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Enforcing immigration law

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Abstract

Over the last few years, an increasingly sophisticated literature devoted to normative questions arising out of the enforcement of immigration law had developed. In this essay, I consider what sorts of constraints considerations of justice and legitimacy may place on the enforcement of immigration law, even if we assume that states have significant discretion in setting their own immigration policies, and that open borders are not required by justice. I consider constraints placed on state or national governments, constraints on enforcement by substate governments, and constraints on the actions of individuals. I show that there are significant limits on what states may do and what they may require substate governments and individuals to do, in enforcing their immigration laws, but that these constraints are not clearly incompatible with significant state discretion in setting immigration policy. Nonetheless, consideration of justice in enforcement is necessary for any complete normative account of immigration.

1 | INTRODUCTION

The normative literature on immigration has grown both in size and sophistication over the last thirty or so years, to the point where it is now difficult even for specialists to keep up with all of it. However, specific focus on the enforcement of immigration law, and the distinctive moral questions that this raises, is a relatively new development. Over the last few years, an increasingly sophisticated literature have developed looking at such topics as immigration

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detention (see, e.g., Silverman, 2014; Ryo & Peacock, 2018), the effect of immigration enforcement on citizens and authorized residents in a state (see, e.g., Carens, 2013; Mendoza, 2017; Reed-Sandoval, 2020), obligations to obey immigration law (see, e.g., Hidalgo, 2016; Yong, 2018), and when resistance to it or civil disobedience is acceptable (see, e.g., Hidalgo, 2015; Bertram, 2018; Lister, 2018b), among other topics. In this essay, I will look at a number of different questions relating to the enforcement of immigration law. My focus will be largely on questions of institutional design, looking at what sorts of state action are acceptable, and what just enforcement policies would be like. I will give relatively little emphasis to questions of individual ethics, except insofar as they relate to institutional design and enforcement policies.

In order to provide structure to the analysis, I will break our inquiry into three broad topics and will try to show how distinct problems arise in each area, necessitating a division of this sort. I will first consider normative limits on enforcement by states.[1] In this section, I will consider both external and internal enforcement of immigration law. Next, I will look at the question of enforcement of immigration law by substate governments, including such entities as states of the United States or Australia, cities, and other local governments. Finally, I will turn to the question of obligations on individuals to take part in the enforcement of immigration law. In general, I will argue that, even if we assume a large degree of discretion for states to set their own immigration policies, there will be significant normative limits on how these policies can be enforced, and also significant limits, both pragmatic and principled, on the enforcement obligations that may be placed on substate actors and individuals.

In addition to the philosophical literature on immigration enforcement, there is a large body of work, legal, and empirical, which may be termed "practical." This literature looks at the actual and expected outcomes of various approaches to immigration enforcement. While there are a number of different conclusions that may be extracted from this literature, a particularly important one is that immigration enforcement often has unintended consequences, and that stringent approaches to immigration enforcement do not necessarily lead to lower levels of unauthorized migration. In fact, somewhat paradoxically, increases in enforcement may sometimes lead to an increase in the overall unauthorized population. Particularly relevant work here includes Massey, Durand, and Malone (2002); Massey (2007); Kanstroom (2007); Ryo (2015); and Ryo (2019). While this literature is of great practical importance and certainly has relevance for normative issues, I will largely leave it aside here, focusing more directly on questions of moral and political philosophy. However, this literature should not be ignored by philosophers seeking to have a full understanding of immigration enforcement.

As a final preliminary matter, I will note some assumptions that will guide my inquiry. I will here assume that states have a large, but not unlimited, degree of discretion in setting their own immigration policies.[2] Limits on this discretion come, at least, from the need to protect the rights of families (see, e.g., Lister, 2010, Lister, 2018a; Ferracioli, 2016; Yong, 2016; and Song, 2019), the need to protect refugees and others who can only be helped by giving them access to a new, safe state to live in, (see, e.g., Gibney, 2004, 2018; Price, 2009; Lister, 2012, 2014, 2020; and Cherem, 2016), and from certain principles of nondiscrimination (see, e.g., Perry, 1995; Blake, 2013, 2016). These are not the only possible limits on state discretion in relation to immigration policy. In this essay, I will show how limits on acceptable enforcement provide another sort of limit on discretion but will also show that this does not, on its own, provide a back-door argument for open or essentially open borders.[3] Finally, I will not assume that noncitizens, especially those without the right to enter a particular state, have a moral obligation to comply with the immigration laws of the state in question. I do not make this assumption on the merits. I am genuinely unsure whether, in most cases, it can be shown that noncitizens have a moral obligation to respect and conform to the immigration laws of other states, but in any case, I think this is very difficult to show.[4] Given the difficulty of establishing the claim that would-be migrants have a general duty to respect the immigration law of other states, I will therefore see what can be established without depending on such a claim (Migrants who have been granted immigration benefits by a state may have an independent moral—in addition to pragmatic—reason to respect and comply with the state's immigration laws, assuming that the laws are minimally but sufficiently just. Such an obligation may be grounded on a claim that compliance is a condition of the receipt of the benefit of lawful immigration status, for example. However, I will not rely on this claim and will not pursue it further here.).

2 | LIMITS ON STATE ENFORCEMENT

In this section, I will consider limits placed on immigration enforcement as carried out by a state, looking at three sources of limitations. First, I will consider limitations imposed by the human rights or basic rights of would-be migrants. Next, I will consider limits imposed by the need to respect the rule of law. Finally, I will consider limits imposed by the way that enforcing immigration law may injure citizens and authorized residents.

Although I will here assume that states have significant discretion in setting their own immigration policy, and with this discretion comes a right to make this policy effective in many ways, this may not be done in ways that are inconsistent with respecting the basic human rights of migrants. Importantly, this is so even if the right to control borders is an important and strong one, and the limits on discretion noted above are interpreted narrowly. If the right to control borders is weak, then the force of arguments for limits on enforcement will grow proportionally. The argument for the claim that basic human rights must be respected during immigration enforcement is straightforward: States must respect (though not necessarily promote) the human rights of all people. Would-be migrants are people. Therefore, states must respect the human rights of would-be migrants. But what does this imply in practice? While I cannot consider all possible topics here, I will look at three cases: the use of force or extreme danger to prevent border crossings, mandatory and indefinite detention of unauthorized migrants, and the use of enforcement techniques that make it extremely difficult or impossible for noncitizens to exercise their right to claim asylum. This list is obviously not exhaustive but should provide a good example of how human rights may limit immigration enforcement.

Border enforcement is coercive. As Joseph Carens noted long ago, borders (often, at least) have guards and guards (often, again) have guns (Carens, 1987, p. 251).[5] But even in cases where the right to control a bit of territory is clear and strong—such as in the case of a person and their own home—the right is typically not thought to allow any use of force in any case. In particular, spring-guns and "man traps" are often prohibited, even though allowing them would clearly improve the ability of property owners to enforce their rights.

The operative principle here is that, even if one has a right to control entry into some territory, the "excessive" use of force to protect the right is not compatible with respecting the rights of others. Some implications for immigration enforcement follow in a straightforward way. Given that even unauthorized migrants rarely, if ever, pose immediate and serious threats to the life or safety of receiving states, the use of deadly force, or the threat of deadly force, is incompatible with respect for human rights. While this clearly rules out the vicious and insane desires of Donald Trump to have border guards shoot would-be migrants, or to build a moat filled with snakes and crocodiles, many important questions are less obviously answered by this principle. For example, it does not seem obvious that this principle requires that states make unauthorized access easy or even largely safe in all cases. The exact line between policies that are unacceptable and those that are compatible with respect for human rights is not completely clear, and it would make sense for states to stay well clear of the danger area. However, the core point at this juncture is that, except in cases where admission is itself required by human rights (a topic I will return to), enforcement of immigration policies does not itself violate human rights, even if these policies make it difficult for would-be migrants to gain access without authorization, but the excessive use of force would violate human rights.

A need to respect human rights will also place limits on the use of detention in immigration enforcement. While it is unclear to me that all immigration detention is always unacceptable, detention must be heavily constrained, limited to short periods in most cases, and serve only specific goals (for helpful discussion here, see Silverman, 2016). For example, detention of migrants who pose a clear and immediate danger to the population can be justified in straightforward ways. And genuinely temporary detention of migrants for the purpose of establishing their identity and processing claims for protection may be justified in cases where less restrictive methods will not work. Finally, temporary detention pending immanent removal may also be justified in certain cases. However, policies that make use of routine mandatory detention, applied to all unauthorized migrants, will be difficult to justify. It is clear that in many countries—including the United States and Australia—detention is used not as last resort means to secure necessary compliance, but as, at best, a deterrence method or a punitive response (for the United States, see Ryo, 2019, and for Australia, see Crock & Berg, 2011, pp. 476–88). Given that immigration violations are themselves typically

mala prohibita offenses, these uses are unjustified. More unjustified yet, and clearly in violation of human rights norms, is the practice of indefinitely detaining migrants who cannot be removed. Such a practice was found to be in violation of the U.S. Constitution's due process clause in the case *Zadvydas v INS* but is still practiced regularly by Australia, the United Kingdom, and other countries, despite the fact that indefinite detention of persons who do not pose a clear and immediate threat to the population is grossly disproportionate and in clear violation of basic human rights norms.

An additional aspect of the need to respect human rights relates to refugee protection. Most states currently recognize, to one degree or another, a right to claim asylum for people who are being persecuted and often other rights to seek protection. However, most states also have in place laws that make it difficult for many who would exercise these rights to reach safe countries. Examples here include visa requirements, carrier sanctions, and interdiction at sea (for a discussion of some of these policies, see Sager, 2018). A difficulty arises in that many of these policies also serve—arguably primarily serve—as acceptable means to the enforcement of acceptable immigration laws. While a full solution to this problem would require looking at particular cases carefully and would turn on the specific details of different cases, some general conclusions are perhaps reachable. For example, we may conclude that, when a population that would otherwise be eligible for refugee protection is unable to safely travel to a state where it would be able to receive protection, states are obliged to take steps to help these populations leave (see Beaton [forthcoming 2020] for a powerful argument to this end). Another possibility would be to allow for special visas for those in need of aid. This is a change in policy that is perhaps more likely to be resisted by states than others discussed here, but it does not strike me as inherently infeasible.

The next set of restraints come from the requirement to respect the rule of law. The rule of law is a contested concept, of course, but certain elements typically seen to be in the "core" of the idea can be referred to with minimal controversy. The core elements of the rule of law that I will consider here include basic elements of due process, including being given at least minimal notice of the grounds for making decisions and at least minimal review of decisions, and protection from arbitrary decision-making, as well as precluding the use of secret evidence in immigration cases. Unfortunately, most states currently use processes in immigration decision-making and enforcement[6] that violate basic rule of law norms. Examples from the United States include the doctrine of consular nonreviewability, where initial denials of visa applications are, legally, unreviewable, and where no reason for a denial must be given,[7] the ability of customs and border protection agents to make largely unreviewable decisions to subject applicants at the border to "expedited removal" if they "suspect" that the person in question is a security risk or likely to violate the terms of their visa,[8] and the ability of officials to change admission categories at will, without notice and with retroactive effect. Such abuses of the rule of law are, of course, not limited to U.S. immigration policy. Australian migration law, for example, provides several instances where the Minister for Immigration is granted the power to make decisions on admission, removal, and detention on an essentially arbitrary basis without any opportunity for review.[9]

Bringing actions of states in relation to immigration policy and enforcement under the rule of law would not require treating every interaction with immigration officials with the same degree of process found in a criminal trial. But it would require establishing policies to improve transparency in decision-making, including giving concrete reasons justifying decisions. Also required would be providing for at least some form of meaningful review in all cases to help avoid the most blatantly arbitrary decisions. The most fundamental change required by respect for the rule of law is rejecting the core of the so-called "plenary power" doctrine that all that is owed to a noncitizen is whatever the state in question decides to give him or her.[10] Details of what sort of process is required by the rule of law is beyond the scope of this essay (but see Lister, 2018c for further, if still incomplete, discussion) and will differ in different immigration regimes but will in any case impose significant constraints on the ability of states to enforce immigration law.

The final constraints on enforcement of immigration law by states that I will consider are constraints imposed by the need to provide equal and fair treatment to current citizens and authorized migrants. This condition is similar to what Mendoza has termed an "equality of burdens" constraint (2017, p. 109). A just state cannot, at the least, put greater burdens on some citizens and authorized residents than others because of their race, ethnicity, religion, or

ancestral origin. However, as Mendoza aptly shows, current immigration enforcement practice in the United States does this, not least because it involves a large degree of profiling based on actual or presumed race, ethnicity, religion, or ancestral origin (Mendoza, 2017, pp. 107–11; see also Hosein, 2018, on the impact of unjust racial profiling). Similar problems have, predictably, arisen under the so-called "hostile environment" approach to immigration enforcement in the United Kingdom, where, in an attempt to make life unpleasant for unauthorized migrants so as to encourage them to leave, lawfully present migrants and citizens who are seen to resemble unauthorized migrants have been subjected to serious deprivations of rights, unlawful denial of access to benefits, and even wrongful deportation (Yeo, 2018; see also Motomura, 2014, pp. 113–44).

As Mendoza notes, a just policy would place all residents at roughly equal chance of being subjected to immigration enforcement measures. While this would not rule out all forms of immigration enforcement by the state, it would place both principled and practical limits on such enforcement. Mendoza notes that place-appropriate policies that can be universally applied, such as document checks at a border crossing, would pass this standard (2017, p. 110). I would claim that a requirement to provide valid documentation when taking employment, such as providing the documents required by an I-9 form in the United States, or to satisfy an e-verify check, or providing a valid tax filer number in Australia, can also be justified, not only because these are universally applied and minimally intrusive, but because these documents are used for other legitimate purposes, such as recording tax withholdings, and paying social security or superannuation benefits. Any requirement to make certain persons provide additional documentation based on stereotypes of unauthorized migrants, however, would run afoul of Mendoza's equality of burdens test.

3 | IMMIGRATION ENFORCEMENT BY SUBSTATE GOVERNMENTS

Substate governments, such as the governments of U.S. or Australian states, cities, and other units, have grown in importance in relation to immigration enforcement over the last several years. Some of this is on the direct initiative of these substate governments, such as when U.S. states or cities move to either impose more stringent regulation of migrants, or put in place policies designed to impede the enforcement of federal law. Sometimes the initiative is on the part of the federal or national government, which either requires or encourages substate governments to use local police, schools, and other entities run by the substate governments to enforce immigration law. I will argue that, while there is good reason to favor uniform rules of immigration and enforcement of immigration laws within a state, substate governments may rightfully and reasonably refuse to comply with laws that would prevent them from effectively fulfilling important functions that fall to them.

There are good reasons to favor a uniform immigration law within a given state, as opposed to one that varies in significant ways from one location to another within the state. First, having different migration laws or enforcement practices within a territory will discourage migrants from moving to places within the state, where they are best able to live good lives or use their talents. This will reduce the economic gain that a state may get from migration. More fundamentally, the complicated nature of immigration law makes the chance of unfair and unjust surprise for migrants too high if there is local variation within a territory (for further discussion on the practical difficulties likely to arise with substate government enforcement of immigration law, see Motomura, 2014, pp. 113–44).

However, even if there are strong reasons for favoring a uniform immigration law at the state level, this does not mean that substate units must themselves take active steps to enforce the law or even necessarily acquiesce in demands by the federal or national government that they do so. This is because doing so will often interfere with vital functions of local governments. This issue arises in at least three areas: provision of police protection, providing education, and providing health care, including, but not limited to, public health measures. As Carens, Mendoza, and others have noted, when normal police are involved in immigration enforcement, migrants—including both unauthorized and authorized migrants—have good reason to be wary of contact with the police (Mendoza, 2017, pp.111–2). When this is so, immigrants are at much greater risk of being crime victims. However, this is not the full

extent of the harm caused. Not only immigrants, but others who live in the community, will be exposed to greater risk of crime if immigrants are not able to rely on the police for protection, making the entire community less safe. There is therefore strong reason to favor a general and thick "fire wall" between normal police activity an immigration enforcement. (Carens, 2013, p. 134; see also Crépeau & Hastie, 2015; Note that this does not mean that serious criminal activity might not be an appropriate ground for removal. However, any determination that criminal activity would ground a removal order would have to be established only after an independent conviction for a serious crime. There are complicated issues here about legal representation and significant questions about which crimes, if any, justify deportation, but I must leave those aside at this point.).

Similar issues arise in relation to health care and public health. I will here assume that at least emergency health care must be provided to all people in need if their basic rights are to be respected. And there will be strong prudential reasons to provide public health measures such as basic preventive health, vaccinations, and so on, to all community members, regardless of their immigration status. However, if health care providers are required to check the immigration status of patients, even if this information is not shared, it will discourage unauthorized migrants and their family members from seeking medical care and preventive measures.[11] There is therefore good reason to not require health care providers, even when they work for the government and even if health care is provided by the state, to inquire about immigration status.

The final area of inquiry here is provision of education, especially primary education. As has been noted by the U.S. Supreme Court,[12] and as is recognized by the Convention on the Rights of the Child,[13] access to education is necessary if children are to develop the skills necessary to be full members of a society. This is so even when the children in question are unauthorized migrants. This strongly suggests that schools and education administrators ought not be required to, and should not be allowed to, inquire into the immigration status of students. As the U.S. Supreme Court noted in the *Pyler* case, there is significant chance that such students will remain in the country (for discussion, see Motomura, 2014, pp. 86–112). And there are strong arguments that states should make citizenship available to children who live for significant time within in the state (see Ferracioli, 2018, forthcoming). Making access to education contingent on immigration status will obviously disadvantage migrant students, even if they do not face direct enforcement while at school. Additionally, schools should not be sites of enforcement activity directed at anyone, even if they are not students. If enforcement activity is directed at parents in the physical area of schools, it is predictable that this will make them less likely to send children to school and cause harmful stress for children.

These policies add up to something less than what is called for by many proponents of so-called "sanctuary cities."[14] Many "sanctuary" policies in this area go beyond the question of enforcement. For example, a city or state deciding to make benefits of different sorts, such as welfare benefits or "in-state" tuition in the United States, available to unauthorized migrants, would, on my account, go beyond the question of enforcing immigration law. Such issues may be relevant for discussions of how substate governments ought to best relate to the state government but are beyond the scope of this essay. Here, the essential point is that state-wide governments ought not coerce or encourage substate governments to enforce immigration laws when doing so would conflict with the duties these substate governments have to provide police protection, education, and health care to the public. Other examples are perhaps possible, too.

4 | INDIVIDUALS AND THE ENFORCEMENT OF IMMIGRATION LAW

In this final section, I will consider two general questions. First, do individuals—citizens of a state—have an affirmative obligation to take steps on their own to promote the enforcement of immigration law? Second, to what extent may the government place obligations on individuals to help with the enforcement of immigration laws?

While controversial, it is at least arguable that citizens of a state have at least some obligation to take steps to promote the enforcement of most laws. The most obvious obligation would be to obey the minimally just laws of a

legitimate state themselves (for discussion, see Yong, 2018). But we might also think that citizens have an obligation to help with the enforcement of at least some laws—to cooperate with police investigations, to report crimes, to discourage lawbreaking, and so on. Do these obligations extend to immigration laws? I will claim that, in general, they do not. The first reason for this is that, as noted before, most immigration laws relate to actions that are, at most, *malum prohibitum*. This is to say that, at least in individual cases, violations of immigration laws typically do not cause any clear or obvious harm to others. In this way, violating an immigration law is unlike assaulting another person or engaging in a property crime. Because most cases of violating immigration laws do not pose a threat of harm to anyone, there is significant less reason to think that individual citizens (as opposed to officials) have any obligation to help in the enforcement of these laws.

There is an additional reason to disfavor the idea that individual citizens, who are not officials, should take an active part in the enforcement of immigration law. In most—perhaps all—states, immigration law is complex. So long as we do not merely eliminate immigration law, this is almost certainly of necessity. Because of this, it will usually be difficult or impossible for most people to be able to tell if someone is violating an immigration law. When we note that even people who would seem to facially be unauthorized migrants, and even people who believe themselves to be unauthorized migrants, may have a valid claim to remain in a state, this conclusion is even more solid. Given this fact, if normal citizens attempt to take active part in the enforcement of immigration law, they are very likely to make mistakes. These mistakes will often not be harmless—they can lead not only to dignity harms but also to people being denied services, to being detained by authorities, and even to being wrongly deported. Furthermore, these harms will not be randomly distributed but will tend to be clustered among both authorized migrants and citizens who are seen to "resemble" unauthorized migrants in terms of race, ethnicity, religion, or ancestral origin. Because of the inherent difficulty of immigration law, individuals who attempt to participate in or promote its enforcement will often make mistakes that tend to disfavor groups who are already disfavored. This will therefore provide another sort of violation of Mendoza's "equal burdens" principle. If this is correct, then there is good reason for individuals to refrain from taking part in immigration enforcement on their own.

Many states or substate governments also seek to have individuals help in the enforcement of immigration law, by making it a requirement to do normal activities such as rent an apartment, visit a doctor, open a bank account, or get married. As Hidalgo notes, this can be seen as a form of conscription of private parties into helping enforce immigration law (Hidalgo, 2016; see also Yeo, 2018, for discussion of U.K. cases). What is problematic here is not requiring identification. For any of these activities, it is reasonable for those involved to want to be sure of whom they are dealing with. But when normal citizens are tasked with checking the immigration status of others in cases like this, and threatened with fines or other penalties if they do the activities in question with unauthorized migrants, significant problems will arise. As we have already noted, given the technical and complex nature of immigration law in most countries, policies such as these will tend to systematically disadvantage authorized migrants and citizens who are thought to "resemble" unauthorized migrants, subjecting them to dignity harms and making it harder for them to access benefits, making living the sorts of lives most citizens take for granted difficult. So when the state commandeers citizens to help in immigration enforcement in these ways, it will predictably be promoting discrimination against, and harming, already disadvantaged citizens and authorized migrants.

While the above should by itself be sufficient to justify prohibitions on states requiring citizens to engage in immigration enforcement, one more reason is worth noting. Policies such as these seek to make it difficult, if not impossible, for unauthorized migrants to take part in activities that are necessary for life, such as to find housing and visiting a doctor. This goal is apparent on the face of the original policy name in the United Kingdom, the "Hostile Environment" program. While I am here assuming that states do not have to allow in anyone who wishes to come, and do not have to extend all rights to those present without authorization, programs such as these that make basic activities that are necessary for living difficult, and place the requirement to check for compliance on private citizens solely for the sake of immigration enforcement, at least arguably violate the basic rights of unauthorized migrants.

Careful readers will notice that I have not included employment in this discussion. Many countries require, at the time a would-be employee is hired, that certain documents be checked, and these documents, while not

necessarily immigration documents themselves, are ones that are typically not available for unauthorized migrants. In the United States, these would include the documents needed to fill out an I-9 form or to comply with E-Verify, and in Australia, it would include a Tax Filer Number or an Australian Business Number. Is there any reason to not include this process under the above analysis? I believe that there is. First, these documents also serve the purpose of making sure that tax withholdings, social security payments, superannuation payments, and other required processes are dealt with. Even if these documents are also used for immigration verification purposes, because they can reasonably be requested to comply with other legitimate requirements, they are less problematic as the immigration enforcement aspect is collateral to their other uses. Because such documentation is required of all people, and is related to other legitimate grounds, we can see it as being neutral and place-appropriate, in Mendoza's terms. Additionally, if, as argued by Mendoza (Mendoza, 2017, p. 101), states wishing to justly enforcing immigration law must reduce their "pull factors" for unauthorized migrants, then requiring all employers to comply with such verification will be a step in this direction.

A final factor in relation to individual action is the increasing use around the world of laws against "people smuggling" or "harboring" unauthorized migrants to discourage giving aid to migrants in need of assistance. Examples here include the threatened prosecution of Captain Rinnan of the *MV Tampa*, who came to the aid of distressed migrants at sea and was threatened with prosecution by Australia, the arrest of ship Captains Carola Rackete and Pia Klemp in Italy for rescuing migrants in distress in the Mediterranean Sea, and the prosecution of Scott Warren and others providing water or other aid to migrants in the desert in Arizona. Even assuming that the underlying laws against "smuggling" or "harboring" unauthorized migrants are legitimate, this sort of use of them is not. First, as noted, it is unreasonable to expect the individuals in these cases to know or evaluate the immigration status of the people in question. But it is easy for the individuals to see that the migrants are in distress and in need of immediate aid. Providing aid in such cases will often be a moral obligation and is sometimes itself a legal one (e.g., both customary international law and the Law of the Sea Treaty require ship captains who come upon distressed persons at sea to provide aid and transit to a safe location).[15] Attempting to criminalize the provision of humanitarian aid to migrants in need is therefore one more illegitimate attempt by governments to enforce immigration laws.

5 | CONCLUSION

In this essay, I have argued that, even if we assume that states have significant discretion to set their own immigration policies, there are justice and legitimacy based limits on how immigration law may be enforced. These limits impact the methods that states may take themselves, the actions of substate governments, and the actions of individuals. Few, if any, states currently satisfy the requirements of having a just immigration enforcement policy. This conclusion should be especially troubling for those (such as myself) who believe that, in principle, states should have significant discretion in setting immigration policy. Even laws that are, in principle, compatible with justice may be enforced in an unjust way, so as philosophical analysis of immigration reaches further maturity, this will be an important area of further research.

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ENDNOTES

[1] In this essay, I will use the term "state" to mean a country or national unit of government, not a state in the sense of a state of the United States or Australia unless otherwise specified.

[2] To this end, I will not fully engage with work that argues for, or takes as an assumption, the claim that there is a basic or fundamental right to free movement, and that therefore states have no or only very little discretion in setting their

immigration policies. I do not find any arguments for this position at all convincing, but arguing for this is outside the scope of this essay.

[3] The best argument for this particular claim is made by Alex Sager in Sager (2017). Sager focuses on what he sees as ineliminable bureaucratic discretion, which, he claims, will inevitably lead to unacceptable abuses. The scenarios Sager focuses on are indeed deeply disturbing, but I do not see that they lead to the conclusions he draws, especially insofar as many of the cases involve the privatization of enforcement, a step that is clearly voluntary and reversible. I provide a preliminary discussion as to how many of the sort of worries Sager raises can be addressed in Lister (2018c). Sager is correct to suggest that limits on acceptable forms of enforcement in turn place limits on how far states may control immigration, but if the arguments of this essay are correct, he has drawn a stronger conclusion than is warranted.

[4] Colin Grey has, to my mind, presented the strongest argument for noncitizens having a duty to respect the immigration laws of states they would like to enter. However, this argument depends on states adopting both immigration policies that are, in form and substance, significantly different from the policies found in most, and perhaps all, states at this time (see Grey, 2015, pp 114–45). While Grey's argument deserves more careful attention than it has so far received, I will not rely on it. On this general point, I have benefited from conversation with Margaret Moore.

[5] Arash Abizadeh (2008) has argued that the coercive nature of immigration enforcement is especially relevant to the argument of open borders. Though I will not devote time to this argument here, I will briefly note that this seems clearly mistaken to me. Whether coercion, in some degree, may be used against a person depends at least largely on whether the person in question has a right to do the act at issue. This means that the question of a right to migrate must come before the discussion of coercion, not afterwards, as Abizadeh suggests. I have benefited here from discussion with Luara Ferracioli and Kieran Oberman.

[6] For helpful discussion of lawless behavior on the enforcement side, in particular, see Cohen (2020). See also Sager (2017).

[7] See Kerry v Din 576 US (2015), upholding the doctrine of consular nonreviewability, even though a fundamental right—the right to live with one's spouse—was at stake.

[8] 8 U.S. C. 1,225(b)(1)(A)(i) (2012); 8 U.S. C. 1,252(e)(2 (2012).

[9] For a particularly striking example, see the Australian Migration Act (1958) §7A, which purports to give the executive the power of "ejecting persons" from Australia when it deems it necessary to "protect Australia's borders" despite any other statutory provisions.

[10] See U.S. *ex rel*. Knauff v Shaugnessy, 338 U.S. 537, 544 (1950), "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." For a detailed discussion of the plenary power doctrine, see Mendoza (2017) pp. 2–5, 20–2. I do not agree with all of Mendoza's argument but find it highly stimulating. The Australian government claims similar powers, as do most states.

[11] Doctors in the United Kingdom are required to check immigration status before providing medical treatment. States may also achieve the same end in less direct ways. In Australia, for example, citizens and permanent residents receive free emergency medical care under the Medicare system. Those who are not citizens or permanent residents must pay a minimum of $500 up front before receiving treatment at an emergency room. Most authorized migrants will have insurance that will reimburse this amount, but for unauthorized migrants, most of whom will lack insurance, the cost may be prohibitive.

[12] *Plyer v Doe* 457 U.S. 202 (1982).

[13] Convention on the Rights of the Child, §18, 28.

[14] For a helpful discussion of the idea "sanctuary" in the immigration context, see Motomura (2018) and Wilcox (2019).

[15] For helpful discussion of the legal issues here, see Papanicolopulu (2016).

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