



DEMOCRATIC LEGITIMACY AND COERCIVELY ENFORCED BORDERS: ASSESSING THE ARGUMENT OF ARASH ABIZADEH

LEGITIMIDADE DEMOCRÁTICA E FRONTEIRAS COERCIVAMENTE IMPOSTAS: AVALIANDO O ARGUMENTO DE ARASH ABIZADEH

Michael Rabinder James^{1*}
mjames@bucknell.edu

Arash Abizadeh argues that *all* coercive enforcement of borders is democratically illegitimate, since foreigners do not participate in the creation of border laws. It is irrelevant whether the border laws are substantively just or unjust, whether the state enforcing them is affluent or poor, and whether the individual being coerced autonomously chooses to cross the border or is forced by desperate circumstances to do so. His argument involves (1) a foundational commitment to individual autonomy; (2) a normative premise that coercion requires democratic legitimation; (3) and an empirical premise that border enforcement laws subject *all* foreigners to state coercion. In this essay, I contest each of these components. I challenge the empirical premise through examples illustrating the empirical limits to state coercion over foreigners. I contest the normative premise by showing that state coercion requires democratic legitimation only for those involuntarily and indefinitely subject to it. Finally, I challenge the commitment to individual autonomy as foundational to political legitimacy by distinguishing political legitimacy from political authority. I conclude by demonstrating how my critique renders a more plausible account of the normative limits of border coercion, one that coheres more readily with stances advanced by Javier Hidalgo and Abizadeh himself.

Keywords: Arash Abizadeh; immigration; coercion; borders; democratic boundary problem

Arash Abizadeh defende que *toda* a imposição coerciva de fronteiras é democraticamente ilegítima, uma vez que os cidadãos estrangeiros não participam na criação de legislação em matéria fronteiriça. É irrelevante se tal legislação é substancialmente justa ou injusta, se o estado que impõe as fronteiras é rico ou pobre, e se o indivíduo coagido decide autonomamente cruzar a fronteira ou se a tal é obrigado por circunstâncias de força maior. O seu argumento implica (1) um compromisso base para com a autonomia individual; (2) uma premissa normativa de que a coerção requer legitimação democrática; (3) e uma premissa empírica de que as leis de imposição de fronteiras sujeitam todos os estrangeiros a coerção por parte do estado. Neste artigo, discuto cada um destes componentes. Contesto a premissa empírica através de exemplos que ilustram os limites empíricos da coerção estatal sobre estrangeiros. Coloco ainda em causa a premissa normativa ao demonstrar que a coerção estatal requer legitimação democrática apenas para aqueles que a ela estão involuntária e indefinidamente sujeitos. Finalmente, contesto que o compromisso para com a autonomia individual seja a base para a legitimidade política ao distinguir legitimidade política de autoridade política. Termino demonstrando que a

^{1*} Department of Political Science, Bucknell University, Lewisburg, PA USA. ORCID: 0000-0002-1700-0694

minha crítica oferece uma descrição mais plausível dos limites normativos à coerção fronteiriça; uma crítica que se revela mais coerente com as posições defendidas por Javier Hidalgo e pelo próprio Abizadeh.

Palavras-chave: Arash Abizadeh; imigração; coerção; fronteiras; problema da delimitação democrática

Introduction

In an enormously influential article, Arash Abizadeh argues that all coercively enforced border laws are democratically illegitimate. Departing from the premise that a state's use of coercion must be democratically justified to "all those over whom it is exercised," Abizadeh concludes that "democratic justification for a regime of border control is ultimately owed to both members and nonmembers," because "border control of a bounded political community subjects both members *and nonmembers* to the state's coercive exercise of power" (2008, pp. 44–45). Importantly, Abizadeh's argument applies to *all* coercively enforced borders. It is irrelevant whether the state in question is affluent and stable or poor and barely able to protect its residents' most basic human rights and needs. It is equally irrelevant whether the individual seeking to cross the border is rich and secure in her human rights or desperately poor and facing threats to life and liberty. All coercively enforced state borders are equally illegitimate, since none of them have been legitimated through global democratic processes that include both members and nonmembers.

Concomitantly, Abizadeh's argument grants all individuals the moral allowance to disregard and potentially resist all coercive border laws (Miller, 2010, p. 111). This differs from the more qualified approach of Javier Hidalgo, who defends the right to resist and the duty to disobey "unjust" immigration laws, defined as those that prevent the entry of people whose human rights would be violated if they were not admitted, even though admission would not significantly harm members of the receiving state (Hidalgo, 2015, 2016). It even stands in tension with Abizadeh's later critique of "special-obligations arguments," a critique aimed specifically at "wealthier polities" that restrict immigration of absolutely or relatively poor immigrants from "globally poor regions" in order to improve the wellbeing of poorer people within wealthy states (Abizadeh, 2016, pp. 105–106). The relative wealth of the receiving state, the relative poverty of the supplying state, the relative or absolute poverty of the migrant, and the justice or injustice of the immigration restrictions themselves are irrelevant. All forms of border coercion, whether exercised by Britain against Bangladeshis or by Bangladesh against Britons, are equally illegitimate.

There are three core steps in Abizadeh's argument: (1) a *foundational commitment* to individual autonomy; (2) a *normative premise* that coercion requires democratic legitimation; (3) and an *empirical premise* that border enforcement laws subject *all* foreigners to state coercion. In this essay, I challenge Abizadeh's critique of the democratic legitimacy of coercively enforced borders by contesting each of these core steps. After first summarizing Abizadeh's original argument and his convincing response to the critique levied by David Miller, I contest each of Abizadeh's argumentative steps in reverse order. I challenge the *empirical premise* by scrutinizing three analogical examples that demonstrate the empirical limits to state coercion over foreigners. I contest the *normative premise* by sorting out the conditions under which state coercion requires democratic legitimation, as opposed to the alternatives of liberal-hypothetical justification or, even more minimally, express consent. Finally, I challenge the commitment to individual autonomy as foundational to political legitimacy by drawing on Allen Buchanan's distinction between political legitimacy and political authority.

1. Abizadeh's Argument

As stated earlier, Abizadeh's argument comprises three core steps: (1) a *foundational commitment* to individual autonomy; (2) a *normative premise* that coercion requires democratic legitimation; (3) and an *empirical premise* that border enforcement laws subject all foreigners to state coercion. All three steps may be controversial, but I will first try to restate them accurately.

The foundational commitment to individual autonomy follows the account of Joseph Raz (1986). An individual enjoys autonomy only when she (1) has the mental capacities to formulate and pursue personal projects, (2) enjoys an adequate range of valuable options, and (3) is independent of the subjection to the will of another through coercion or manipulation (Abizadeh, 2008, p. 39). Coercion can negate the first two conditions indirectly, by undermining the development of mental capacities and reducing the number of options to below an adequate range. Most importantly, coercion directly negates the third condition, independence, "because it subjects one agent to the will of another" (Abizadeh, 2008, p. 40).

States coerce individuals in two ways: through *actual coercion* (noncommunicative physical force) and through communicative *coercive threats*. In order to comply with the foundational

principle of individual autonomy, both liberal and democratic theories seek to justify state coercion. Rawlsian liberalism does so through “hypothetical justification”, whereby any coercive “political power must take into account each person’s interests and status as a free and equal agent who is a source of value.” However, liberal theory makes no “claims about the actual process of justification” (Abizadeh, 2008, p. 41). Democratic theory, conversely, justifies state coercion through political processes that grant to the coerced “actual participation”: “political power is legitimate only insofar as it is actually justified by and to the very people over whom it is exercised, in a manner consistent with viewing them as free (autonomous) and equal” (Abizadeh, 2008, p. 41).²

Abidazeh proceeds to argue that “democratic justification for a regime of border control is ultimately owed to both members and nonmembers,” based upon the next two steps of this argument. The *normative premise* of democratic legitimation contends that “the coercive exercise of political power be democratically justified to all those over whom it is exercised.” The *empirical premise* holds that “the regime of border control of a bounded political community subjects both members *and nonmembers* to the state’s coercive exercise of power” (2008, pp. 44–45). The two premises work in tandem to ground the conclusion that foreigners must be granted democratic participation in the formation of coercive border enforcement laws. If the normative premise is true that “all” individuals subject to state coercion deserve democratic participation in the formation of coercive laws, and if the empirical premise is true that nonmembers are subject to state coercion through border laws, then nonmembers must be able to participate in the formation of coercive border enforcement laws.

While one might assume that only foreigners who actually make it to the border are subject to state coercion, Abizadeh’s empirical premise extends to *all* foreigners, through the distinction drawn between actual coercion and coercive threats. Guards at the border exercise *actual coercion*, or the noncommunicative act of restraining a person’s motions by physically beating, pushing, pulling, or imprisoning. However, coercive border laws render all foreigners *subject to coercion*, by communicating the threat of physical force or other punitive harm should a foreigner seek to cross the border without permission (Abizadeh, 2010, p. 123). This communicative threat subjects

² Abizadeh commits himself not to any particular institutional form of democracy but only to a deliberative democracy that prohibits a simple majority from imposing harmful laws upon an entrenched minority without good reasons (2008, p. 42).

an individual to coercion whether or not it succeeds in preventing or compelling the behavior in question. Thus, a prisoner is subject to coercion by prison guards if the prisoner (1) is prevented from escaping through actual physical force; (2) does not try to escape for fear of the communicated threat of force; (3) actually escapes by overcoming the guards' coercive force; or (4) never tries to escape because he enjoys prison life. In all four cases, the prisoner is subject to coercion, for which justification is owed (Abizadeh, 2008, pp. 57–58).

When applied to immigration, the result of this argument is radical. Abizadeh contends that *all* foreigners are subject to coercion via border enforcement. Both nearby Mexicans and distant Zambians are equally subject to U.S. border enforcement laws, whether or not coercion manifests as actual force or communicative threats, succeeds in altering behavior, or alters the will of the individual in question. So mirroring the example of the prisoner, Abizadeh concludes that Mexicans and Zambians are subject to coercive U.S. border laws if they (1) are prevented from crossing the border through physical force; (2) do not try to cross the border for fear of the communicated threat of force; (3) actually do cross the border illegally by evading or overpowering the guards; or (4) never contemplate crossing the border (Abizadeh, 2008, p. 59).

Uncomfortable with the expansive scope of the phrase “subject to coercion,” David Miller challenges Abizadeh’s understanding of the term “coercion,” which he contrasts with the term “prevention.” Whereas coercion forces a person *to do* a specific thing, prevention merely uses force to preclude a person from doing a specific thing, while leaving other options open (Abizadeh, 2010, p. 114). By leaving open an adequate range of other options, prevention does not undermine autonomy and therefore does not require democratic legitimation. Conversely, coercion compels a person to do a specific action, either directly or indirectly (by greatly reducing the number of options), and thus requires democratic legitimation. At most, prevention subjects a person to “hypothetical coercion,” whereby physical force would ensue only if that person pursues a specific course of action (Abizadeh, 2010, pp. 115–116). So a Scottish landowner who hires armed guards to keep tourists off his island exercises prevention by subjecting others to hypothetical coercion. To mirror the above examples, all people are subject to prevention and hypothetical coercion via the Scottish landowner if they (1) are prevented from entering the island by force; (2) do not try to enter the island for fear of force; (3) actually do enter the island by evading or overpowering the guards; or (4) never contemplated entering the island. Returning to immigration, border laws are

merely forms of prevention that subject foreigners to hypothetical coercion. So long as foreigners have an adequate range of options in pursuing life plans, either in their home countries or through emigration to other countries, border enforcement does not undermine their autonomy and requires no democratic legitimation.

In response, Abizadeh challenges Miller's normative distinction between coercion and prevention. For instance, criminal laws prohibiting murder are preventative, since they primarily communicate hypothetical coercive acts and command the forbearance of a specific action while leaving open an adequate range of alternatives. Thus, Miller would have to exempt laws prohibiting murder from democratic legitimation, since they would only constitute prevention through hypothetical coercion and not coercion itself (Abizadeh, 2010, pp. 123–124). The key point is that coercion, either as a hypothetical coercive act or as a coercive threat, undermines an individual's autonomy, even amidst an adequate range of options. A "happy servant, whose enlightened master has left her an adequate range of valuable options, whose protection she does not wish to leave, but who is nonetheless under threat of corporal punishment should she try," is subject to coercion and has her independence invaded (Abizadeh, 2010, p. 126). So Abizadeh convincingly concludes, "Preventative laws are coercive laws" (Abizadeh, 2010, p. 125).

2. The Empirical Premise

As stated earlier, all three of Abizadeh's argumentative steps may be controversial. The critique in Miller (2010) accepts the validity of the first step (the foundational commitment to individual autonomy) and the second step (the normative premise that coercion requires democratic legitimation).³ He contests only the third step, the empirical premise that all foreigners are subject to coercion, by contesting the term "coercion" within the phrase "subject to coercion." The difficulty is that, although there is no canonical definition of coercion, any stipulative definition must still cohere, at some level, with our own everyday, pre-theoretical understanding of a term. So to claim that the Scottish landowner's armed guards do not subject trespassers to

³ In a later work, Miller (2016, pp. 121–122) challenges the second step by engaging the claim of Thomas Nagel (2005) that subjection to state coercion requires distributive justice: "it seems that the relationship between immigrants and the state that they join is relevantly different from that of native-born citizens who have been incorporated into it involuntarily. The state does owe immigrants just treatment...but their being present in the society by virtue of a voluntary decision sets them apart from the native-born. The fact that once inside they are subject to the coercive authority of the state does not entail that they must be included on equal terms with citizens whose subjection is involuntary. Moreover...the state could simply cancel its obligations by requiring them to leave." (Miller, 2016, p. 122)

coercion rings hollow, since the very threat of force seems to imply coercion in a way that challenges our understanding of autonomy. Similarly, when border guards with guns threaten to detain migrants, our everyday intuitions lead us to think that the former exercise coercion over the latter. Replacing “coercion” with “prevention” does not help, since the threat of force strikes us as coercive, even if persons subject to it have an adequate range of options.

A better challenge to the empirical premise that all foreigners are “subject to coercion” requires focusing instead on the prior term “subject to.” Abizadeh claims that the empirical premise is “an obvious empirical fact” (2008, p. 45). This leads Mathias Verschoor to assert that border laws “claim universal jurisdiction” (2018, p. 15). But is this really the case in any uncontroversial way? It is true that border laws, as coercive threats, have *penumbras*. They do not coerce solely at the moment that a border guard physically prevents an individual from crossing the frontier. Rather, their coercion extends a penumbra outward.⁴ Even while still in their own country, an individual planning to come to the United States must take preliminary steps, such as acquiring a passport from their own government and, potentially, a visa from the U.S. State Department. Far from the border, the individual is altering their behavior in order to comply with the coercive threat communicated by U.S. border laws. But does this outward penumbra really mean that U.S. border laws exercise *universal jurisdiction*? In order to assess this empirical premise, let us examine two of Abizadeh’s examples, along with a third of my own.

Start with the “happy servant.” It is true that she remains subject to the coercion of her master, even if she enjoys an adequate range of options and does not wish to leave, so long as she is vulnerable to punishment if she tries. But let us add to the example a second master with his own happy servant. Master A controls happy servant X, while master B controls happy servant Y. While happy servant X is subject to the coercion of master A, X is not subject to coercion from master B, even if the latter has an equally terrifying set of coercive controls. The question is not whether happy servant X is subject to coercion by master A, which Abizadeh thinks Miller is suggesting. The question is whether servant X is subject to master B. In the end, we have to say no. But what if happy servant X believes she will be even happier under master B? If she escapes the coercion of A and submits to B, she will surely be subject to the latter’s coercion. But what if

⁴ The penumbra also extends inward. Even after crossing the border, foreigners will be subject to the threat of deportation if they break domestic laws distinct from border laws. Citizens, regardless of the domestic laws they break, will not be subject to deportation.

B refuses to take her on, because he feels sufficiently occupied by exercising coercive mastery over Y? If B repels X, either by force or by threat, B does exercise coercion over her. But does that mean that master B *already* exercised coercion over her, *even prior to* her escape from Master A and attempted submission to B? I think not.

Turn now to the example of the prison. The pertinent question is whether *somebody outside of the prison* is subject to coercion by the prison. This example hits home for me for two reasons. Not only were my first teaching experiences inside a maximum security prison, but today I live in a town that hosts one. Nowadays, when I bike past the impressive coercive apparatus of my town's prison, it is not at all clear that I am subject to coercion by the prison nor threatened in my autonomy. I should add that I could become subject to its coercive force, even without being convicted of a crime and sentenced to its confines. That is because visitors to the prison, as I learned while teaching at one decades ago, must undergo an invasive process involving metal detectors and pat downs, in order to enter. Furthermore, such coercion extends a penumbra outward, prior to presenting at the prison gates, as I must first submit personal information to the prison in order to be approved for entry. Indeed, getting into a prison in order to teach philosophy subjected me to far more coercion than any border crossing I have experienced, although as a citizen of a wealthy country, I am happily spared the indignities that citizens of poor countries confront. Nevertheless, the basic fact remains. As a non-incarcerated person, I am not subject to the coercive power of the prison until I either am sentenced to it or I initiate actions to enter the prison as a visitor.

The implication is clear. Residents of a state are subject to its coercive force in a manner analogous to prisoners and servants. It is irrelevant whether servants, prisoners, or residents are happy or unhappy, since all are subject to coercion, through either direct physical force or, more commonly, communicative threats of force. The question is not whether what they are subject to is *coercion*, as Miller contends. Rather, the question is whether a servant is *subject to coercion* from another's master; whether a free person is *subject to coercion* by a prison; or whether the resident of one country is *subject to coercion* by another country. Abizadeh asserts that a resident of one state is *subject to coercion* by another state through border enforcement, but his examples of happy servants and happy prisoners do nothing to resolve this question.

My example of the free person seeking to enter the prison is relevant, since that person resembles the foreigner seeking to enter another country, thereby becoming subject to its coercive laws. But even that example gains relevance only once the free person initiates actions to enter the prison. A free person is not subject to the coercion of a prison merely by living in the same town or biking past it. Yet this would have to be the case for Abizadeh to claim that “foreigners, *even those who never present themselves at the border or never seek citizenship*, really [are] subject to border coercion” (2008, p. 123; emphasis added). Transposing this statement back to the prison analogy, Abizadeh is effectively claiming that every resident of the country, nay every person in the world, is subject to the coercive power of the prison. Does that really jibe with our intuitions or experiences about being subject to coercion? Abizadeh might retort that residents of the country are subject to coercion by the prison, by being subject to the coercion of the state that establishes the prison. I find this reply unconvincing, since I am treating the prison not as a real case but as an analogy to the state.⁵ We both agree that residents of a state are subject to its coercion. The question is whether residents of one state are subject to coercion by another state, without even contemplating crossing the border. Just as the resident of one state *who does not seek to cross the border* is not subject to coercion by another state, so too the free person *who does not seek entry* is not subject to coercion by the prison.⁶

The limited reach of coercion is further illustrated by a third example. Imagine a Canadian woman hoping to terminate an unwanted pregnancy that was not the result of rape or incest and does not threaten her life. She lives in Ontario, where abortion is both legal and free. However, she wishes to have an abortion in Colombia, where abortion is both illegal and criminally punishable (Casas, 2020; Turkewitz, 2020). Does this Canadian woman experience subjection to coercion by Colombia’s punitive abortion laws? It seems not, since she is not in Colombia. However, she could easily travel there, given that its border enforcement laws grant nearly effortless entry to citizens of rich, western countries like Canada. So she *could* travel to seek an

⁵ Abizadeh makes a similar response to Miller, who states that a neighbor seeking to enter my house is not subject to coercion and therefore democratic justification, since the neighbor need not enter my house in order to have an adequate range of options. Abizadeh’s response is that the democratic justification has already been given, since both are members of the same democratic state that has created laws of property and trespass that authorize the homeowner’s use of coercion in expelling the neighbor. But this fails to recognize the analogous status of the example, wherein the house represents the state.

⁶ But perhaps the analogy between prisons and states is not apt, since one prison need not affect another prison, whereas states do affect each other through global political and economic interaction. This is true but not universal. Some states, due to their military or economic power, can affect the actions of other states. But this depends on the specific policies or decisions adopted or threatened by specific states, and on the relative military or economic power of the states in question. While the United States has a vast capacity to affect Grenada, the reverse is not the case. However, Abizadeh’s general argument about the democratic illegitimacy of all forms of border coercion applies equally to Grenada as it does to the United States. As a result, I think this further advances my argument the legitimacy of border coercion should be sensitive to the relative power and wealth of different states. I thank one of the anonymous reviewers for pressing this point.

abortion in Colombia, thereby making her subject to coercion under that country's punitive abortion laws. The question is whether she is subject to Colombia's abortion laws *only after entering* the country, or earlier, when she feels a desire to have an abortion there, or even earlier, prior to having such a desire.

The situation of the Canadian woman seeking an abortion in Colombia resembles that of "Mexicans and Zambians who...never had any intention of entering" the United States. In either case, the relevant laws in Colombia and the United States are indeed coercive. To me, the question is whether the Canadian, the Mexican and the Zambian are *subject to* the coercive laws of the other countries. More precisely, *at what point* do they become subject to the other countries' coercive laws. Here, the concept of "subject to coercion" is limited not by challenging the coerciveness of the laws, but rather their *reach*. Abizadeh suggests that the mere fact that the Zambian *could become subject* to the United States' coercive border law is sufficient to make the Zambian *in fact* subject to that coercive law. But as my example suggests, the same argument could be made about the Canadian woman, who *could be* subject to Colombia's coercive abortion laws. But both examples are unconvincing, since the reach of US border laws, just like the reach of Colombia's abortion laws, are limited. Colombian abortion laws reach the Canadian woman only when she enters the country; similarly, US border laws reach the Zambian only when initiating actions to come to the United States. The coercive laws of territorially bounded states are not universal in their reach, even if they have penumbras that extend outward. For this reason, they invade the autonomy of only those initiating actions to cross the border. For this reason, coercive laws require justification, of either the democratic or the liberal-hypothetical type, only to those who fall within their *reach*.

By focusing on the *reach* of coercive laws rather than questioning their coerciveness, we circumvent the confusion over avoidability that hampers Miller's response to Abizadeh. For Miller, laws are coercive only if they compel a specific action, either by directing an individual to perform some action or by drastically limiting the range of alternatives. Laws that merely prohibit a specific action while leaving open an adequate range of alternatives are preventative, not coercive, because one can avoid the hypothetical coercion threatened by the law. Abizadeh convincingly responds that most laws, such as prohibitions of murder, are avoidable but nevertheless coercive. But by focusing on the reach of a coercive law, rather than its coerciveness,

we can more convincingly show how the Zambians uninterested in migration and the pregnant Canadian woman are *not subject* to coercive laws of the United States or Colombia respectively. *For you need not avoid a coercive law that does not reach you.* Just as you need not avoid my fist if I swing it miles away from you, you need not avoid a coercive law that cannot be enforced upon you. A coercive threat needs to be credible if it is to be coercive. A country's anti-murder or anti-abortion laws provide credible threats to those within it. Yes, you can avoid the actual physical enforcement of those laws by not committing murder, but you remain subject to these coercive laws, since you are always within their reach. This is not the case with coercive border laws. And while coercive border laws have penumbras that stretch outward, this does not render them universal. Just as the coercive power of the prison does not affect me until I either am sentenced to the prison or initiate actions to enter it voluntarily, so too the reach of coercive border laws extends to those who initiate actions to cross that border.

3. The Normative Premise

Having challenged the empirical premise, let us turn to the normative premise that state coercion requires democratic legitimation. Abizadeh never actually makes an argument in favor of democratic legitimation over liberal hypothetical justification. Rather, he merely notes the difference between the two and proceeds to assert that the former cannot justify coercive border laws without first letting foreigners participate in the process of their formation. However, Abizadeh's approach remains inadequate, since state coercion may be justified in different ways, depending upon at least two conditions: (1) whether or not the person *autonomously* or *non-autonomously* becomes subject to coercion; and (2) how long a person is subject to state coercion. In this section, I will argue that state coercion requires democratic legitimation only when a person is *non-autonomously* subject to it for an *indefinite* period of time.

Let me begin with the question of autonomous subjection to coercion. As I suggested in the previous section, border laws do not have universal jurisdiction. Even though their penumbras reach outward, any particular state's border laws only reach those foreigners who initiate actions to enter that specific state. Thus, we must examine the conditions under which any particular foreigner comes to be subject to them.

At one extreme lies a case cited by Abizadeh, that of the Jewish refugees fleeing “the Nazis aboard the St. Louis, whose ship was turned away by Cuban and U.S. authorities and returned to Europe” (Abizadeh, 2008, p. 51). However, this example contributes little to his position, since even defenders of a community’s right to unilaterally close borders still recognize refugees’ right to entry (Walzer, 1983; Pevnick, 2011). More pertinent is the extreme opposite case of a poor country that unilaterally closes its borders to rich immigrants from wealthy, liberal-democratic states. This is because Abizadeh’s argument delegitimizes *all instances of* unilateral coercive border enforcement, regardless of the situation of the migrant or the character of the country of origin. Moreover, the example of the rich migrant moving to the poor country is not far-fetched. Although we usually imagine immigration involving people moving from poor to rich countries, citizens of rich countries sometimes migrate to poor ones in order to purchase cheap property in warm locales or to access inexpensive medical treatment. So Abizadeh must explain why Cote d’Ivoire must grant democratic participation to French citizens looking for cheap beach houses or plastic surgery.⁷

Intuitively, it is morally more troubling to close borders to the Jewish refugees than to the French beachgoers. This stems from the normative differences in the conditions under which each set of individuals comes to be subject to the coercive border laws that may exclude them. Raz’s three conditions for autonomy help to clarify these normative differences. If foreigners live in a country that (1) does not harm their capacity to formulate and pursue personal projects, (2) provides them with an adequate range of valuable options, and (3) does not subject them to coercion or manipulation without adequate justification, then we can say that they have *autonomously subjected themselves* to another state’s coercive border laws. If foreigners live in a country where these three conditions do not obtain, then they have *non-autonomously been subjected* to the reach of that state’s coercive border laws.

This distinction is crucial for normatively distinguishing the situations faced by refugees, immigrants from poor countries, and immigrants from rich liberal democracies. Because most citizens from rich liberal democracies enjoy all three conditions of autonomy and thus *autonomously subject themselves* to a state’s coercive border laws, their subsequent loss of autonomy requires minimal justification. So Cote d’Ivoire need provide little justification for

⁷ On French moving to Cote D’Ivoire, see <https://qz.com/529441/the-french-are-back-in-booming-cote-divoire-but-so-is-everyone-else/>.

denying entry to French nationals seeking cheap, beachside property or plastic surgery. At the other extreme, refugees, like the Jews fleeing Nazi Germany, suffered a violation of all three conditions and thus *non-autonomously have been subjected* to coercive border laws that kept them out of the United States, Cuba, and Canada. In between lies the situation of immigrants from poor but minimally decent, democratic countries, who confront border coercion *somewhat autonomously*. The coercive laws of such countries need not hinder their mental capacities and, if democratically legitimated, do not subject them to arbitrary manipulation or coercion. However, the poverty of such countries may limit their range of life options to below an adequate minimum. As a result, immigrants from poor but decent countries are subjected to coercive border laws under conditions less autonomous than those of rich immigrants but more than those faced by the Jewish refugees.⁸

Now, let us turn to the temporal duration of a person's subjection to state coercion. Border coercion normally should persist for a relatively short period of time.⁹ But once a migrant has crossed the border, then that individual becomes subject to a much wider array of coercive laws. Thus, the Canadian woman discussed earlier becomes subject to Colombia's coercive anti-abortion laws only after passing through its coercively enforced border. But even in this case, so long as the Canadian woman is just visiting the country and has the option of leaving Colombia, she is only temporarily subject to these laws and can return to Canada in order to avoid them. Her situation differs from that of women permanently residing in Colombia, who are indefinitely subject to these anti-abortion laws. Perhaps if they have the right to live in another country that allows abortion, they can escape subjection to abortion prohibitions. But even then, their long-standing residence in Colombia may have generated social and economic ties that render it difficult or impossible to leave. As a result, these women remain indefinitely subject to Colombia's abortion laws in a way that is non-autonomous (see Simmons, 1979, pp. 99–100).

If we then synthesize two conditions of (1) whether a person has autonomously become subject to state coercion and (2) if that subjection is temporary or indefinite, we can derive an alternative argument for democratic legitimacy, one that mirrors but alters Abizadeh's two

⁸ Much depends on the details, however. Not all poor countries equally restrict the range of options available to their citizens, and not all citizens of poor countries are themselves poor. Mexico is a middle-income country, unlike Zambia, which is extremely poor. Thus the range of options in the former likely greatly exceeds that of the latter. And while the conditions of a poor country may limit the range of all citizens, wealthy citizens of poor countries often enjoy a wide range of life options, both at home and abroad, making it plausible to say that they autonomously subject themselves to coercive border laws. Poor citizens of poor countries exercise much less autonomously in confronting coercive borders.

⁹ Though migrants may often suffer long-standing detention at the border, these cases are easily morally condemned, even if they exist in fact.

premises. A first, normative premise is that the coercive exercise of political power must be democratically justified to all those over whom it is *non-autonomously* exercised *indefinitely*. A second, empirical premise is that long-term residents of a state are *non-autonomously subjected* to the state's coercive exercise of power *indefinitely*. The conclusion is that democratic justification of state coercion is owed only to long-term residents who are *non-autonomously subjected to indefinite state coercion*. The indefinite character of state coercion is crucial for the requirement of democratic participation, precisely because democratic participation is an ongoing form of legitimation. Rather than a one-shot form of consent or hypothetical justification, democratic participation allows for ongoing and iterative legitimation of coercive laws.

Conversely, non-democratic forms of legitimation are acceptable for persons subject to state coercion temporarily. The strength of those forms of legitimation will vary depending on whether or not their subjection to state coercion has arisen autonomously and will persist indefinitely. While space precludes me from completely defending what follows, I will provisionally suggest three types of justification of state coercion appropriate to three classes of foreigners. (1) *Visitors* from wealthy, liberal-democratic countries *autonomously subject themselves* to state coercion *temporarily*. They thus deserve the least demanding justification for state coercion, since they can grant their express consent to the coercive border laws of the receiving state and will soon exit from subjection to other forms of state coercion. (2) Conversely, refugees or other foreigners subject to autonomy-negating conditions in their home country are *non-autonomously subjected* to coercive border laws *temporarily*. As a result, state coercion requires strong, hypothetical liberal justifications that treat them as free and equal humans, so long as they are only temporarily subject to the coercive power of the receiving state. (3) *Immigrants*, and *long-term refugees*, deserve access to democratic participation, because they are subject to *indefinite coercion* under conditions that may become *non-autonomous*, given the barriers to emigration that can emerge as one puts down roots in a new country.

4. The Foundational Commitment to Autonomy

But are borders themselves legitimate, apart from their coercive enforcement? So far, I have presupposed this in my argument that only citizens and long-term immigrants and refugees are

owed democratic participation rights in order to justify the coercive state laws to which they are involuntarily and indefinitely subject. However, Abizadeh challenges this presupposition of a “bounded demos” by citing the “boundary problem,” which states that “democratic theory is unable to specify, in terms consistent with its own theory of political legitimacy, the boundaries of the people that forms its constituency” (2008, pp. 45–46). In effect, Abizadeh is arguing that borders themselves are illegitimate if they have not been created democratically. However, borders cannot be created democratically, since any exercise of democratic decision making must first define the borders of the demos who participates democratically, and such democratic decision making can only proceed after first defining the borders of the demos. The result is a paradox.

In a later article, he articulates this critique through the principal-agent model of democratic representation found in what he calls “traditional democratic theory,” but which more precisely is a schematic version of social contract theory. In this account, democratic legitimacy depends upon the prior creation of a principal, “a people that forms its constituency,” which then uses democratic processes in order to select a representative, such as the coercive state. The problem is that there is no way democratically to create a boundary around the principal constituency, since every exercise of democratic will formation will presuppose a boundary. Democracy first needs a boundary around its electorate before voting can occur. The result is a dilemma. Either we must find a “prepolitical” criterion to justify the boundaries of a demos, or we must follow the “logic of the social-contract account,” which suggests that the boundaries of the demos “requires the consent of all would be insiders and outsiders” (Abizadeh, 2012, pp. 874–876; cf. 2008, p. 48). But because any prepolitical criterion for demarcating a bounded demos, such as a national culture, will likely be fuzzy, Abizadeh advances the “unbounded demos” alternative, which follows the social contract logic to claim that the only valid principal is a global demos. The global demos can then utilize democratic processes both to demarcate the boundaries around bounded sub-demos of territorial states and to approve the laws governing their enforcement. The problem is that Abizadeh’s social contract account, with its temporal imagery of first creating a constituency which then selects a representative, blurs the historical and normative analyses of political legitimacy.

Historically, of course, modern states and their territorial borders did not emerge through the democratic processes that generate the democratic boundary problem. Rather, they emerged

through monarchical consolidation of power during the decline of the medieval feudal system in Europe and through imperial conquest of territorial colonies. Democratization followed the formation of territorially bounded states, with their territorially bounded subject populations. In this way, the boundaries of the *demos* were created *pre-democratically* but not *pre-politically*. As a result, we should understand democratic legitimation was a post-hoc reaction to the *non-autonomous* imposition of *indefinite* coercion by specific states. Abizadeh at one point seems to acknowledge this, when he asks us to dispense with “the fiction of an originary social contract” and begin instead “with the fact of political power...and ask how to legitimize it.” Doing so allows us to realize that “democracy is better understood as an attempt to legitimize the collective and political exercise of power” (Abizadeh, 2012, pp. 879–880). This is completely correct, but realizing this requires rejecting the social contract framework that blurs the fact that bounded *demos* were created pre-democratically but not pre-politically. Unfortunately, this still leaves us with the predicament of having to accept the legitimacy of state borders created and defended for reasons not only undemocratic but also positively racist or imperialist. This predicament can be softened if we contest Abizadeh’s foundational commitment to autonomy, which itself is a reflection of his residual reliance on a social contract understanding of political legitimacy.

Allen Buchanan, in exploring the relationship between political legitimacy and democracy, helpfully separates these two ideas which Abizadeh conflates. *Political legitimacy*, strictly speaking, refers only to the moral justification for an entity, such as a state, to wield political power, defined as the capacity to exercise a monopoly in making and coercively enforcing laws. *Political authority*, on the other hand, exists when the people subject to a legitimate wielder of political power also have a *moral* obligation to obey it (Buchanan, 2002, pp. 689–692). Many states can have political legitimacy without also enjoying political authority. This need not lead to anarchy, since the people may still obey a legitimate state due to other reasons, such as prudence in light of political power, or moral duties that align with the coercive law, as with prohibitions against murder (Buchanan, 2002, pp. 695–696).

Consent theory, like that of the Lockean social contract, is attractive because it simultaneously provides both political legitimacy and political authority. If you consent to the state, you not only provide legitimacy to its wielding of political power; you also morally bind yourself to obey its commands (Buchanan, 2002, pp. 698–699). However, empirical and

philosophical problems plague consent theory. It is well known that the empirical conditions for consent are unlikely ever to be satisfied for people born into a specific state. More importantly, consent theory philosophically founders in its foundational commitment to liberty from coercion. As he puts it, “the justification of coercion as such is of paramount concern only if one assumes that liberty in the sense of freedom from coercion is the only or at least the most fundamental value” (Buchanan, 2002, p. 698). But Buchanan challenges this commitment.

In place of freedom from coercion, Buchanan places ultimate value on justice and human rights, themselves understood as manifestations of equal concern and respect. In turn, political legitimacy accrues to the wielder of political power, such as a state, simply by its ability to uphold justice and human rights, thereby treating those subject to it with equal concern and respect. So if the state must exercise coercion in order to uphold human rights, say by prohibiting and punishing murder, such coercion is *ipso facto* legitimate. As a result, Buchanan stands Abizadeh’s foundational commitment on its head: “we *do not have a right not to be coerced* to do what we have an obligation of justice to do.” Instead, there is a “conceptual link between justice and coercion: in principle the need to satisfy the demands of justice provides a powerful reason for coercion, perhaps the most powerful reason” (Buchanan, 2002, p. 703; emphasis added). In short, if state coercion is needed to protect human rights and uphold justice, then such state coercion is legitimate. Human rights and justice, as manifestations of equal concern and respect, are the highest fundamental values, not individual freedom from coercion.

Of course, this does not mean that states can legitimately violate human rights. If political legitimacy accrues to coercive states to the extent that they are needed to secure human rights, then states lose their political legitimacy to the extent that they violate human rights. The key point is that the ability to secure justice and human rights is the fundamental foundation of state legitimacy. Herein lies the foundation for the legitimacy of state boundaries. If a specific state has the capacity to secure justice and human rights only within a spatially limited domain, then its territorial jurisdiction must be bounded to align with the capacity and obligation to do so. State boundaries need not be legitimated through consent, as Abizadeh suggests. Instead, state boundaries are legitimated by the empirical limitations on the capacity and obligation of the state to secure human rights.

But that still leaves the state without political authority, and thus those subject to it without a moral obligation to obey its laws. Will this always be the case? Buchanan suggests a way out. Whereas subjects lack an obligation to obey the state or its government, in a democracy citizens have an obligation *to each other* to obey the law. Since in a state some people (members of the government) get to rule other people, this inequality must be justified. Democracy does this in two ways. First, the state is conceived merely as a tool of the citizenry (Buchanan, 2002, p. 713). Second, democracy grants each citizen an equal say in choosing which of them will rule over the rest (Buchanan, 2002, p. 710). In this way, democracy reconciles equal concern and respect with unequal access to political power. The result is political authority, or the obligation of citizens to obey the law out of respect for the equal say of citizens in choosing a government.

But democratic authority, understood in this way, necessarily follows the prior creation of the state. Because our first obligation is to create a state in order to secure human rights, we may have to accept as legitimate an undemocratic state simply as a means to providing the basic social order necessary to protect human rights. But once that state is established, we then have an obligation to transform it into a democratic state, so as to more fully extend to each other equal concern and respect (Buchanan, 2002, p. 717). This then leads to the democratic unification of political legitimacy and political authority. As Buchanan concludes, “where institutional resources are available for democratic authorization of a wielder of political power, political legitimacy requires democracy” (Buchanan, 2002, p. 719).

But notice how this again turns Abizadeh’s argument on its head. Whereas Abizadeh suggests that we need a global demos in order to justify the coercively enforced territorial borders of the state, Buchanan’s argument suggests the opposite sequence: there is no need to create a global demos until a global state with the capacity for coercively upholding human rights can be established. Only once such a global state is created are we faced with the need to secure its political authority by transforming it into a global democracy. But by the time we have created a global state, and even before we have created a global democracy, we have negated this argument’s relevance to the question of immigration. For if immigration is defined as the movement of people across the boundaries of sovereign states in order to establish residence, then a single, sovereign global state, democratic or not, would negate the very existence of immigration. Movement and residence would be matters internal to the sovereign global state.

If the preceding argument is correct, then the legitimate but non-democratic state is both historically and normatively prior to democratic legitimation. If this is the case, then the air comes out of Abizadeh's notion that the borders of democratic states must themselves be justified democratically. Instead, state boundaries are justified non-democratically, by the limitations on the capacities and concomitant obligations of states to uphold justice and human rights. This then bolsters the argument in the preceding sections that democratic inclusion is owed only to persons who are *non-autonomously subject* to *indefinite* coercion by the state. Typically, such persons would be citizens and long-term immigrants and refugees.

5. Conclusion

In this essay, I have challenged the enormously influential argument of Arash Abizadeh (2008), that all coercively enforced border laws are illegitimate, because they subject foreigners to coercion without including them in the democratic processes of creating such laws. Importantly, this argument applies to all coercive border laws, regardless of the status of the foreigner subjected to them or the state enforcing them. All coercively enforced borders are illegitimate, even when used by a poor state to exclude migrants from rich, liberal democracies who wish to enter for morally trivial reasons. Concomitantly, because of the illegitimacy of coercive border laws, all migrants subject to them are justified in disobeying, resisting, or evading such laws. This position goes beyond the more qualified position of Javier Hidalgo (2015, 2016), who defends resisting or disobeying only unjust immigration laws, and even Abizadeh himself (2016), who in a later article focuses only on immigration restrictions imposed by wealthier states in order to exclude absolutely or relatively poor migrants from globally poor regions of the world.

Abizadeh's argument against all coercively enforced borders proceeds in three steps: (1) a *foundational commitment* to individual autonomy; (2) a *normative premise* that coercion requires democratic legitimation; (3) and an *empirical premise* that border enforcement laws subject *all* foreigners to state coercion. I challenged the *empirical premise* through examples that illustrate the empirical limits to state coercion over foreigners. I contested the *normative premise* by distinguishing whether persons come to be subject to state coercion autonomously or non-autonomously, and whether this subjection to state coercion is temporary or indefinite, concluding

that democratic legitimation is only required for those persons non-autonomously subjected to indefinite state coercion. Finally, I challenged the foundational commitment to individual autonomy by drawing on Allen Buchanan's argument that the political legitimacy of a territorially bounded state stems from the need to exercise coercion within a bounded territory in order to uphold justice and individual rights, not on an individual's contractual consent to or democratic legitimation of such coercion. Only once political legitimacy is established is there any need for democratic processes to establish the political authority of an otherwise legitimate, territorially bounded state.

Importantly, my argument against Abizadeh's *normative premise* also concludes that different forms of justifying state coercion are appropriate for different categories of foreigners, depending on whether they have become subject to state coercion autonomously or non-autonomously, and whether their subjection is temporary or indefinite. Because *visitors* from wealthy, liberal-democratic countries *autonomously subject themselves to temporary* state coercion, they deserve the least demanding justification for state coercion. Conversely, refugees or other foreigners subject to autonomy-negating conditions in their home country are *non-autonomously subjected* to coercive border laws, and therefore deserve strong, hypothetical liberal justifications, so long as they are only *temporarily* subject to the coercive power of the receiving state. Finally, *immigrants* and *long-term refugees* deserve access to democratic participation, because they are subject to *indefinite coercion* under conditions that were or may become *non-autonomous*.

Notably, my more nuanced approach to justifying state coercion exercised upon foreigners fits better with Hidalgo's argument for resisting "unjust" immigration laws, defined as those that prevent the entry of people whose human rights would be violated if they were not admitted, even though admission would not significantly harm members of the receiving state (Hidalgo, 2015). My nuanced approach also coheres better with Abizadeh's own later critique of wealthy states' imposition of immigration restrictions against poor immigrants from poorer regions. This is because both refugees facing human rights violations and poor migrants from poor regions *non-autonomously become subject to coercive border laws*. Even if I do not believe that they deserve rights to democratic participation in the receiving state, I do believe that they are owed much stronger liberal hypothetical justifications for being excluded than would be the case of visitors

from rich liberal democracies seeking to enter poor states for trivial reasons. In challenging Abizadeh's argument against the legitimacy of all forms of border coercion, I have thus rendered a more plausible account of the limits of coercively enforced borders.

Acknowledgments: An earlier version of this paper was presented at the Political Theory Institute at American University in Washington, DC. I would like to thank Thomas Merrill for inviting me to present this paper, and for the thoughtful comments of members of the audience, in particular Jacque Pfeffer and Alan Levine.

References

- Abizadeh, A. (2008). Democratic theory and border coercion: No right to unilaterally control your own borders. *Political Theory*, 36(1), 37–65. <https://doi.org/10.1177/0090591707310090>
- Abizadeh, A. (2010). Democratic legitimacy and State coercion: A reply to David Miller. *Political Theory*, 38(1), 121–130. <https://doi.org/10.1177/0090591709348192>
- Abizadeh, A. (2012). On the demos and its kin: Nationalism, democracy, and the boundary problem. *American Political Science Review*, 106(4), 867–882. [Hhttps://doi.org/10.1017/S0003055412000421](https://doi.org/10.1017/S0003055412000421)
- Abizadeh, A. (2016). The special-obligations challenge to more open borders. In S. Fine & L. Ypi (Eds.), *Migration in Political Theory* (pp. 105–124). Oxford University Press.
- Buchanan, A. (2002). Political legitimacy and democracy. *Ethics*, 112(4), pp. 689–719. <https://doi.org/10.1086/340313>
- Casas, X. (2020). Three reasons to decriminalize abortion in Colombia. *Human Rights Watch website*. <https://www.hrw.org/news/2020/12/02/three-reasons-decriminalize-abortion-colombia>
- Hidalgo, J. (2015). Resistance to unjust immigration restrictions. *Journal of Political Philosophy*, 23(4), 450–470. <https://doi.org/10.1111/jopp.12051>

- Hidalgo, J. (2016). The duty to disobey immigration law. *Moral Philosophy and Politics*, 3(2), 165–186. <https://doi.org/10.1515/mopp-2015-0031>
- Miller, D. (2010). Why immigration controls are not coercive: A reply to Arash Abizadeh. *Political Theory*, 38(1), 111–120. <https://doi.org/10.1177/0090591709348194>
- Miller, D. (2016). *Strangers in our midst*. Harvard University Press.
- Pevnick, R. (2011). *Immigration and the constraints of justice*. Cambridge University Press.
- Raz, J. (1986). *The morality of freedom*. Oxford University Press.
- Simmons, A. J. (1979). *Moral principles and political obligations*. Princeton University Press.
- Turkewitz, J. (2020, March 2). Colombia court keeps restrictive abortion law in place. *New York Times*. <https://www.nytimes.com/2020/03/02/world/americas/colombia-abortion.html>
- Walzer, M. (1983). *Spheres of justice*. Basic Books.