

## **Migration Control, Authority, and Disobedience**

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### **I. Introduction**

Every day, migrants cross borders irregularly around the world. Governments generally claim that those migrants are "illegal migrants," while humanitarian NGOs prefer to call them "irregular migrants." More than 11 million migrants reside in the United States while not having the legal authorization to do so (Baker, 2021)—but this number includes both those who have entered irregularly and those who have overstayed their visas. Furthermore, in the Fiscal Year 2022, more than two million encounters were registered in the Southwest Land Border of the United States by U.S. Customs and Border Protection (U.S. Customs and Border Protection, n.d.). Governments try to prevent migrants from crossing their borders irregularly—they build border walls, deploy border control agencies and officers, and even use emergency powers. Governments control their borders and require migrants to obey migration laws on admissions while at the same time not allowing them to have any influence in that legislation.

In this essay, I seek to answer the following, closely related questions: how should we understand irregular migrants' disobedience to migration law? And is such disobedience justified? By migration law, here, I do not refer to the whole legal framework that regulates migration admissions, types of visas, and pathways to citizenship. Rather, I refer to a more limited aspect of it: the control of immigration and decisions over admissions. While migration control occurs at multiple ports of entry—such as international airports, ports, and

land border crossings—we generally associate disobedience to migration law with migrants who attempt to enter a country through unauthorized land border crossings.<sup>1</sup> Although the practices of disobedience that I address in this essay refer mostly to disobedience to migration control at the border, this is only an illustration of where it is more common to happen, and not because my argument refers only to border control itself. Therefore, I focus on whether migration enforcement authorities have the legitimate right to enforce migration law—to prevent migrants' entry to a country's territory.<sup>2</sup>

To answer the above questions, I proceed in two steps. First, I argue that the literature on disobedience to migration law has overlooked a crucial element: one necessary condition for migration control authorities to have a legitimate claim to rule and enforce migration law over migrants is the multilateral determination of immigration law. Immigration law, in the sense I use the term here, exerts authority over immigrants. Therefore, we should not set a standard for the legitimacy of that authority that is too different from the standard that we require for other sources of authority—namely, the state. If such a standard is not met, there is no legitimate authority that can rule over migrants's entry. Therefore, immigrants may be justified in not obeying migration control at the border. As I show in the next section, the different views on disobedience to migration law have missed the fact that migration law involves the exercise of authority over migrants, and therefore needs to be subjected to certain standards of legitimacy.

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<sup>1</sup> That is what we think of, for instance, in the case of immigrants' disobedience at the U.S.-Mexico border. More recently, though, disobedience to migration law has also taken the shape of entering a country without authorization through the sea, as in the case the European Mediterranean Coast.

<sup>2</sup> By immigration enforcement authorities, I mean a dedicated border control agency or whoever is performing that task in a given moment, which may, under certain circumstances, be police officers and the military.

In the second step of my argument, I argue against recent work that has attempted to consider disobedience to migration law as a type of civil disobedience or as something akin to it. I argue that this is wrong; instead, we should understand them as acts of unprincipled disobedience in the absence of a legitimate authority. Such understanding of disobedience to migration law, I argue, can better account for migrants' lack of principled—political or moral—motivation. As I will discuss later, most migrants who irregularly enter a country do not do so as a form of protest or to press for change in migration policy. When we understand the justification for immigrants' acts of disobedience without framing them as acts of civil disobedience, we avoid one of the elements of the normative political theory of civil disobedience that can result problematic: to be justified, civil disobedience requires unlawful actions to have a principled motivation. In that sense, migrants' disobedience to migration control might imply requiring them to show that their disobedience has a moral or political motivation. Therefore, studying migrants' disobedience can shed light on cases of justified disobedience to the law without a principled motivation. Besides, understanding such actions as acts of unprincipled disobedience suggests that we do not need to hold migrants to incredibly high standards of morality or neediness to justify their disobedience to migration law.

This essay proceeds as follows. In section II, I review recent work on disobedience to migration law and show that they either have failed to address the question of the legitimacy of border control or propose inadequate standards for the legitimacy of border control. In section III, I develop my argument about how border control could be legitimately exercised. I aim to show that border control exerts authority and that, therefore, admission policy should be multilaterally determined. I close the section by discussing competing arguments about

the multilateral determination of migration and border control. In section IV, I argue that if border control is not legitimate, then migrants are justified in disobeying migration laws. I claim that this type of disobedience is to be generally understood as a form of unprincipled disobedience in the absence of a legitimate authority and not as a form of civil disobedience. Finally, I conclude.

## **II. Four Views on Disobedience to Migration Law**

The literature on the disobedience to migration law can be, at a broad level, divided into two main positions. According to the first one, migrants have a duty to obey migration law if it is just. According to the second one, migrants have a duty to obey migration law if it is legitimate. Let us call the first the justice view and the second the legitimacy view. This is a very rough division, since those who fall into the justice view actually disagree profoundly about when such restrictions are unjust. In this section, my goal is to discuss those two views and their different versions. I argue that, while the legitimacy view seems to more rightly identify the problem of migration control—I also argue it is a matter of legitimacy—they have failed to identify the adequate criteria for making migration control legitimate.

Let us start by discussing the justice view. Javier Hidalgo (2015, 2016a, 2016b, 2019a, 2019b) has developed, to the best of my knowledge, the most comprehensive account of disobedience to migration law. Here, I focus on his arguments that bear on disobedience to migration control. One of Hidalgo's main claims is that "migrants can evade, deceive, and use force against state officials to avert the threat these agents pose when these officials enforce unjustified immigration restrictions" (2019b, p. 115). Of course, whether one shares Hidalgo's argument depends on what one considers an unjustified migration restriction to

be—or whether such restrictions can be justified at all.<sup>3</sup> Hidalgo himself has developed two positions.

On the one hand, Hidalgo holds that most restrictions on immigration are unjust, and therefore migrants are justified in disobeying migration law: "Since most immigration restrictions are unjust, resistance to unjust immigration restrictions is usually justified" (2019b, p. 115). This view depends on Hidalgo's broader views about migration justice. As he summarizes them:

Are immigration restrictions justified? My answer: generally speaking, no... Immigration restrictions interfere with valuable freedoms, such as freedom of association and occupational choice. So, there is a presumption against immigration restrictions. Other moral considerations can in principle defeat this presumption. Yet actual states enforce immigration restrictions in an unreliable way. States are biased against immigration. (2019b, p. 12)

As we know, however, Hidalgo's views on migration policy are not necessarily widely shared. There is an ample literature on why restrictions on immigration are justified or can potentially be.<sup>4</sup>

Hidalgo has also provided a more limited version of his argument that does not require us to accept open borders. Hidalgo's (2015) more restricted account depends on what he calls the Minimal Standard (p. 453), according to which states cannot refuse the entry of prospective immigrants for whom migrating is the only way of protecting their human rights and whose entry does not impose significant net burdens on the citizens of such state.

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<sup>3</sup> As Hidalgo himself notes, "[y]our background views about the moral status of immigration restrictions will likely affect your position on the permissibility of resistance to immigration law" (2019a, p. 3).

<sup>4</sup> See, for example, Gillian Brock (2020), David Miller (2015, 2016b, 2016a), Ryan Pevnick (2011), and Sarah Song, (2019). For those who support open borders, see Joseph Carens (2013), Chandran Kukathas (2012), and Sager, (2020).

Furthermore, Hidalgo observes that "that state employees pose threats of harm to some prospective migrants and unauthorized immigrants" (p. 454). Hidalgo concludes from this that "it is sometimes permissible for foreigners to evade, deceive, and use defensive force against border agents" (p. 458). However, Hidalgo's article now applies mostly to those who leave their country for humanitarian reasons.

Is it possible, then, to extend the right to disobey migration control beyond humanitarian cases? Guy Aitchison (2023) attempts to make such a case. In Aitchison's view, "unlawful border crossing should be understood as the exercise of a remedial moral right to resist the illegitimate exercise of coercive power" (p. 598). For Aitchison, there is "a moral right to cross state borders in violation of immigration laws in cases where those laws violate the procedural standards that provide the most plausible basis for the law's authority in relation to noncitizen outsiders" (p. 598). Particularly, thinks Aitchison, those are the cases in which migration laws "are constructed and enforces in ways that are racist or otherwise discriminatory, failing to show regard for equal moral status" (p. 599). However, Aitchison argues that migrants ought to respect the other country's migration law, if this has been "arrived at through a democratic constitutional process" (p. 603), as a way of showing recognition respect to the citizens of that state.

In a similar line, David Miller (2023) also defends a conditional duty of migrants to obey migration law. Miller's argument relies on the natural duty of justice, particularly according to Rawls's formulation: that we ought to "support and to comply with just institutions that exist and apply to us" (Rawls, 1971, p. 115). Miller argues that migration law should meet a series of requirements in order to be legitimate and require migrants' obedience. First, the state should show that "some restrictions on immigration need to be

imposed, in the name of social justice, or democracy, or environmental protection and so forth" (p. 842). Second, "the general shape of immigration law... needs also to be tested at the bar of justice" (p. 842). Finally, the implementation of the migration law "must comply with standards of procedural justice" (p. 842), which would involve that admission claims are properly assessed with the necessary information available, that those whose admission is denied can appeal against the decision, and that the claimant's human rights are respected.

The four perspectives presented by three authors that I have discussed so far have something in common: they focus on whether immigration restrictions are just or not, and claim that only if immigration restrictions are sufficiently just, irregular migrants should obey them. If migration restrictions do not meet a certain standard of justice—and authors differ on what such a standard is—then migrants might be justified in disobeying migration law. Caleb Yong (2018), presents a different view, as his focus is on legitimacy.

Yong's argument is focused on responding to Hidalgo's (2015) view that I also discussed above. Yong proposes that, in assessing the justifiability of disobedience to migration law, we should focus on whether migration law is legitimate, rather than—as Hidalgo's argument does—whether it is just or unjust. He proposes what he calls the Illegitimacy Principle:

Would-be migrants to a constitutional democracy  $D$  are morally justified in nonviolently breaching a particular primary immigration law  $L_P$  enacted and applied by  $D$  according to its established procedures only if either (1)  $D$ 's regime of primary immigration law lacks legitimate authority altogether, or (2)  $D$ 's regime of primary immigration law as a whole presumptively has legitimate authority, but for  $L_P$  in particular that presumptive legitimacy is defeated. (p. 465)

For Yong, the idea behind this principle is that migrants can be justified in disobeying migration law if a legitimacy-defeating condition is present in the migration law of the state.

Yong acknowledges that traditional principles of legitimacy apply to a state's domestic law, and hence "do not offer the theoretical resources to explain how primary migration law can have legitimate authority" (p. 466),<sup>5</sup> since migration law "applies to persons who are not already its members" (p. 466). I think Yong is right about this. However, I disagree with his next step: he seeks a way of legitimizing migration law by appealing to principles of international legitimacy. If we take seriously the fact that migration law is an authority exercised over non-members, we should ask what—if anything—can make such authority legitimate. In this sense, we should ask whether principles of international legitimacy themselves can meet those requirements. Yong does not follow that path.

So far, we have seen that a group of authors—Hidalgo, Aitchison, and Miller—focuses on the justice or injustice of migration law and claims that under certain conditions disobedience to migration law might be justified. Yong, on the other hand, has switched the focus to legitimacy. I think this is a movement in the right direction. Since migration law exercises authority over non-members, we should subject it to standards of legitimacy. However, my disagreement with Yong is in the specific standards he sets for the legitimacy of migration law. In the next section, I aim to develop an account of what legitimacy migration law could be.

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<sup>5</sup> Yong uses the term "primary migration law" as I use migration law throughout this essay. In Yong's view, primary migration law refers to "the regime of laws that regulates noncitizens' entry into and residence in a receiving state's territory" (pp. 459-60). Secondary migration law, in turn, refers to "the regime of laws that directs certain individuals among a receiving state's existing citizenry to participate in or contribute to the implementation—the application and enforcement—of their state's primary immigration law" (p. 460).



### **III. What, If Anything, is Legitimate Border Control?**

So far, I have reviewed the main arguments for and against the rightness of disobeying migration law. The arguments reviewed so far can either justify disobedience to migration law under very limited conditions or require a very demanding and contentious grounding. Besides, they fail to address the question of the need to legitimize the migration control regime to foreigners themselves or provide inadequate standards, as in the case of Yong's argument. In this section, I start developing an account of justified disobedience to migration law. For this, I first need to substantiate one of the main claims that I have made in this essay so far: that migration control exercises authority over non-members. After that, I provide an account of legitimate border control.

#### **A. What is migration control?**

The first step is to understand what migration control is and what it entails for would-be migrants. I claim that migration control implies the exercise of both authority over migrants. Therefore, one must first ask what authority is. Of course, the literature on the meaning of authority is lengthy, but I think Thomas Christiano's (2008) typology results useful here. He distinguishes three ways of understanding legitimate authority. The first is legitimate political authority as justified coercion: "an agent has legitimate authority over other agents with respect to a certain set of issues if the agent is morally justified in coercing the other agents to do what the coercing agent wishes concerning those issues" (p. 240). The second type is legitimate political authority as the capacity to impose duties: "an agent has legitimate authority over other agents if the agent can impose morally binding duties on those

other agents" (p. 240). Finally, the third type of authority is political authority as a right to rule: a "a robust right to rule is first and foremost a valid claim to the authoritative body against others upon whom certain duties are imposed" (p. 240).

If we consider Christiano's second conception of authority,<sup>6</sup> we can see that states not only exercise authority over their own citizens but also over people beyond their borders.<sup>7</sup> States claim, on the one hand, the right to control their borders: to decide who can enter or not into their territory. This imposes duties on people beyond their borders, as they are expected to comply with states' requirement to not enter without their authorization. Furthermore, when migrants approach an inter-state border, either to a legal border crossing or an illegal one, they will face border control agents.<sup>8</sup> When migrants attempt to enter a country, a migration agent—or several of them—will decide whether to grant admission or not. That decision is itself an exercise of authority. When a migrant attempts to enter a country through unlawful means—say, through an unauthorized border crossing, with or without the aid of a smuggler—then the migrant is likely to face border control agents which, under general conditions, will either place her under detention or will make her return to the country where she came from. That is an act of authority. Migration agents exert authority over migrants, but migrants do not have any kind of influence over the laws the border agent is enforcing.

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<sup>6</sup> This account of authority is similar to, for instance, Daniel Viehoff's (2014)(Viehoff, 2014). He argues that "Authority is centrally the power to morally bind others by giving them directives that they must follow" (p. 340).

<sup>7</sup> This point has gained more attention in the political philosophy of migration and of territorial rights. Authors like Arash Abizadeh (2008) and Paulina Ochoa Espejo (2020), for instance question the assumption that states only exercise their authority over their citizens.

<sup>8</sup> Of course, this is an idealized description of how irregular immigration works. In many cases, borders may be poorly oversighted by one or all of the bordering states, or states might simply lack the capacity to oversight the border, and hence migrants will not really face border control agents.

And what if the migrant resists border control agents' decisions or orders? The authority being exerted by the border agent is backed up by (the threat) of coercion. If a would-be migrant attempts to disobey migration law, she will face the state's coercive force. Therefore, when (would-be) migrants attempt to enter a country, whether by lawful or unlawful means, they will face the threat of coercion by an authority over which they have no influence.

Therefore, migration control entails the exercise of authority (and eventually coercion) over (would-be) regular and irregular migrants. What does this imply? The kind of authority that border control exerts over migrants is not so different from the kind of authority that the state regularly exerts over its citizens. The state exerts authority and coercion over its citizens, and in legitimate states, citizens vote for their government, elect authorities, and even vote directly for some laws during referendums. Since border control exerts the same type of authority over migrants, for it to be legitimate, border control should be legitimized not only toward citizens but also to noncitizens.<sup>9</sup>

Legitimacy, as it is widely understood, is a matter of both respect for individual rights and of democracy. Consider, for instance, John Rawls's (2005) account of political legitimacy.<sup>10</sup> How can citizens justify their political decisions to each other? As Rawls argues, the key is the criterion of reciprocity: "our exercise of political power is proper only when we sincerely believe that the reasons we offer for our political action may reasonably be accepted by other citizens as a justification of those actions" (p. xlv). This, according to

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<sup>9</sup> In the following subsection I sketch a proposal of what this might entail more precisely.

<sup>10</sup> Rawls formulated his view of legitimacy for the domestic sphere, besides assuming a closed society. However, what I claim it follows from my discussion is that the same principles of legitimation of political power that we think of as legitimizing the exercise of political power in the domestic sphere, also should be applied toward non-citizens.

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Rawls, applies to both the constitutional structure and the statutes and laws enacted in accordance with that structure. And the liberal principle of legitimacy states that "political power is legitimate only when it is exercised in accordance with a constitution (written or unwritten) the essentials of which all citizens, as reasonable and rational, can endorse in the light of their common human reason" (Rawls, 2001, p. 41). Furthermore, "all legislative questions that concern or border on these essentials, or are highly divisive, should also be settled, so far as possible, by guidelines and values that can be similarly endorsed" (Rawls, 2001, p. 41).

And consider also Christiano's (2008) account of legitimate political authority. According to Christiano,

to say that democracy has authority implies that the citizen is required to go along with the democratic decision even in those cases where he or she thinks the decision unjust. But the authority is unlimited; there are some cases in which the injustice of the result outweighs or defeats the justice of democracy (p. 231).

Of course, Rawls's and Christiano's grounds for the legitimacy of political authority are different. However, they both converge in that for a political authority to be legitimate, this one would be required to meet the requirements of both being democratic and respecting the rights of those subjected to it.

Although Rawls's and Christiano's discussion of legitimacy refer to the domestic sphere, the core idea is that political power, which is coercive, must be legitimized to those who are subject to it. The way in which it is legitimized is by offering reasons that all rational and reasonable citizens could accept. And for Rawls, the discussion of the reasons given for exerting political power over citizens is key. It is not enough that public officials offer the

reasons behind the laws they enact. Those reasons are to be discussed by legislators chosen by citizens. This is central in Rawls's (2005) account of public reason.

### **B. Towards Legitimate Border Control**

If what I have argued in the previous subsection is right, then non-citizens should also be given reasons for the laws regulating entry to the countries they wish to enter. Furthermore, the laws regulating immigration should be subjected to respect for immigrants' rights.

Here, a couple of questions arise. Consider, first, whether the international control of borders should be done by bordering states or by the international community of states as a whole. On the one hand, it seems logical that bordering countries should be the ones determining their shared border control regime.

Paulina Ochoa Espejo (2020) makes such a case. She develops a theory of territorial rights that she calls pluralist conventionalism. In her view, the right to border control is "grounded in the conventional recognition of the border—first by neighboring states, and second by the international network of states" (p. 214). On the one hand, the international community of states grants a right to nonintervention. On the other, "bordering states give each other assurances that they will respect each other's limits and create institutions of border control on the ground" (p. 214). This has implications for how border control is to be enforced, and I briefly review the two most important for this discussion. In the first place, she argues, since "the right to border control is justified on the basis of mutual recognition" (p. 218), there are "special obligations to cooperate on matters of shared concern, particularly those issues arising from two countries' contiguity" (p. 218). In the second, "neighboring

countries should cooperate in governing the border" (p. 217). This would include both the allocation and delimitation of the border itself and the management of border control. In Ochoa Espejo's account, this implies that "U.S. immigration policy should be designed with a view to regional concerns, for whether the Mexican state has fundamental objections to the policy, and to whether the Mexican state can enforce the policy" (2020, p. 220).

While I agree with Ochoa Espejo in that shared governance of borders is important—there are issues at the border that Chile and Bolivia share that simply do not arise in the diplomatic relations between Chile and Germany—I think the governance of migration control requires going beyond that. Chile does not claim to have authority only over migrants from Bolivia, Peru, and Argentina. Chile claims control over migration from everywhere, and therefore, the authority it exercises applies everywhere. And the same applies to every other country.

Another—maybe more practical—problem arises. There is an obvious problem in implementing this idea: how are we going to select the people who are entitled to participate in the formulation or reform of the migration law that regulates access to a country?<sup>11</sup> Selecting all of the migrants who are attempting to migrate at a given moment would be impossible to institutionalize.

A way to avoid such a problem, and maybe others, is for there to be an international organization in charge of defining a migration regime for all the world. Such a regime, to be legitimate, should be composed of representatives of all countries around the world elected

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<sup>11</sup> In his discussion on the all-affected principle, James Wilson (2022) calls this the problem of the ever-changing constituencies.

by the citizens of each country or by diplomatic delegates named by each government.<sup>12</sup> Such an international organization would have the authority to determine the regime of migration control, especially with regard to admission policy. That authority would be legitimate in the same sense as we think of the legitimacy of the state since it would be subjected to the democratic control of the people, to a greater or lesser extent, depending on the precise way in which its members are determined.<sup>13</sup>

### **C. Competing Arguments**

To further clarify my proposal, I present two competing arguments on border control and show how they are different from mine. Those are the arguments by Arash Abizadeh (2008) and Sager (2020). I start with Abizadeh's account since it seems to be the most similar to mine and one of the most prominent positions in the subject.

Abizadeh (2008) argues that border control is coercive, and therefore it must be democratically justified not only to citizens but also to foreigners. Why? As he puts it, "because the demos of democratic theory is in principled unbounded, and the regime of boundary control must consequently be domestically justified to foreigners as well as to citizens" (p. 38). Therefore, Abizadeh's argument relies on what he calls the unbounded

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<sup>12</sup> Although there is also a problem with this second options: not all of the countries of the world are equally legitimate in democratic terms. Some governments are more responsive to their people, while other are autocracies—and there is a full range of regimes between both extremes. The second option would be ideal if governments around the world enjoyed of a similarly high degree of democratic legitimacy.

<sup>13</sup> Notably, Hidalgo (2016a) proposes the creation of international institutions devoted to the governance of migration, starting from the fact that immigration restrictions—and particularly their enforcement—are morally risky, and that states are biased against immigration, which influences their decision-making about migration policy. Since public officials and citizens have the duty to mitigate the risks involved on migration restrictions, and to avoid their biases about migration from influencing their decision-making, there are moral reasons for them to transfer that decision-making to a reliable party, argues Hidalgo. I fundamentally agree with Hidalgo in this point, but I have attempted to show that there are more principled reasons for the promotion of such institutions—or one international institution in charge of migration policy and border control. Besides, it is not clear whether an international institution would be necessary if the procedural problems of migration policy that Hidalgo discusses could be addressed by each country separately.

demos thesis, the idea that the "demos to whom democratic justification is owed is in principle unbounded" (p. 45). Abizadeh defends that idea by demonstrating that the idea that the demos is bounded is incoherent. The first incoherence he identifies is the boundary problem. The key question here is "whose participation is necessary for legitimation?" (p. 46). Democratic theory does not have an answer for this question, "for we would once again have to ask, whose participation must be sought to answer the question of membership, which in turn raises a second-order membership question, *ad infinitum*" (p. 46). The second incoherence Abizadeh identifies is that democratic theory requires the democratic legitimation of borders. As Abizadeh puts it, "the act of constituting civic borders is always an exercise of power over both insiders and outsiders that intrinsically, by the very act of constituting the borders, disenfranchises the outsiders over whom power is exercised" (p. 46).

However, I think that Abizadeh's argument can be misleading in two ways. First, I think the focus on coercion alone is misleading.<sup>14</sup> It does not seem correct to say that Argentina's border control is coercing Chileans in general. It does, for sure, coerce those Chileans who actually attempt to enter and face Argentinean border control agents, who may detain them and send them back to Chile.<sup>15</sup> Instead, what border control seems to involve is the exercise of authority over foreigners, an authority that is backed by coercion. It is not until a foreigner attempts to enter a country—lawfully or unlawfully—that it would be subjected to the coercion of that country's border control agencies if her entry is denied. But

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<sup>14</sup> For critiques on this point, see Miller (2010) and Sharp (2022). Sharp considers the claim of that migration control coerces as "controversial" (p. 660). For a response to Miller, see Abizadeh (2010).

<sup>15</sup> And something like this seems to be the focus of Abizadeh's argument at some points. For example, he points out that "[w]e should keep in mind what we are talking about here: modern border controls rely on a terrifying array of coercive apparatuses, ranging from police dogs, electric wires, and helicopters, to incarceration, deportation, torture, shooting on sight, and so on" (p. 46).



that country holds, at every time, the right to decide who enters and who is left outside, therefore exercising that authority. Therefore, distinguishing between authority and coercion seems to be a better way of understanding the exercise of migration control.

Secondly, Abizadeh's grounding on democratic theory seems incomplete. As it is widely acknowledged and as I discussed above, legitimacy is both a matter of democracy and rights. While authors such as Hidalgo and Aitchison, as I have discussed, focused only on the substantive justice element of legitimacy to describe what a legitimate regime of migration control would be—on the particular content of migration law—and Abizadeh only discusses the procedural element—how the content of migration law is determined. To assess whether border control is legitimate or not, both parts are necessary.

Sager (2020), on the other hand, aims to defend open borders. He states that "open-borders proponents advocate abolishing borders that use force to produce illegality. To support open borders is to deny that the use of a state coercion to restrict immigration into state territories is ethical" (2020, p. 12). One of his main arguments for open borders is that border control restricts freedom, and it is a liberal axiom that "restrictions on freedom need justification" (p. 24). Furthermore, "the burden of proof is on those who favor restriction. Anyone who wants to restrict liberty has the responsibility to justify why the restriction is warranted" (p. 24). However, his arguments, at least the ones reviewed here, fall short of actually justifying open borders. Instead, his arguments seem closer to justifying an international way of establishing a regime of immigration that actually justifies immigration restrictions to would-be migrants, as I have attempted to show in the previous subsections.

#### **IV. Illegitimate borders, legitimate disobedience**

So far, I have argued that for states in general—and border (agents) in particular—to exert the authority and coercion they exert in a legitimate way, migration policy should be legitimately determined multilaterally by an international organization. Now, I turn to one of the consequences of my argument: if current border policies are not legitimate, states do not have the right to rule over migrants. Migrants, therefore, can rightly disobey migration law on admissions.

If legitimacy is what grants the right to rule, and legitimacy in border enforcement regimes requires them to be determined multilaterally, then current border enforcement regimes are not legitimate. Current border control regimes involve the exercise of authority over migrants who do not have any type of influence over them. Instead, border control regimes are unilaterally determined by each state. Therefore, migrants have the right to disobey migration law: there is no legitimate authority that can impede them from entering a country. In doing so, perhaps the most important practice of migrant disobedience that migrants are justified in doing is using unauthorized border crossings. In those cases, they circumvent the regular ways of entering a country and try to evade border control agents.

How should we understand the type of disobedience committed by immigrants in circumventing border control? Robin Celikates (2019) argues that we should understand "irregularized migration as a form of civil disobedience that manifests a specific kind of constituent power, namely, the power to initiate a reconstitution of borders and categories of membership" (p. 68). Celikates acknowledges that in most cases the practices of disobedience committed by irregular migrants are "not directly aimed at changing legislation or making a contribution to a debate within an already constituted public of citizens" (p. 75). However, he aims to show that

this type of disobedience can be situated within the terrain of the politics of constituent power in so far as it creates new forms and spaces of the political—often in infra-political or subaltern modes—and is transformative vis-a-vis the existing constitutional order with the potential to reconstitute its boundaries and its logic. (p. 75)

The key here, argues Celikates, is not to make changes at the level of legislation. Instead, these acts of disobedience challenge what are usually "taken-for-granted assumptions about borders and citizenship as the defining features of political communities, and the limited ability and willingness of the members of these communities to reconsider these features" (p. 75).

Celikates makes a very important point about what disobedience by irregular migrants can show us, as he asserts that

it pushes us beyond statist understandings of citizenship in terms of formal status to an understanding of citizenship as a practice that can involve acting as if one is a recognized political subject, and in this way claiming political standing that one might not (yet) have (2019, p. 76).

In Celikates's view, then, disobedience to migration law constitutes a form of civil disobedience, as it challenges our current understanding of borders and citizenship and leads us to rethink our state-centered understanding of citizenship. Luis Cabrera (2010) makes a similar argument.

Cabrera discusses the case of irregular migrants, and claims that

such immigrants are practicing something akin to global civil disobedience within a nascent global civil rights movement. By offering deliberate, principled, though usually covert, resistance to restrictive entry laws, they expose tensions between the structural features of the

current global system and an emerging global normative charter, or set of universal rights that its most prominent nation-states have affirmed. (p. 132).

Therefore, Cabrera also claims that irregular migrants engage in civil disobedience, in a way that challenges our current understandings of citizenship as tied to the nation-state. According to him, such practices of disobedience lead us to rethink "questions about membership, exclusions, and distributions that are central to accounts of global citizenship" (p. 132).

I think Celikates and Cabrera are right about showing that (civil) disobedience, or more generally speaking, resistance, can be done by agents outside the narrow contemporary understanding of citizenship. And I also agree that irregular migrants can have a potential role in this.

However, I think both Celikates and Cabrera go too far in attempting to include all or most of the practices of irregularized migration in the category of civil disobedience. The category of civil disobedience, in this case, seems to apply more directly to those migrants who are actually protesting at the border—and Cabrera acknowledges this to some extent, although he then dismisses its importance.<sup>16</sup> Celikates points out that, in the classical liberal definition, civil disobedience "occurs when citizens act in public, nonviolent, morally justified, and communicative albeit illegal ways in order to press for local changes in the political and legal order of a community while recognizing the general legitimacy of that order" (2019, p. 75).

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<sup>16</sup> Cabrera acknowledges that conscientiousness is a central element of civil disobedience (2010, p. 137). However, he then claims that "the fact that most migrants are economically motivated, rather than seeking to make a moral point by breaking a specific law, does not diminish the broader moral significance of their action" (p. 137).

Celikates argues that understanding irregularized migration as acts of civil disobedience challenges three of the elements of the mainstream, liberal definition: the agents (citizens), the practices (nonviolent and communicative), and the aims (press for political change). As I discussed, I think it is important to recognize that migrants—noncitizens—can also be agents of civil disobedience. Furthermore, the practice of border crossing could also be understood as direct action and a means of civil disobedience, as Celikates notes. However, Celikates also tries to make the case that disobedience by irregularized migrants also shows us a different perspective on the aims of civil disobedience. First, he notices that beyond the superficial account of irregular migrants as self-interested individuals or, at most, people with humanitarian aims, these acts often go along with "protesting the unjust, dominating, and undemocratic nature of the global order regime" (p. 78). In this sense, transnational disobedience plays the epistemic role of revealing global injustice. It can also highlight "historical context and continuities against the amnesia of much of public discourse for which migrants and refugees seem to come from out of nowhere and for reasons that are completely unrelated to one's own political community" (p. 78). And finally, Celikates argues that disobedience at the transnational level can be seen as constructive or constituent, as it aims at achieving a new normative agreement or form of rule.

But here, I think, it is important to make a point about the scope of Celikates' and Cabrera's argument. Migrants who protest with a political goal are only a reduced number among all those who migrate irregularly. In the normative political theory of civil disobedience, an important element of its justification is the fact that civil disobedience aims

to bring about political change.<sup>17</sup> But what about those who do not have that goal in mind, and disobey migration law only, say, because they were compelled by their material or economic circumstances? Trying to include them in the category of civil disobedience seems to stretch too far the definition of civil disobedience.<sup>18</sup> Besides, I think that a strong reason for not including a political phenomenon within the definition of another is that by doing it, we risk losing what is unique about the phenomenon, as it might become assimilated to the one in which we try to encompass it. In contrast, I argue that while it is true that many migrants who are involved in irregular migration indeed do it because their goal is to produce political change, the acts of most of the irregular migrants<sup>19</sup> should be understood as a form of unprincipled disobedience, a concept which I explain in the following paragraphs.

Following Candice Delmas (2018), we can understand civil disobedience as one subset of principled disobedience, the "deliberate breach of law intended to protest unjust laws, policies, institutions, or practices and undertaken by agents broadly committed to basic norms of civility" (p. 42). And the norms of civility refer to publicity, non-evasiveness, nonviolence, and decorum. Another of the subsets of principled disobedience is uncivil disobedience. This form of disobedience, in Delmas's (2018) account, implies leaving aside the forms of civility of civil disobedience. Therefore, it implies at least one of the following elements: covertness, evasiveness, violence, or offensiveness. And principled disobedience,

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<sup>17</sup> The most prominent of such accounts is, probably, Rawls's (1971) account of civil disobedience. As Rawls notes,

civil disobedience is a political act not only in the sense that it is addressed to the majority that hold political power, but also because it is an act guided and justified by political principles, that is, by the principles of justice which regulate the constitution and social institutions generally. (p. 365).

<sup>18</sup> Hidalgo (2015, 2019a, 2019b) has also criticized the use of the category civil disobedience to understand disobedience to migration law by migrants.

<sup>19</sup> In a survey of the reasons why most migrants who migrate irregularly, the International Organization for Migration (n.d.) points out that for Central America, the reasons behind irregular migration are mostly related to economic insecurity and victimization. Climate change, natural disasters and opportunities for education are also relevant factors.

according to Delmas, "refers to politically or morally motivated resorts to illegality in the opposition or refusal to conform to the system's dominant norms" (p. 42). Principled disobedience, broadly speaking then, refers to acts of disobedience to the law with a political or moral goal in mind. Unprincipled disobedience, as I define it then, refers to disobedience to the law through civil or uncivil means without a political or moral objective.

Unprincipled disobedience, then, leaves aside the moral or political motivation element of principled disobedience—which encompasses civil disobedience. Therefore, it has the advantage of not requiring disobedients to show their moral or political motivation in order for their breaking of the law to be justified—which is especially important in the cases of people fleeing oppression and in desperate condition. And as mentioned, unprincipled disobedience can include means associated with both civil and uncivil forms of principled disobedience. These elements are key to understanding disobedience to migration law. Migrants who enter unlawfully to another state generally do so in a covert, evasive, and anonymous way—and in the absence of a legitimate authority over them, I have tried to show that they are justified in doing so. They do not do so in a public and open way to address a wider audience and mobilize them to unite to a cause. Migrants may be justified even in the destruction of fences, walls, and barb wire deployed to prevent them from migrating.

Furthermore, unprincipled disobedience can be distinguished from Tommie Shelby's (2007) deviance, and impure dissent (2016). I will start by the former. For Shelby, deviance includes three main types of behavior that diverge from widely accepted norms: "crime, refusing to work in legitimate jobs, and having contempt for authority" (2007, p. 128).<sup>20</sup> Key in Shelby's account of deviance is that "the overall social arrangement in which the ghetto

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<sup>20</sup> For a further discussion on crime, see Shelby (2016, Chapter 7).

poor live is unjust, this requires that we think about what their obligations are quite differently than we should if the society were judged to be just" (p. 127). The living conditions of the ghetto poor people are what justify their deviant conduct. As Shelby says, "lacking acceptable alternatives, crime may be necessary to meet one's needs or the needs of others" (2007, p. 159, 2016, p. 226). In contrast, unprincipled disobedience is justified not based on the conditions of those who disobey the law, but on the system's lack of legitimacy in the senses of both procedural and substantive justice. In the case of migrants, those who disobey the law are justified in doing so even if they have enough alternatives at home to lead a decent life.

A further distinction could be made. My concept of unprincipled disobedience differs from Tommie Shelby's (2016) idea of impure dissent. Shelby's focus is on political hip hop. As Shelby explains, "[i]mpure dissent in all its forms is... political speech, a form of communicative action in a complex and multilayered public sphere" (p. 265). The point, argues Shelby, is that that type of dissent, because of its "content, inflection, ground, medium, mode, or messenger is widely perceived as morally or politically objectionable" (p. 261). Therefore, impure dissent has a political goal, especially, argues Shelby, the one of expressing the conviction that a wrong has occurred or continues to occur. In contrast, the idea of unprincipled disobedience refers to disobedience to the law not motivated by political principles.

Therefore, when we understand the practice of migrant disobedience to migration law, except in those cases in which irregular migrants actively show a political or moral motivation to disobey it, we should do it as an example of unprincipled disobedience. These acts of unprincipled disobedience, such as irregular border crossings, are not justified because the migrants are looking for political change but because they are disobeying an attempt to



exert authority and coercion by someone—border control agents and the like—that does not have a right to rule over them. They attempt to disobey an authority that has not been legitimized to them.

## **V. Conclusion**

In this essay, I have attempted to show that, if there is any way of making border control have legitimate authority over (would-be) migrants, border control should be multilaterally determined by an international organization. Contemporary border control is unilaterally determined by each receiving state. Since current border control does not meet the requirements of legitimacy, then border control does not have the right to rule over migrants. Therefore, I have argued that migrants have the right to disobey migration control and, hence, irregularly migrate to other countries. I argued that this, however, should not be considered a form or manifestation of civil disobedience. Instead, I claim that the forms of migrant disobedience addressed in this essay shed light on a different form of disobedience: unprincipled disobedience.

One thing that disobedience to migration law and migration control by migrants can teach us about the rightness of disobedience to the law is that disobedience can be justified even if it is not motivated by bringing about political or moral change. That shows the importance of studying and not focusing only on civil and uncivil disobedience, or principled forms of disobedience in general, but also on the rightness of forms of disobedience that are not motivated by political or moral reasons when there is no legitimate authority.

7839 words.

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