speaking from a commitment to maintaining the core institutions of liberal democratic societies, where the rule of law and equality principles are fundamental. From this perspective, Schmid argues for an approach to immigration policy that upholds basic liberal democratic principles, particularly the obligation to prevent the creation of a permanent underclass of immigrants and their families, a risk posed by some current laws and policies. However, Schmid's argument extends beyond immigration policy; advocating for the application of equality principles to all members of society includes anyone who in one way or another is affected by harsh immigration policies, such as those that undermine immigrant labour rights.

In centring his proposed approach on liberal-democratic ideals of equality, Schmid argues that such alternative policy aligns with regularisation. Regularisation ensures immigrants' entitlements to basic rights, minimizes the risk of discriminatory practices, reduces the number of unauthorised immigrants, guarantees the application of other aspects of the rule of law, and allows immigrants to live free of the looming threat of deportation. Based on these considerations, Schmid recommends a larger policy alternative—continuous and non-conditional regularisation, with minimum residence requirements, of which firewall policies are part but not the goal. Significantly, the audience for his proposal is not the wider public or even all policymakers. Schmid addresses this policy dilemma to a conscientious migration policymaker who is open to research-based solutions and dedicated to upholding basic democratic principles.

I fully agree with Schmid's main arguments and find the connections he draws across various aspects of immigration policy important and relevant to most immigrant-receiving contexts today. I welcome his efforts to highlight these ethical dilemmas for a conscientious policymaker who wants to do the right thing, which invites serious reflection. Given how strongly Schmid's comments resonate, I would like to add some considerations outside the specific purview of immigration policy that may pose some challenges in implementing thoughtful recommendations.

I appreciate the emphasis on policymakers who are committed to doing what is right. There are many elected officials for instance who run for office precisely to right policy wrongs. However, these individuals often face conflicting demands and considerations that can clash with each other and undermine even the most well-intentioned, evidence-based policy measures. Like everyone else, policymakers operate within a complex web of social, political, and economic forces, never alone or in a vacuum. To shed light on the challenges they may face, I offer some thoughts that focus on state power and the role of government—both receiving and sending—in shaping conditions within which conscientious policymakers must navigate. It highlights the challenges they may encounter as they respond to the competing interests of multiple constituencies and contingencies in addition to the goals and missions of diverse state agencies.

The bureaucratic labyrinths that policymakers must navigate when proposing and getting policies approved can easily derail the best-intentioned proposals. The government itself, along with the politics of running it, can contribute to undermining basic principles of liberal democracy, as we have seen in recent years in the U.S. case. Government structures often make passing laws difficult, and when political parties are polarized, it becomes nearly impossible for policymakers to work on any policy solutions. Additionally, individual policymakers may be influenced by powerful groups whose interests contradict their intentions for sound policy. A prime example is the case of the private corporations that run detention facilities in the United States. These corporations lobby elected officials and donate to their political campaigns, ensuring the continued expansion of lucrative detention facilities (Gómez Cervantes, Menjívar, and Staples 2017), which significantly undermines efforts to reduce immigration detentions. All these factors, tied to the politics of government, can either sabotage or support the viability of sound policy, depending on the political climate of the moment. However, I want to draw attention to larger considerations, both internal to governments and external factors, that directly impact the decisions and operations within which policymakers do their work.

First, I want to mention an internal factor to the workings of the state and functioning of government, that is, the bureaucratic entanglements that can create obstacles to efficient policymaking. We know that states are not homogenous entities but instead are constituted by a constellation of agencies that pursue different, often conflicting goals. I am referring to the "many hands of the state" (Morgan and Orloff 2017), which I consider key in considering policy proposals. To accomplish their goals, each state agency creates its regulations, and each administrative unit can therefore pose obstacles or facilitate policy design and implementation (Menjívar 2023). For instance, as Galli (2023) observes, when entering the U.S. asylum system, undocumented immigrant minors face contradictory logics: as minors, one agency categorizes them as deserving of protection; as undocumented people, another agency subjects them to the enforcement system. These are just two agencies pulling in different directions. In the face of "incoherence of government," as Bialas (2024) describes these agency misalignments around immigration, what does a conscientious policymaker do? Such tensions also reveal the hierarchy of institutional power embedded in state agencies, as not all state agencies have the same bureaucratic status and decision-making power, which will impact which agency's policies are supported and which are ignored.

Second, policymakers do not work independently of larger issues, such as foreign policy demands and international obligations, which structure policy responses to immigration, especially to humanitarian flows. In the case of the United States, as in other receiving countries, it would be incorrect to assume that all asylum seekers are classified equally, even if the same set of rules and regulations presumably apply to all. Some are welcomed with open doors while others are not even allowed to apply for protection, a difference with roots in foreign policy and political considerations on the world stage, including the interests of the sending country, instead of the plight of those seeking protection. For instance, U.S. foreign policy has played a fundamental role in the dramatically different treatment of two Latin American groups of migrants seeking protection: For over four decades, Central Americans arriving at the U.S. southern border have been classified and reclassified over time as economic migrants, "feet people," or criminals to avoid extending them asylum protection (Menjívar 2023, 2000). In contrast, for over six decades, Cubans have received the most generous treatment of any immigrant group in the United States, with a special Congressional Act (Eckstein 2022). This distinct treatment has placed these groups on considerably divergent paths of integration, with long-term effects across generations, creating significant inequalities across immigrant groups (Menjívar 2023), and thus contradicting fundamental liberal democratic principles. The contrasting receptions across Europe and North America to Afghans and Ukrainians have been examined through the lens of race and/or religion, with arguments that Afghan identity is perceived as a threat and thus these asylum seekers have not been as welcome as Ukrainians (De Coninck 2023). It is difficult to ignore, however, the role of foreign policy considerations; formally recognizing a group's need for protection outside their countries because their government cannot or would not protect them is a political act

that condemns the sending country (Menjívar 2000). These highly uneven receptions to asylum seekers today highlight the import of larger pressures on policymakers though, as FitzGerald (2019) argues, the Global North has used legal and political structures to deter the migration of unwanted groups since the nineteenth century, doing so in earnest since World War II. A conscientious policymaker would take these larger pressures into account in formulating ethical immigration policy thus preventing the creation of castes and second-class citizens.

My last consideration relates to certain domestic demands that directly or indirectly impinge on how policymakers respond to their multiple constituencies. Perhaps one of the most critical issues today is the anti-immigrant backlash and expressions of racism around the globe. Anti-immigrant sentiments seem everywhere, leading Kustov (2024) to start a response in this series by observing that, "many people in the United States, Europe, and other rich democracies don't like immigration." It is unclear if anti-immigrant backlash puts pressure on elected officials to adopt harsh immigration policies or, conversely, whether elected officials' hostile anti-immigrant rhetoric rationalizes the harmful policies they pass. However, there seems to be a confluence of these factors, with one amplifying the other. This is how immigration issues, especially efforts at containment with punitive and anti-democratic measures, occupy centre stage in major political campaigns in immigrant-receiving countries around the globe today. Although wealthy receiving countries historically have welcomed immigrants, either because immigrants fulfil labour needs across sectors and occupations or because they serve a humanitarian purpose (FitzGerald 2019), they have kept a half-open door ready to be closed when politically (or economically) expedient. Round-the-clock media images today contribute to keeping "immigration crises" on the radar of constituents. This saturation of information does affect candidates' and elected officials' policy agendas as they strive to address voters' concerns about the perceived threats that immigrants presumably pose. In the U.S. case, for example, the two major parties have largely converged on policies likely to undermine principles of equality and the rule of law, often competing to propose the most punitive and exclusionary measures. Given these immense pressures, a conscientious policymaker would need to take this political landscape into consideration in policy planning even if they are not motivated by political gain but by a genuine desire to uphold liberal democratic principles.

To conclude, I want to reaffirm my agreement with Schmid's thoughtful and well-crafted essay. Beyond proposing a sound regularisation policy, he rightly emphasizes that ethical immigration policies are not independent of policies that ensure equality, access to rights, and legal protections for everyone in society. His arguments about the relationship between firewalls and regularisation, along with the benefits of regularisation, are compelling and deserve widespread attention. The concerns I raise above, reflecting my interests in the workings of the state and state power, are intended to acknowledge the pressures conscientious policymakers face as they navigate multiple, often conflicting, demands. My comments are meant to encourage further reflection and discussion on this critical and enduring issue.

Responding to critics

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(Originally published [online](#), on the 'Dilemmas website', on 20 November 2024)

I want to thank Antje Ellermann, Adam Hosein and Cecilia Menjívar for their careful and challenging responses to my article on *Responding to Unauthorised Residence* ([Schmid 2024](#)). They all raise important, interrelated questions. In the following pages, I discuss some of the key points they make, outlining agreements and disagreements, and attempting to see the bigger picture arising from these discussions.

Do firewalls create social fog?

Ellermann's incisive commentary cuts right to the chase, taking issue with my argument's understanding of the relationship between firewalls and 'social fog' ([2024](#), see pages 8-9 of this volume). As a reminder, in my essay, I argued that "firewalls ensconce unauthorised immigrants in a 'social fog' – a layer of protection that hides some of their traces from immigration law enforcement – which stifles efforts to forcibly remove those deemed ineligible for regularisation" (Schmid 2024, 2). Ellermann discusses empirical evidence which she takes to show that *the opposite* is true: it is in the *absence* of firewalls that unauthorised immigrants tend to wrap themselves in social fog, increasing their invisibility to circumvent the hindrances of hostile environments. For instance, unauthorised immigrants affected by marginalising legislation will shift to employment in the informal sector and acquire fraudulent identification documents, decreasing risks of apprehension and deportation. Exclusion and marginalisation favours alternative, 'foggy' structures of living; firewalls, instead, incentivise visibility and participation in society. The conclusion is that my argument relies on a faulty claim. Compared to the firewall-less counterfactual, firewalls do not necessarily complicate enforcement, and thus need not be in any particular tension with regularisation programs tethered to residual enforcement. The dilemma is a false one.

I welcome Ellermann's objection, as it gives me the chance to correct some sloppiness that undoubtedly crept into the construction and presentation of my argument. I see no reason to doubt that Ellermann is correct in her empirical assertions: On the whole, I am sure that firewalls allow unauthorised immigrants to live lives less concealed, more integrated and participatory. Indeed, the fact of this truth is key to the liberal-democratic case for firewalls, as I demonstrated when presenting the 'open society' and 'anti-caste' arguments. But I am not sure that this truth entails that firewalls do not run up against enforcement imperatives in ways that create dilemmatic tensions between firewall policy and enforcement-backed regularisation policy. I suspect much of Ellermann's disagreement comes from a place of bewilderment at the suggestion that there is a general, positive link between firewalling and *social fog* in its conceptual specificity. However, I think the problem here is largely just that I was careless enough to present my claims in such arguably bewildering light and can be resolved once some conceptual mistakes are rectified.

Let me clarify. First, I am less interested in the *social* fog firewalls may or may not create than the fogginess they cast on the gaze of *immigration enforcement authorities* specifically. So, I acknowledge that firewalls *reduce* the need of irregular migrants to keep in the shadows for much of their daily lives whilst maintaining that they can *increase* fogginess of vision on part of those inclined to prosecute them. Second, I am not making a definite claim about when and whether the vision of enforcement authorities is foggier overall under circumstances of widespread firewalling compared to circumstances in which firewalling is (more) absent. What *is* clear, however, is that properly institutionalised firewalling creates authoritative, top-down barriers of vision for agents of enforcement, whereas its absence requires irregular immigrants to develop measures of evasion and resistance themselves, measures whose conditions of possibility and success may be dependent on

any number of factors.[2]

Once the conception of social fog and its relation to firewalling is thus corrected, I am not sure that Ellermann retains (or would want to retain) her critique. It may be that I should simply have used a different concept than 'social fog;' Ellermann is right to point out that its coinage in Bommes and Sciortino ([2011](#)) aims to capture the social structures pressurised immigrants create rather than the field of vision available to state agents. But ultimately, Ellermann is too quick to conclude from my mistakes that "pursuing firewall policies and regularisation programs do not have to stand in tension with each other" (page 9 of this volume). Even if firewall policies do not create social fog proper, they clearly do constrain immigration enforcement by blurring its vision and shackling its hands. It is a further question, contingent on a great range of factors, whether new kinds of migrant visibility (re-)emerge due to the inclusive effects of newly introduced firewall policy, kinds that may confer on enforcement agents apprehension capacities that ultimately overpower and outweigh any constraints imposed by policy. But this is an unsure and contextual question, not conclusively answerable by the conscientious policymaker who must decide on firewall policy. What this policymaker must decide is whether to mandate widespread firewall practice, constraining enforcement in a way that principally and predictably creates tensions with enforcement-backed regularisation ambitions. For this policymaker, the dilemma remains.

Grounding inclusive policy in the value of autonomy

Like Ellermann, Adam Hosein ([2024](#), pages 10-13 of this volume) thinks the proposed dilemma can be dissolved rather easily. While Ellermann's doubts stem from conceptual and empirical reflections, Hosein's are grounded in a supposed disagreement about the 'best' normative justifications for inclusive policy, and especially regularisation. In his view, the most robust justification is derived from the value of autonomy: because unauthorised status entails a precarity that imperils autonomous living, and because states still *govern* unauthorised immigrants, therefore automatically straining their autonomy, they have both humanitarian and political duties to grant regular status. Autonomy is a moral imperative, states must do what they can to use their powers in ways conducive to the autonomy of those under their control, and regularisation is an important means to that goal. Once this perspective is adopted, no dilemma between firewall and regularisation policy arises, because regularisation is uncoupled from any underlying enforcement imperative. State authorities need not pursue any investigations that clash with the protective function of firewalls; indeed, they need not ramp up enforcement at all, and so firewalls and regularisations *do* become the two steps up the same ladder that I claimed in my kick-off article they were not.

My quibbles with Hosein's line of argument seem minor at first sight. For one thing, he presents the argument from autonomy as if it were free from tensions and trade-offs. It seems to me that, in immigration destination states, promoting the autonomy of unauthorised immigrants in such an encompassing and uncompromising manner will force us to face morally complex fallout. Where state capacity is limited, is the challenge of continuous and automatic regularisation compatible with the progressive promotion of the conditions of autonomy for *citizens*? If so, under which circumstances? For another thing, I am not sure Hosein's description of my suggestion that regularisation and removal are linked in a deeper sense (thus leading to the tension between regularisation and firewall policy) as a supposed 'expulsion dilemma' quite hits the nail on its head. In Hosein's re-telling of my story, the deeper link is forged merely by a purported necessity of using multiple means to achieve anti-caste goals: Liberal democracies cannot tolerate the formation of subordinated classes, and to prevent unauthorised immigrants from forming such a class, both regularisation and removal will realistically be required. What this neglects is that my discussion takes it as axiomatic that the exercise of sovereign immigration control – that is, the setting and enforcement of discriminatory

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2 One particularly grave factor may be acceptance of social exclusion and marginalisation (as manifests, for instance, in informal sector work or improvised and insecure access to healthcare and education), which a conscientious policymaker of the type I describe in my article has strong reason to prevent.

entry standards – is, for one reason or another, itself a morally weighty goal of state action. This is where the deeper link between regularisation and removal is to be located: in the uneasy but structurally necessary attempt to meet the double constraint that arises from equal commitments to liberal democracy and discriminatory sovereignty.

I won't here engage in further criticism of the autonomy argument as such, partly because Hosein explicitly offers it as a mere sketch, further developed only in other writings, and partly because, once viewed in its full development, I find it compelling myself. But Hosein's idea that this autonomy argument could *diffuse the dilemma* as well as his understanding of the deeper link between regularisation and removal do ultimately reveal a more profound disagreement, or at least a more pronounced contrast of approach to the questions at hand. It appears to me that Hosein addresses the question of the hard moral dilemma – is there one, or can it be avoided? – from no particular point-of-view, except perhaps his own, that of a moral philosopher pondering the nature of things. This perspective allows him to lay down his argument without too much difficulty: the proper basis of inclusive migration policy is an appreciation of the value of autonomy, and once this is accepted, tensions melt away. It is not that I think this is an illegitimate or inherently flawed way of proceeding; it is important to think through fundamental normative questions with as little constraint as possible, even at the danger of detachment 'from the real world.' Some of my own work proceeds in a similar vein. I just think that this approach is not particularly useful if we want to understand the ethics of migration *policy* dilemmas, that is, the moral dilemmas conscientious policymakers embedded in harshly non-ideal conditions find themselves exposed to.

To think through such challenges is to adopt a different perspective, operate on a different level of abstraction, develop an appreciation of the unique conditions of ethical reasoning facing different types of policymakers in virtue of their particular positionings; and to do so above and beyond the mere question of feasibility, that is, mere reflection on whether it betrays an unproductive kind of utopianism to expect policymakers to accept moral guidance abstractly conceived. So, to engage in the analysis of hard moral dilemmas in migration policymaking requires a sort of contextualist commitment to try to anticipate the particular constraints and considerations characterising particular environments of ethical reasoning.

This is a difficult endeavour that we're very much in danger of getting wrong. It involves challenging questions: How much and which aspects of the real world should we treat as fixed? *How* variable are those aspects we can treat as variable? Do we over- or underestimate structural constraints, and agential capacities of policymakers to change status quos? Which tensions are likely to emerge under which presuppositions of the circumstances of our politics? These are the kinds of difficulties I attempt to appreciate towards the end of my article, when I discuss realities and political claims that appear outside the scope of admissibility to the ethical frame of reasoning available to conscientious policymakers *now and around here* (to use Bernard Williams' phrase), and the bewilderment that may leave us with. Nonetheless, if we're truly interested in the hard moral dilemmas of policymaking, we must at least *try* to consider the unique circumstances and horizons of policymakers.

My attempt to do this, however flawed, explains some of the argumentative choices that Hosein appears to perceive largely as obstacles to the correct moral judgment, or distractions from what matters most, morally. It is why I stress the importance of social ties and the avoidance of caste formation; the perspective of the rule of law and the open society; and so on. The point of this is not to contend that the justice claims of immigrants, or the burdens irregularity imposes on them, don't matter morally. The point is to try to anticipate what a liberal-democratic, conscientious policymaker, ethically reflexive but accountable not to unauthorised immigrants but to a self-interested, demanding citizenry, might be able to see as particularly forceful and publicly appealing reasons for the crafting of inclusive policy responses to the phenomenon of unauthorised residence. It is that same attempt that explains why I treat as axiomatic the underlying sovereign control imperative, despite my own view that the notion of this imperative is fundamentally flawed. If we want to appreciate the kinds of dilemmas likely to arise for real, liberal-democratic policymakers, we must first try to be clear-eyed

and accepting of the space within which they move.

   None of this means that Hosein is wrong in thinking that the value of autonomy provides the best moral argument for inclusive regularisation policy. He may well be right. But even if he is right, this does not itself tell us much about the question if policymakers who come to favour inclusive policy arrangements via the arguments most readily available to them end up facing hard moral dilemmas, and what they can and ought to do about them. Intervention on this level of debate would require a further argument to show not simply that autonomy-based grounds provide 'the best' moral justification for inclusive policy but also give *conscientious policymakers labouring under particular political circumstances* uniquely forceful reasons for action.

The constraints of conscientious policymaking

These concerns about the positioning of conscientious policymakers, their circumstances of ethical reasoning, shaped by subjection to various pressures and forces, are precisely what Cecilia Menjívar's (2024, pages 14-16 of this volume) response zooms in on. Her piece, clear-eyed and timely, reminds us that "policymakers operate within a complex web of social, political, and economic forces" (ibid, 14), woven from interests arising from the political economy of the capitalist state, hierarchies and rivalries within executive bureaucratic apparatuses, perceived exigencies of foreign policy, and racialised anti-immigrant backlash. No matter what individual policymakers would like to achieve, they must deal with pressure from private interest groups long influential in the shaping and implementation of immigration policy; "agency misalignments around immigration" (ibid, 15), where one executive organ follows paths of action that contradict those of another; entrenched and institutionalised understandings of immigration policy as a key instrument of foreign policy (for instance explaining the preferential treatment of Cuban immigrants in the U.S.); and voters who, for one reason or another, increasingly converge around anti-immigrant attitudes. Though Menjívar steps short of this conclusion, I take the implication to be a need for doubtful reflection on the nature and extent of individual policymaker agency, which may in turn move us to reconsider which, if any, are the hard moral dilemmas *truly* crystallising out of, and reflecting, the complex and competing structural pressures underpinning immigration policymaking today.

   I can't provide much critical response to Menjívar. I don't disagree with any of her remarks on the complicating factors in play; her intervention provides an apt reality check to overly simplified or abstracting ideas of the 'conscientious policymaker.' However, there may perhaps be some use in offering a thought on the relevance of distinctions between *types* of policymakers. At *Dilemmas*, we have a markedly broad conception of 'the' policymaker; depending on the circumstances, we might count a member of parliament, a senior civil servant directing executive action, a policy advisor, a leading employee of an international organisation, or even a seafaring activist as belonging to the category. This is because we're interested in the distinct and specific moral tensions arising for all those with unusual power over the fates and opportunities of migrants. But while all these policymakers, if they want their plans and projects to succeed, had better cultivate an awareness of the complexity of background conditions as demonstrated by Menjívar, none of them need directly deal with *all* the problems generated by the interrelated challenges that make up the arena of action as a whole. There is necessarily a division of labour between different types of policymakers; though powerful, they are all just individual cogs in a larger machine, and the specific functions they fulfil within that machine determine the concrete tensions and dilemmas *they* will distinctly face. Processual and functional logic focus the gaze and limit the considerations that can develop into full-blown policy dilemmas for specific types of policymakers.

My article attempts to adopt specifically the perspective of the legislator, that is, the writer of new immigration legislation. Among the set of challenges Menjívar mentions, voter backlash to inclusive immigration policy most obviously shapes this policymaker's options, which is why I have attempted to make my case on the basis of moralised goals that should both motivate conscientious liberal-democratic policymaking *and*, interrelatedly, be able to be grasped as attractive social improvements by self-interested, yet informed and reflective citizens.

But at least two of the other factors depicted in Menjívar's analysis – special interests and agency misalignment and bureaucratic contingency – need not determine legislators' reasons for action, even where they affect the feasibility of such action or bear on the strategical and tactical means to bring such action to fruition. Indeed, we should want to rule out the compatibility of conscientious legislative policymaking and responsiveness to special private interests from the very start. One need not ascribe to a thoroughly Kantian view of the public sphere to see that such policymaking requires a full and exclusive commitment to the public good, a fidelity to office fundamentally corrupted by any adoption of the point of view of private moneyed interests. Considering bureaucratic realities is not opposed to conscientious legislative policymaking in this way, but we may still hold that it is not the *primary business* of the conscientious immigration policy legislator. Because of the division of the labour of policy-making and -implementation, it is neither in the power of our legislator to control bureaucratic contingencies, nor is she likely in a position to reliably predict how these are bound to shake out. Our policymaker is to consider inclusive policies for unauthorised immigrants, and decide how to deal with tensions arising out of the best reasons to pursue specific policy options; that is, her primary business is in setting out the broad strokes of policy, and it is not necessarily irresponsible or imprudent for her to tune out more granular questions of administration and implementation at this stage of the process.

Foreign policy considerations, the third issue Menjívar raises, may be more genuinely germane to this primary business, as the boundaries of principally distinct policy fields are soft and malleable; for our conscientious legislator, they could conceivably count as reasons for action regarding unauthorised residence. Still, where our legislator prioritises the health of liberal democracy, I agree with Menjívar that, if anything, reflection on foreign policy and its fallout is likely to lead to support for wide-ranging regularisation and firewall policy, precisely to prevent "the creation of castes and second-class citizens" (ibid, 16).

The upshot of this discussion is merely that we may want to distinguish among the complicating factors raised by Menjívar. For a conscientious policymaker of the type I am concerned with, only some will bear clearly on the primary business of developing reflective reasons for policy action on unauthorised residence. This is important insofar as we want to understand the space of reasons from within which our hard moral dilemma arises, and against which it ought to find resolution or mitigation. But of course, this is no rebuke of Menjívar, whose point is another, perhaps more crucial one: policymakers, legislative or otherwise, are not autonomous designers, and their intentions and actions alike are liable to be bent and twisted, potentially beyond recognition. Intentionally or not, Menjívar thereby raises more general, and difficult, questions that a project like *Dilemmas* must contend with: How much abstraction can we afford? What is the price of assuming significant policymaking agency among individual institutional actors, as well as a widespread intention *and* capacity of 'conscientiousness'? Is the idea of *Dilemmas* ultimately too biased towards a bourgeois-individualistic conception of the character of historical change and development, and insufficiently attentive to the overbearing determination of impersonal forces?

These are questions I struggle with. At worst, I think *Dilemmas* and its associated ideas can serve as a sort of useful fiction. That is, first, even if its presumptions or goals are some steps removed from the way the world works, its aspiration to carefully balanced moral progress can encourage individual policymakers in their struggles for agential wriggle room. And second, an approach like *Dilemmas* can help critical citizens evaluate whether their representatives work earnestly towards breaking through or reshaping the structural conditions which both give rise to complex tensions and restrain policymakers' response capacities: whether policymaking elites dismiss a perspective like *Dilemmas* or demonstrate earnest sensitivity towards it will tell us a great deal. Really, though, I think *Dilemmas* is more than just that useful fiction. Even in the midst of a whirlwind of complex background conditions, structural imperatives, and perverse incentives, there are policymakers dead-set on spending their energies on identifying and rectifying injustice, both the kind that besets the greater structures which restrain us all, and the kind that surfaces in particular regimes of regulation, such as the legal constraint of unauthorised immigrants. Perhaps the mistake is to think that there are many of them. But *Dilemmas*, limited as it is, is for them; if it can support clarity in diagnosis and carefulness in treatment, it will have done its job.

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