

Justice, Collective Self-Determination, and the Ethics of Immigration Control

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ABSTRACT *This article brings Gillian Brock and Alex Sager's recently published books into conversation with my book, *Immigration and Democracy*. It begins with a summary of the main normative arguments of my book to set the stage for critical engagement with Brock and Sager's books. While I agree with Brock's *Justice for People on the Move* that state power must be justified to both insiders and outsiders, I think she gives too little weight to the value of collective self-determination. I distinguish between justice and collective self-determination and argue that each is an important component of legitimacy. Sager's *Against Borders* focuses on immigration enforcement and contends that violence is inherent in border controls. Every legal system is backed by the threat of the use of force; the question is whether the use of force by state agents is justified. In contrast to Sager, I argue that the proper response to the injustices of current immigration enforcement is reform, not abolition, of the immigration system.*

Migration is one of the most contentious issues in contemporary politics. Where you stand on specific policy questions about migration depends in part on how you interpret fundamental values of political morality. Does respect for the freedom and equality of human beings require opening international borders? States exercise power over borders, but what, if anything, justifies this power? Do states have a right to control the movement of people into its territory? If so, how should the state's claim to control immigration be weighed against the prospective migrant's claim to enter? My book, *Immigration and Democracy* (2018), takes up these questions and considers their implications for immigration law and policy in liberal democratic countries.¹ A number of philosophers and political theorists have recently written books about migration. I am grateful for the opportunity to engage with two of them, Gillian Brock's *Justice for People on the Move* and Alex Sager's *Against Borders*.² We may not agree on a single approach or set of solutions to the challenges raised by migration, but I hope this critical exchange can move the debate forward by identifying key points of contention and clarifying the sources of our disagreement.

I begin with a brief summary of my own approach to set the stage for analysing Brock and Sager's arguments. My book offers an intermediate ethical position between proponents of open borders and their critics, what I call *controlled borders and open doors*.³ In contrast to some nationalists, I do not believe states should regulate immigration solely in the interests of their own members. I argue that members of a political community have special obligations to one another, but they also have an obligation to take the interests of prospective migrants into account. We have universal obligations to respect the human rights of all people, regardless of whether they are inside or outside the borders of the country in which we live. Prospective migrants may have urgent reasons for moving across borders,

and their interests may trump the less weighty interests of members. For example, refugees fleeing persecution and violence must be taken in by neighbouring states, and those unable to return to their homelands due to protracted conflicts must be resettled in countries with integrative capabilities.

At the same time, in contrast to open-borders proponents, I do not think that respect for the moral equality of all human beings requires treating everybody the same. We have universal obligations to all persons, but we also have associative obligations in virtue of the particular relationships we have with others. Political membership or citizenship is a type of associative obligation, which grounds particular rights and obligations. A government may show some partiality toward its members. One of the rights of membership in a political community is the right to make decisions about migration and membership. This right flows from the idea of collective self-determination, the claim of a group of people to rule itself. Collective self-determination grounds the territorial rights of states, which includes the right to control resources in the territory and the right to regulate migration. On my view, a government may deny admission to prospective migrants if their basic interests are protected in their home countries, and doing so protects important interests of its constituents. For example, a government is justified in excluding prospective migrants who want to move to pursue higher wages above an already decent level if doing so is necessary to sustain domestic social-welfare programs.

Gillian Brock's *Justice for People on the Move* also offers a 'middle ground' approach between proponents of open borders and their critics (p. 190). We share the view that the value of collective self-determination can ground the right of states to control immigration and that this right is qualified by universal obligations. One challenge Brock's book raises for my account focuses on the relationship between our universal obligations and the state's claim to collective self-determination. Building on Charles Beitz's conception of human rights, Brock develops a human rights-oriented account of migration justice in which the legitimacy of the state system depends on each state doing its part to protect and fulfil human rights both inside and outside its borders. As Brock puts it, 'States have responsibilities to promote conditions that support self-determining, just communities. Discussion of these supplementary responsibilities is missing in many conversations about migration justice' (p. 33). I think Brock is right that theorists of migration, including myself, have given insufficient attention to connecting the state's claim to control migration with its responsibilities toward people outside its borders. I do discuss obligations of global justice in analysing distributive justice arguments for open borders. I argue that remedying historical injustices will sometimes require targeted admissions policies as in the case of countries that have contributed to the creation of refugee crises and in the case of colonial powers that have coercively shaped the lives of those they colonised. But in many other cases, the redistribution of resources is a more effective and more desirable alternative to open borders.

Brock goes farther than I do in elaborating the content of our universal obligations and in making these obligations a condition of the legitimacy of the state system. She begins by asking how we can justify a world carved up into states. Her answer is that 'the justification needs to be made in terms that everyone including and especially those excluded from the state can appreciate as compelling' (p. 36). The justification she develops from this common standpoint is centred on human rights: 'states will have obligations to support institutional arrangements that can respect everyone's human rights, whether or not they are on the territory of the state' (p. 37). Brock elaborates three conditions for the legitimacy

of states: (1) states must respect their own citizens' human rights (internal requirement), (2) states must be part of a legitimate state system (system requirement), and (3) states must participate in the cooperative project needed to sustain a justified state system (contribution requirement) (p. 38). A key implication of these legitimacy conditions is that:

when particular state governments fail to perform adequately on human rights or fail to do what the presuppositions of a justified state system require, the state's own claim to exercise power legitimately can be called into question...including throwing into doubt whether a state has a defensible right to control borders. (p. 39)

While I agree with Brock that state power must be justified to both insiders and outsiders, I think she gives too little weight to the value of collective self-determination. On her view, if a government fails to meet its obligations to support the human rights of people outside its borders, its legitimacy, including its authority to make decisions about migration, is called into question. As Brock says, 'the claim to self-determination may not shield states from those who undertake actions that would better align with a justified state system (such as when they act in ways that can better secure human rights that are under threat)' (p. 39). She gives the examples of 'refugees entering a state unlawfully when the state system fails to make adequate arrangements for their protection' and the creation of sanctuary cities to protect undocumented migrants from deportation (p. 39). Another implication of her view is that a state may be justified in forcibly intervening in another state that fails to fulfil its human rights obligations.

Brock's account of legitimacy privileges justice at the expense of collective self-determination. In my book, I distinguish between justice and collective self-determination and argue that each is an important component of legitimacy.⁴ Liberal theorists tend to approach the question of the legitimacy of states in terms of justice: the focus has been on the quality of state institutions and whether they provide certain rights and substantive goods. I believe Brock's theory falls into this category. By contrast, I think that while the provision of basic rights is a necessary condition of legitimate political authority, it is not sufficient. People have an interest not only in receiving goods but also in shaping the institutions under which they live.

Justice-based theories of legitimacy ignore the distinctive value of collective self-determination. For example, colonised peoples have appealed to the idea of self-determination in mobilising against colonial governments. Even proponents of humanitarian intervention by one state into the affairs of another in cases of genocide and other mass atrocities have held that occupiers have an obligation to restore the country to independence after the emergency has passed and a decent political order has been established. The claim of self-determination in these cases, by colonised and occupied peoples, is a claim about who has the authority to rule. The claim of self-determination says the legitimacy of political rule depends in part on authorisation by the people. In other words, collective self-determination is a necessary condition of legitimate political authority. To be legitimate, political institutions must not only be just; they must reflect the will of the people governed by those institutions. This means that sometimes the exercise of collective self-determination can lead to injustice, resulting in a tension between these two components of legitimacy.

Brock anticipates the objection that her account of migration justice leaves little room for collective self-determination. In response, she discusses the example of a government

trying to decide whether to sign on to the Global Compact for Safe, Orderly, and Regular Migration. By signing up, the state would commit itself to various actions aimed at reducing migration injustice. She says no state will force this government to adopt the Compact, but adds that:

the state has strong moral reasons to sign up. I claim it has an obligation to do so. Binding itself to the terms of the Compact does not relevantly undermine the fact that the state remains a self-determining entity. Self-binding and self-determination are compatible. (p. 217)

If a state chooses to bind itself to the Compact, then such binding is compatible with self-determination. What if a state refuses to sign up or after signing up, fails to act in support of the Compact? We could say the state is acting unjustly. In contrast to Brock, however, I think we could also say that the state's refusal to sign up is a prerogative that flows from its right of collective self-determination. On Brock's account, any state that refuses to sign up jeopardises its right to collective self-determination. The state's claim to self-determination seems to dissolve if it fails to meet its human rights obligations toward those outside its borders. In my view, we should recognise that even when a state fails to meet its human rights obligations abroad, it may still have a rightful claim to collective self-governance over its territory. In other words, we should say that a state that refuses to sign the Compact still has the right to collective self-determination, but it exercises this right wrongly from the standpoint of migration justice.

Why does this matter? In five chapters of her book, Brock provides accessible, up-to-date discussions of specific controversies in contemporary immigration politics, including irregular migration, refugees, temporary labour migration, and the Muslim bans in the United States. Part of the aim of these chapters is to flesh out her account of migration justice, showing how specific human rights requirements constrain what states may do. For example, in the chapter on irregular migration, she provides reasons why legitimate states may not expel irregular migrants who have lived in the territory for at least five years and should instead regularise their status. She argues that deporting such long-settled migrants 'threatens a state's right to exercise power legitimately by failing to meet core internal, system, and contribution requirements' (p. 90). The implication is that the state's failure to meet its human rights obligations undermines its claim to control migration. Like Brock, I argue that the longer migrants have lived in a country, the stronger their right to remain, but unlike Brock, I do not think that if the state were to expel long-settled migrants, it loses its right to collective self-determination. Instead, I regard the reasons for regularising and ultimately extending citizenship to unauthorised migrants as countervailing considerations of justice, which should be regarded as constraints on the state's right to collective self-determination. The right to collective self-determination resides in the people whom the state is supposed to represent. When the state acts unjustly, the people do not lose their right to collective self-determination. Instead, the people must speak up, lobby, and protest to get their political representatives to act in accordance with justice.

It is precisely because I take the value of collective self-determination seriously that the arguments in my book are addressed not only to scholars of migration but also to members of political communities engaged in public debate about what kind of immigration policies democratic countries should pursue. I believe democratic countries have the right to govern migration, even when they act wrongly. My hope is that normative scholarship on

migration such as our books can contribute toward illuminating and reducing the gap between what collective self-determination permits and what justice requires.

I turn now to discuss Alex Sager's *Against Borders*, which advances a number of arguments for open borders. He reiterates arguments made by Joseph Carens and other liberal proponents of open borders based on the right to freedom of movement and the demands of distributive justice. Since I devote two chapters of my book to such arguments, I focus here on what I take to be the more distinctive contribution of Sager's book: his attention to the actual practice of immigration enforcement. As he puts it,

Fleeting attention to the nature of border controls reveals their considerable violence. Border controls predictably contribute to the deaths of thousands of migrants each year, deliver refugees into the hands of their persecutors, and deprive hundreds of thousands more of their liberty through immigrant detention. Given the nature of border controls and the unlikelihood of reforms that would ameliorate these harms, immigration restrictions cannot be justified. (p. 52)

Sager contends that violence is 'inherent' in border controls (p. 51). The violence is clearest when security forces injure and kill migrants as in the case of 15-year-old Sergio Hernandez Geureca who was shot by a US Border Patrol agent (p. 52). Violence is also 'visible' in the EU's partnership with countries such as Libya and Sudan to prevent migrants from reaching the EU; by cooperating with these countries, the EU participates in human rights abuses (p. 52). States also 'inflict violence directly' through immigration raids and immigrant detention (p. 53). These enforcement practices have devastating effects on not only unauthorised migrants but also many citizens and legal permanent residents who are interrogated and detained without access to legal counsel or the opportunity to contact family members (p. 54).

Sager's argument about the inherent violence of border controls poses a challenge to those who defend any form of immigration regulation. It is one thing to argue, in theory, for a legal system of immigration controls, but what if, in practice, immigration laws cannot be enforced without inflicting violence on migrants? I think Sager is right that theorists of migration have given insufficient attention to the actual practice of immigration enforcement. The policy-focused chapters of my book advocate a number of immigration reforms, including expanding legal pathways for immigration and legalisation for unauthorised migrants who have settled in the country. I argue that migrants who have been settled for a period of time acquire the right to remain, but those who have just arrived or been present for only one or two years do not. On my view, it is within the legitimate exercise of the state's right to control immigration to deport unauthorised migrants who have not yet settled in the territory. Sager's objection is that states cannot enforce such a policy without inflicting violence against migrants.

In response, I want to start with the basic point that every legal system is backed by the threat of the use of force. The question is whether the use of force by state agents is justified. I join Sager in condemning the killing of migrants at the border and the EU's complicity in the human rights abuses suffered by migrants in Libya and Sudan. I also share Sager's view that immigration raids and immigrant detention are deeply troubling. Unlike Sager, however, I think the proper response to such injustices is reform, not abolition, of the immigration system. The United States and other liberal democratic countries should create a more humane system that respects the human rights of migrants. In discussing

state responses to unauthorised migration in my book, I argue there are moral constraints on how liberal democratic states can carry out removal. The current immigration enforcement system in the United States has weak procedural protections that fall far short of any reasonable standard of due process. Noncitizens facing deportation have no right to counsel, except at their own expense, and the immigration judges who hear their cases face overwhelming caseloads.⁵ Creating a more humane system requires providing immigrants with access to legal counsel and other due process protections and expanding the number of and increasing training for immigration judges. A more humane system would also drastically limit the use of detention. I share Sager's view that immigrant detention is unjust; it deprives people of their liberty solely because they lack lawful immigration status. Alternatives to detention include release, supported community placement, and affordable bond. Many unauthorised migrants have deep community ties and strong incentives to appear in immigration court.

Sager considers such reform proposals and rejects them in favour of open borders for two reasons. First, he says a more humane system is 'only a small step away from open borders... Why, then, not take the last step and endorse open borders instead, abolishing the opposition between people who belong to our community and potentially problematic 'others'?' (pp. 57–58) My answer is that there's an important difference between his open borders and my 'controlled borders and open doors' position: the weight given to the idea of associative obligations and the value of collective self-determination. As I said above, I believe we have particular obligations in virtue of the particular relationships we have with others; this includes not only family and friends but also members of the political community. We have special rights and obligations in virtue of our political membership. In contrast to many nationalists, I do not define political membership in terms of sharing a national culture but rather in terms of participating together in a scheme of social and economic cooperation and in a shared project of collective self-determination. Although members of a political community are strangers to one another, they come to identify with the community through a shared history of cooperating together. One important right of membership is the right to make decisions about migration and membership.

Sager seems to give some weight to collective self-determination and state sovereignty when he contrasts his open borders position from the 'no borders' position. He maintains 'it is neither feasible nor desirable to eliminate all borders or forms of closure... The question isn't whether or not to have borders or whether all borders should be open but rather which borders we want to sustain and how open they should be' (p. 17). He argues state borders should be open, whereas the borders to family and intimate friendships can be closed. He contends that open borders would not undermine state sovereignty, which he takes to include 'the right to exclude other states from intervening on their territory' and 'the right to administrative activities within state borders,' but not the right to control migration (p. 17). On his account, states would still have 'abilities to exclude foreign political actors from their territories or even to regulate the movement of goods or capital' (p. 18). They just would not have the ability to exclude prospective migrants.

I agree that state sovereignty consists of a bundle of territorial rights, which can be unbundled, but removing the ability to control migration from the bundle would eliminate one key element of state sovereignty. For example, if a group of wealthy Americans decided to migrate to Vietnam and buy up land and settle there, on Sager's theory, there is nothing the Vietnamese government could do to stop them. It is hard to deny that the Vietnamese government's inability to regulate such migration is a loss of state sovereignty.

In contrast to Sager, I believe there is an undeniable tension between open borders and state sovereignty, unless a state chooses to enact a policy of open borders. Proponents of open borders often point to the European Union as an example of state sovereignty with open borders, but it is important to recognise that the member states of the EU chose to join the European Union and adopt a policy of open borders for citizens of EU member states.

The second reason Sager gives for favouring open borders over a more humane open-doors position like mine is:

the difficulty of reaching this humane system while maintaining the right to exclude. Liberal criticism of immigration enforcement begins to identify important wrongs, but it ignores how immigration enforcement is a product of structural injustice... [Immigrant exclusion] has always involved actively constructing people as inferior, subordinate, and exploitable to uphold racialized hierarchies. (p. 58)

Sager focuses in particular on immigrant detention, which must be understood in the broader context of a racialised system of mass incarceration. As he puts it, 'race and class are not incidental to immigration enforcement; they are at the core of a system that allows for and indeed encourages abuse, subordination, and exploitation of racialized, illegalized populations' (pp. 58–59).

In response, it is important to acknowledge the persistence of structural racism in the United States and other liberal democratic countries. Structural racism is not unique to immigration law and practice; it pervades our legal and political system across all areas, including criminal justice, health care, housing, and education. We must continue to work toward dismantling structural racism. I share Sager's concern about the racialised origins and effects of immigrant detention, which is why I favour alternatives to detention in enforcing immigration law and regularisation for unauthorised migrants who have settled in a country. But I am more optimistic than Sager about the possibility of reforms to ameliorate racial injustice in immigration law and policy. The history of US immigration policy is rife with racism, as Sager emphasises. The Chinese Exclusion Act of 1882 enacted by the US Congress and upheld by the US Supreme Court was based on morally reprehensible views about Chinese people as 'foreigners of a different race' who threatened national security.⁶ The 1924 National Origins Quota Act privileged immigration from northern and western Europe and reduced immigration from southern and eastern Europe based on racist ideologies. Yet, there have also been significant legal reforms that have moved the United States toward greater racial equality. The 1965 Immigration and Nationality Act abolished the national origins quotas and established the preference system making family reunification the centerpiece of US immigration policy. The 1965 law led to large-scale migration from Asia and Latin America and significantly changed the racial composition of the United States. In 1970, 83 percent of the population was White, 11 percent Black, 4.6 percent Latino/Hispanic, 0.8 percent Asian/Pacific Islander, and 0.4 percent American Indian/Native Alaskan. In 2019, 60 percent of the US population was White, 18.3 percent Latino/Hispanic, 13.4 percent Black, 6 percent Asian, and 1.3 percent American Indian/Native Alaskan.⁷

I do not mean to suggest the 1965 immigration law was perfect. The law instituted the first ever cap on immigration from the 'Western hemisphere' and imposed a quota of 20,000 per country. This narrowed the legal pathway to entry for migrants from Mexico

from a theoretically unlimited number of resident visas (which averaged around 50,000 per year) to 20,000 visas annually. This facially equal formula of 20,000 visas per country ignored the long history of economic interdependence and circular migration between the United States and Mexico. Around the same time, the US government ended the Bracero program, a temporary migration program that began in 1943. Mexico went from annual access to roughly 450,000 guest-worker visas down to zero. In practical terms, similar numbers of migrants were continuing to circulate across the Mexico-US border and going to the same destinations in the United States. Yet, in the eyes of the law, the vast majority of migrants from Mexico were now deemed 'illegal'. This created an opening for political entrepreneurs to cultivate a new politics of fear, framing Latino immigration as a grave threat to the United States.⁸

Sager is right to emphasise that immigration law constructs some migrants as inside and others as outside the law. But in my view, the proper response to these problems is not open borders but migration policies that recognise and accommodate longstanding circular migration between Mexico and the United States. I support many of the policies recommended by Douglass Massey, Jorge Durand, and Karen Pren, who argue for shifting from a policy of 'immigration suppression' to one of 'immigration management': accept Mexican migration as a natural component of ongoing economic integration under NAFTA; encourage return migration by lowering the cost and risk of remitting US earnings, making legal immigrants eligible for US entitlements even if they return to Mexico, and cooperating with Mexican authorities to create attractive options for savings and investment in Mexico; and instead of continuing to pour billions of dollars into border enforcement, provide structural adjustment funds to Mexico to improve its infrastructure for public health, education, transportation, banking, and insurance.⁹

Finally, I appreciate Sager's focus on structures of inequality and how they are shaped by race, class, imperialism, and other hierarchies of power. I think theorists of migration need to attend much more to these forms of structural inequality and how they affect what is owed to migrants. In contrast to Sager, however, I am sceptical that open borders would really do much to dismantle structural inequality. There are reasons to think that open borders would exacerbate, not ameliorate, inequality between and within countries. First, in a world of open borders, it is not the world's poorest people who are likely to migrate, but those with more resources and connections, which would make open borders a limited solution to global poverty.¹⁰ Second, the departure of high-skilled individuals from developing countries would lead to the loss of the people best equipped to demand and build better institutions. Finally, open borders may reinforce neoliberal policies and practices by making it easier for corporations to have access to a low-skilled labour force and contributing to the erosion of the wages of working-class people, including immigrants of colour, in wealthy Western countries. This objection was raised by Bernie Sanders when he was asked if he was for open borders. He replied,

Open borders? No, that's a Koch brothers' proposal... a right-wing proposal, which says essentially there is no United States... It would make everybody in America poorer—you're doing away with the concept of a nation-state... What right-wing people in this country would love is an open-border policy. Bring in all kinds of people, work for \$2 or \$3 an hour, that would be great for them. I don't believe in that.¹¹

Would open borders lead us further toward a neoliberal dystopia or turn us toward an egalitarian utopia? In the broader context of global capitalism, growing economic inequality, and the surge of far-right populism, our best hope might be to harness the state's power to enact progressive immigration reform and more robust social welfare programs rather than calling for open borders.

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NOTES

- 1 Sarah Song, *Immigration and Democracy* (Oxford: Oxford University Press, 2018).
- 2 Gillian Brock, *Justice for People on the Move: Migration in Challenging Times* (Cambridge: Cambridge University Press, 2020); Alex Sager, *Against Borders: Why the World Needs Free Movement of People* (New York: Rowman & Littlefield International, 2020).
- 3 Song op. cit., p. 10, 111.
- 4 Here I draw on Song op. cit., Chapter 4.
- 5 Song op. cit., pp. 187–188.
- 6 I discuss the 1882 Chinese Exclusion Act and the foundational US Supreme Court case that upheld it in Song op. cit., Chapter 2.
- 7 U.S. Census Bureau, 1970 Census and 2019 American Community Survey.
- 8 Douglas S. Massey & Karen A. Pren, 'Origins of the New Latino underclass', *Race and Social Problems* 4,1 (2012): 5–17; Douglas S. Massey, Jorge Durand & Karen A. Pren, 'Why border enforcement backfired', *American Journal of Sociology* 121,5 (2016): 1560.
- 9 Massey *et al.* op. cit.
- 10 I develop this argument in Song op. cit., Chapter 4.
- 11 Ezra Klein, 'Bernie Sanders: The Vox conversation', *Vox* (28 July 2015). Online at: <https://www.vox.com/2015/7/28/9014491/bernie-sanders-vox-conversation>. Accessed 17 October 2021.