

# The Ethics of Migration Policy Dilemmas

## Responding to Critics

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

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### **Do firewalls create social fog?**

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

I welcome Ellermann's objection, as it gives me the chance to correct some sloppiness that undoubtedly crept into the construction and presentation of my argument. I see no reason to doubt that Ellermann is correct in her empirical assertions: On the whole, I am sure that firewalls allow unauthorised immigrants to live lives less concealed, more integrated and participatory. Indeed, the fact of this truth is key to the liberal-democratic case for firewalls,

as I demonstrated when presenting the ‘open society’ and ‘anti-caste’ arguments. But I am not sure that this truth entails that firewalls do not run up against enforcement imperatives in ways that create dilemmatic tensions between firewall policy and enforcement-backed regularisation policy. I suspect much of Ellermann’s disagreement comes from a place of bewilderment at the suggestion that there is a general, positive link between firewalling and *social fog* in its conceptual specificity. However, I think the problem here is largely just that I was careless enough to present my claims in such arguably bewildering light and can be resolved once some conceptual mistakes are rectified.

Let me clarify. First, I am less interested in the *social fog* firewalls may or may not create than the fogginess they cast on the gaze of *immigration enforcement authorities* specifically. So, I acknowledge that firewalls *reduce* the need of irregular migrants to keep in the shadows for much of their daily lives whilst maintaining that they can *increase* fogginess of vision on part of those inclined to prosecute them. Second, I am not making a definite claim about when and whether the vision of enforcement authorities is foggier overall under circumstances of widespread firewalling compared to circumstances in which firewalling is (more) absent. What *is* clear, however, is that properly institutionalised firewalling creates authoritative, top-down barriers of vision for agents of enforcement, whereas its absence requires irregular immigrants to develop measures of evasion and resistance themselves, measures whose conditions of possibility and success may be dependent on any number of factors.<sup>1</sup>

Once the conception of social fog and its relation to firewalling is thus corrected, I am not sure that Ellermann retains (or would want to retain) her critique. It may be that I should simply have used a different concept than ‘social fog;’ Ellermann is right to point out that its coinage in Bommers and Sciortino (2011) aims to capture the social structures pressurised immigrants create rather than the field of vision available to state agents. But ultimately, Ellermann is too quick to conclude from my mistakes that “pursuing firewall policies and regularization programs do not have to stand in tension with each other” (Ellermann 2024, 3). Even if firewall policies do not create social fog proper, they clearly do constrain immigration enforcement by blurring its vision and shackling its hands. It is a further question, contingent on a great range of factors, whether new kinds of migrant visibility (re-)emerge due to the inclusive effects of newly introduced firewall policy, kinds that may confer on enforcement agents apprehension capacities that ultimately overpower and outweigh any constraints imposed by policy. But this is an unsure and contextual question, not conclusively answerable by the conscientious policymaker who must decide on firewall policy. What this policymaker must decide is whether to mandate widespread firewall practice, constraining enforcement in a way that principally and predictably creates tensions with enforcement-backed regularisation ambitions. For this policymaker, the dilemma remains.

### **Grounding inclusive policy in the value of autonomy**

Like Ellermann, Adam Hosein (2024) thinks the proposed dilemma can be dissolved rather easily. While Ellermann’s doubts stem from conceptual and empirical reflections, Hosein’s are grounded in a supposed disagreement about the ‘best’ normative justifications for

<sup>1</sup> One particularly grave factor may be acceptance of social exclusion and marginalisation (as manifests, for instance, in informal sector work or improvised and insecure access to healthcare and education), which a conscientious policymaker of the type I describe in my article has strong reason to prevent.

inclusive policy, and especially regularisation. In his view, the most robust justification is derived from the value of autonomy: because unauthorised status entails a precarity that imperils autonomous living, and because states still *govern* unauthorised immigrants, therefore automatically straining their autonomy, they have both humanitarian and political duties to grant regular status. Autonomy is a moral imperative, states must do what they can to use their powers in ways conducive to the autonomy of those under their control, and regularisation is an important means to that goal. Once this perspective is adopted, no dilemma between firewall and regularisation policy arises, because regularisation is uncoupled from any underlying enforcement imperative. State authorities need not pursue any investigations that clash with the protective function of firewalls; indeed, they need not ramp up enforcement at all, and so firewalls and regularisations *do* become the two steps up the same ladder that I claimed in my kick-off article they were not.

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

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

possible, even at the danger of detachment ‘from the real world.’ Some of my own work proceeds in a similar vein. I just think that this approach is not particularly useful if we want to understand the ethics of migration *policy* dilemmas, that is, the moral dilemmas conscientious policymakers embedded in harshly non-ideal conditions find themselves exposed to.

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

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

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

None of this means that Hosein is wrong in thinking that the value of autonomy provides the best moral argument for inclusive regularisation policy. He may well be right. But even if he is right, this does not itself tell us much about the question if policymakers who come to favour inclusive policy arrangements via the arguments most readily available to them end up facing hard moral dilemmas, and what they can and ought to do about them. Intervention on this level of debate would require a further argument to show not simply

that autonomy-based grounds provide ‘the best’ moral justification for inclusive policy but also give *conscientious policymakers labouring under particular political circumstances* uniquely forceful reasons for action.

### The constraints of conscientious policymaking

These concerns about the positioning of conscientious policymakers, their circumstances of ethical reasoning, shaped by subjection to various pressures and forces, are precisely what Cecilia Menjívar’s (2024) response zooms in on. Her piece, clear-eyed and timely, reminds us that “policymakers operate within a complex web of social, political, and economic forces” (ibid, 2), woven from interests arising from the political economy of the capitalist state, hierarchies and rivalries within executive bureaucratic apparatuses, perceived exigencies of foreign policy, and racialised anti-immigrant backlash. No matter what individual policymakers would like to achieve, they must deal with pressure from private interest groups long influential in the shaping and implementation of immigration policy; “agency misalignments around immigration” (ibid, 2), where one executive organ follows paths of action that contradict those of another; entrenched and institutionalised understandings of immigration policy as a key instrument of foreign policy (for instance explaining the preferential treatment of Cuban immigrants in the U.S.); and voters who, for one reason or another, increasingly converge around anti-immigrant attitudes. Though Menjívar steps short of this conclusion, I take the implication to be a need for doubtful reflection on the nature and extent of individual policymaker agency, which may in turn move us to reconsider which, if any, are the hard moral dilemmas *truly* crystallising out of, and reflecting, the complex and competing structural pressures underpinning immigration policymaking today.

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

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

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

Foreign policy considerations, the third issue Menjívar raises, may be more genuinely germane to this primary business, as the boundaries of principally distinct policy fields are soft and malleable; for our conscientious legislator, they could conceivably count as reasons for action regarding unauthorised residence. Still, where our legislator prioritises the health of liberal democracy, I agree with Menjívar that, if anything, reflection on foreign policy and its fallout is likely to lead to support for wide-ranging regularisation and firewall policy, precisely to prevent “the creation of castes and second-class citizens” (ibid, 3).

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

individualistic conception of the character of historical change and development, and insufficiently attentive to the overbearing determination of impersonal forces?

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

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## About the “Dilemmas” project

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