Deportation, harms, and human rights

Lukas Schmid

To cite this article: Lukas Schmid (2021) Deportation, harms, and human rights, Ethics & Global Politics, 14:2, 98-109, DOI: 10.1080/16544951.2021.1926083

To link to this article: https://doi.org/10.1080/16544951.2021.1926083

© 2021 The Author(s). Published by Informa UK Limited, trading as Taylor & Francis Group.

Published online: 27 May 2021.

Submit your article to this journal

Article views: 256

View related articles

View Crossmark data
Deportation, harms, and human rights

Lukas Schmid

Department of Political and Social Sciences, European University Institute, Fiesole, Italy

ABSTRACT

In Justice for People on the Move, Gillian Brock constructs an elaborate normative framework, based on human rights practice, to assess how states must treat international migrants in order to legitimate exclusionary claims to self-determination. In this discussion piece, I argue that this framework cannot always satisfactorily explain when and why it is impermissible for legitimate states to remove irregular migrants from their territory (i.e., deport them). I show that Brock's intuitions about at least one of her own paradigm cases — the removal of long-settled immigrants whose irregular immigration was tacitly approved at the time — are not accommodated by her own framework. However, Brock also acknowledges that deportation is often harmful to persons and that this is morally problematic. Although this concern with harm is not systematically elaborated in Brock's discussion, I think it should be. I suggest that a purely harm-based framework is fully able to negotiate Brock's moral worries about deportation and outline the cornerstones of such a framework, stressing that harm in deportation may count as permissible only if it satisfies the joint desiderata of necessity and proportionality. I conclude by giving a sense of how one of Brock's paradigm cases — the tacit-approval case — could be assessed within this framework, arguing that such an analysis would likely bolster Brock's intuitions about this case whilst satisfactorily explaining if and why exactly the deportation practice in question cannot permissibly be pursued by legitimate states.

Introduction

Gillian Brock's Justice for People on the Move, a rich and resourceful book on the ethics of migration governance, pursues a large and immensely important question: How must individual states and the state system treat international migrants in order to justify state claims to legitimacy and self-determination? Brock's answers are often convincing, taking well-argued stands on matters of both fundamental normative
principle and policy development, and cogently intertwining both levels of analysis. In my view, the book is especially engaging when it applies its carefully constructed, human rights-based normative framework to real-world policies: among the book’s highlights are a fiercely argued condemnation of Donald Trump’s ‘Muslim Ban’ and an insightful perspective on the desirable future directions of the international refugee regime. Another area in which Brock’s human rights framework finds application is the question when, and if, long-settled irregular immigrants may legitimately be deported. In response, she argues that deportation is only permissible when it satisfies key human rights requirements, which it does not usually do in the case of deporting the long-settled.

In this discussion piece, I restrict myself to providing a critical perspective on this argument. I argue first that Brock’s own framework does not fully succeed in explaining her intuitions about the impermissibility of deporting the long-settled and, secondly, offer a sketch of an alternative framework that I believe can do a better job. The crux is that even though Brock acknowledges (some of) the harm deportation does to long-settled immigrants, she does not funnel the normative implications of such harm into a systematic framework, instead leaving all the normative work to her large-scale human rights framework for the assessment of state legitimacy. I believe a reliance on human rights practice is too constraining to account for the normative subtleties at play, and suggest that a systematic framework evaluating the necessity and proportionality of harm-infliction explains better when and why legitimate states may permissibly inflict harm through deportation and when and why such harm constitutes impermissible wronging. This framework remains responsive to many of Brock’s concerns regarding the primacy of human rights but can also account for a wide range of additional factors. It can also weight the state’s and the immigrant’s interests in an appropriate manner.

Human Rights and State Legitimacy in Justice for People on the Move

Let me begin with some fundamental exposition. In Brock’s view, legitimate states have a right to self-determination, which can justify the exclusion of would-be immigrants. But wearing the badge of ‘legitimacy’ is, in her understanding, not a trivial achievement: self-determination is exclusionary and thus a prima facie infringement on foreigners’ freedom which must be adequately justified. Indeed, she proposes conditions for state legitimacy that are quite demanding, perhaps to such an extent that most actual states today would not meet them. In reiteration of a central liberal commitment, she is adamant that such justifications need ‘to be made in terms that everyone, including and especially those excluded from the state can appreciate as compelling’ (Brock 2020: 36). She argues that the basis of such kinds of justifications may be found in international human rights practice, and should ultimately reflect the central goal that all persons can find their human rights – as specified in the UDHR – respected, protected, and fulfilled (cf. Ibid: 37–52). To be legitimately self-determining, states need to satisfy three requirements that she takes to reflect a proper commitment to achieving a world characterized by the widespread realization of human rights. The requirements are:

1 I accept this claim for the sake of argument and base the remainder of this essay on it.

2) *System Requirement.* To exercise power legitimately, states must be ‘part of a legitimate state system’ (Ibid).

3) *Contribution Requirement.* A legitimate state system can only be sustained if states participate in a cooperative project of building and maintaining such a system. States ‘have some positive obligations that are generated in virtue of the legitimacy conditions on the state system’ (Ibid).

These requirements seem straightforward enough, but their joint satisfaction constrains permissible and required state action in a rather demanding way. Importantly, obligations involved in meeting contribution requirements pose several constraints, among them commitments ‘to maintain an ethos conducive to respect for human rights’ (*Ethos Requirement*), a ‘commitment to practices of accountability’ (*Accountability Requirement*), a ‘commitment not to promote arrangements in which respect and protection for people’s human rights is significantly worsened, ceteris paribus’ (*Constraint Against Worsening*), and a commitment ‘to undertake action when one is the agent capable and appropriately placed to have sufficient reason to act’ regarding human rights issues of international concern (*Commitment to Action under Relevant Circumstances*) (Ibid: 58).

**Deportation in Justice for People on the Move**

We are now in a good position to introduce Brock’s reasoning concerning the permissibility of deporting long-settled irregular immigrants. Brock begins the fifth chapter of *Justice for People on the Move* by depicting five categories of allegedly illegal immigration cases: 1) The Windrush Generation in the UK, 2) Overstaying Temporary Protected Status (TPS) in the USA, 3) Young Children Brought by Parents, 4) Tactically Approved Irregular Migration, and 5) Migration in Response to State System Failures (Ibid: 90–98). Common to our intuition that migrants belonging to cases 1) to 4) ought not to be threatened with deportation, if we are so inclined, is the element of the passage of considerable amounts of time. When time passes, Brock argues, ‘people settle into ways of life that can then become immensely important to their wellbeing and sense of purpose in life’ (Ibid: 99–100). Uprooting people after they have settled into ways of life, then, ‘would typically cause considerable hardship and disproportional harm to them and those with whom they have formed significant relationships’ (Ibid: 100). Given that inflicting hardship and harm often constitutes a wrongdoing, this strengthens our intuitions against deportations with what seem to be strong pro tanto reasons to avoid the removal of at least those irregular migrants that are long-settled.

Brock then specifies some of the harm exerted on long-settled deportees. For instance, deporting long-settled irregular migrants threatens to split up mixed-status families and is unduly disrespectful to the localized nature of making and following through on life plans, a core human need. These considerations are then built into Brock’s human rights-based framework for assessing legitimate state action. According to Brock, deporting the long-settled may involve a number of human rights violations, such as violations against the human right to family, the human right against cruel treatment, the human right against arbitrary exile, and the human right to a fair
hearing. This entails blatant underfulfillment of internal legitimacy requirements. Moreover, deporting the long-settled also violates contribution requirements, by transgressing the requirement against worsening and commitment to action under certain circumstances criteria (cf. Ibid: 103–106).

This account provides us with two ways in which we may critique deportations of long-settled residents. First, we may concentrate on the harm inflicted on such deportees and argue that this harm-infliction is morally impermissible. Second, we may identify the relevant human rights stipulations that are transgressed by such state behaviour and conclude that deporting long-settled migrants is impermissible because doing so violates Brock’s preconditions for state legitimacy. I suggest that these should be seen as distinct approaches. While a focus on harm is more promising, Brock’s normative framework does not allow concerns with harm to develop their own systematic force. This leads to a lacuna in which we remain unable to pinpoint when and why exactly deportation is illegitimate, and have trouble accounting for the conclusions Brock draws from some of her own paradigm cases; or so I shall argue in the next section.

The limits of human rights practice

Human rights standards are important for assessing legitimate state action. But they may not exhaust the range of normatively salient evidence we have to consider when evaluating what a state may permissibly do. This becomes clear when we ask how legitimate states may permissibly treat long-settled irregular migrants. Here, the harm that states inflict on their subjects is of immense importance. As mentioned above, Brock intuitively grasps this: she devotes some energy to asserting that the harm caused by deportation is substantial and normatively problematic. Before continuing, let us quickly introduce a definition of harm, adopted from Buckinx and Filindra (2015: 396–397) ‘ecumenical’ framework, in which harm is seen as a ‘setback to interests, rights, or capabilities’. Brock does not herself provide a definition, but her usage of the concept makes clear that she understands it in a similarly broad way. Brock strongly suggests that she believes that the infliction of such harm on deportees often violates moral limits for permissible state action, for instance when harm is ‘disproportionate’, but she does not provide a systematic analysis of why this should be the case or how proportionality should be assessed (cf. Brock 2020: 110). Instead, it seems that the concerns with harm are auxiliary to her broader human rights framework. The different instances of harm Brock introduces – e.g. the harm of being separated from family, or the harm of being thrust into an unknown society – are seen as violations of the broader human rights-based legitimacy framework, and conceptualized explicitly as transgressing specific rights codified in the UDHR. Ultimately, it is only harm-infliction qua the violation of human rights practice that undermines the state’s fundamental claim to act in pursuit of self-determination (cf. Ibid: 104–106). Harm-infliction, then, is not a normatively independent evaluative concept, but is instead constrained to doing

---

2Brock earlier asserts that internal legitimacy requires that states respect their own citizens’ human rights; but here she applies the requirement to include all present on a state’s territory (cf. Ibid: 89, 104–105).
illustrative work for the human rights framework through which the evaluative work proceeds.

But if human rights do not exhaust the range of concerns that pertain to legitimate state action against outsiders, this is a problem. Indeed, it is a problem that renders Brock unable to fully account for some of her own conclusions. To see this, let us see if Brock’s human rights framework can uphold her conclusion that long-settled irregular migrants who entered the country at a time when there was ‘widespread tacit approval’ for such migration cannot legitimately be deported (Ibid: 96–97). What Brock stipulates here is that ‘undocumented migrants came at a time when […] very lax enforcement policies suggested such migrants were not doing anything particularly bad’ (Ibid: 96). Furthermore, one could interpret these circumstances to suggest that ‘migrants had been given a certain understanding that their presence was welcome and immigration laws would not be enforced in their kinds of cases […]’ (Ibid). Later, when assessing how this case may be squared with internal legitimacy requirements, Brock asserts that deporting such long-settled irregular immigrants effectively amounts to banishment, which ‘counts as a violation of Article 5 of the UDHR, that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’ (Ibid: 104), and further adds that ‘[a] case can also be made that ejecting the long-settled in these cases violates Article 9 of the UDHR that no one shall be subjected to arbitrary exile’ (Ibid: 105).

It seems to me that this is too quick. Importantly, the extent to which banishment can be considered cruel, inhuman, or degrading treatment or punishment will at least partly depend on what is at stake for the to-be-banished. We cannot assume that deportation, even if analogized with banishment, reflects such human rights-violating treatment without learning more about the case we are considering; without learning more about the deportee’s circumstances, interests, relationships, values, and so on. But this is explicitly what Brock wants to avoid. She has deliberately crafted a case in which we know nothing about the deportee except her circumstances of arrival and long-settledness, to show that these factors in themselves suffice to ground a conclusion of non-deportability. But this cannot be squared with her appeal to the UDHR’s article 5. One might ask, for instance, why it should in principle be considered cruel or degrading treatment to deport a long-settled hermit, who has no human attachments, and makes do wherever nature provides her a suitable cave. There might also be less fantastical cases. Think about a long-settled Mexican labourer in the US who generally enjoys his life there and prefers the US over Mexico for financial reasons, but also has life-defining commitments and close emotional ties to his family in Mexico. There might be many reasons to argue that this labourer ought not to be deported, but would his deportation necessarily constitute cruel, inhuman, or degrading treatment? I think this is insufficiently substantiated, given only these few facts about the case. We can make a similar critique of Brock’s appeal to Article 9 of the UDHR: it does not find blanket applicability to cases about which we know nothing except circumstances of arrival and long-settledness. Is a Mexican citizen who is forcibly deported back to Mexico necessarily exiled in the relevant sense? Much seems to depend on further context, which Brock is here unwilling to provide.
To establish Brock’s conclusion within her own framework, it seems more promising to argue that the deportation of such immigrants violates contribution requirements. Perhaps the two sub-requirements within the contribution requirements most likely to be violated by deportation in this case are the requirement against worsening and the ethos requirement. But the requirement against worsening seems jeopardized only when deportation leads to a predictable deterioration in the protection of affected persons human rights. The case as stipulated does not suggest that such worsening is entailed by deportation. Such worsening could occur, for instance, if the fulfilment of some human right were necessarily tied to an immigrant’s host-country, or if immigrants were to be deported to states where their human rights would be imperilled; but neither of these outcomes are strictly entailed by the case. Moreover, focusing on this possibility would, again, remove the case’s intended salient features from the locus of normative concern. Similar conclusions apply to a consideration of the ethos requirement. Its prescription that states’ actions remain in line with an ‘ethos conducive to respect for the practice of human rights, such as that everyone deserves to be treated with dignity and respect as a human being’ (Ibid: 58) is wide open to interpretation, but it is at least not straightforwardly plausible that deportations in this case would undermine dignity and respect in such a fundamental manner. Here, as opposed to, for instance, the case of the Muslim ban, no one is stipulated to be unduly targeted by arbitrary discrimination. The case as stipulated allows for the possibilities that, among others, claims to remain have been carefully considered before being denied, adequate notice has been given before deportation is carried out, deportees retain adequate possibilities to legally challenge the deportation order, and that the actual deportation is carried out respectfully and with the minimum amount of force, if and only if applying force is strictly necessary. Once again, we would have to redesign the salient features of the case in order to be able to convincingly apply the human rights-based legitimacy framework.

I agree with Brock’s intuition that this is a case in which we want to say that deportation is not usually a permissible option open to legitimate states; unfortunately, Brock’s framework is too constrained to properly account for this intuition.

**Legitimacy beyond human rights**

I believe that if we conceded that adherence to human rights practice does not comprehensively determine if exclusionary acts possess legitimate authority, we might be able to explain more convincingly why it is impermissible for the state to deport long-settled, irregular tacit-approval immigrants. But it is important to stop and acknowledge that this is not a straightforward enterprise. There is a good reason for Brock’s central focus on human rights for assessing state legitimacy, and it requires some argumentative work to show how this framework could be appropriately supplemented or altered.

The central problem is that there seems to be an important normative distinction between a state acting in a pro tanto wrongful way and acting in a way which contravenes its basic claim to legitimate authority. To illustrate this in a crude way, we might think that a state which uses its asymmetrically greater power to negotiate an overly favourable trade deal with a weaker partner state does something wrong, but it does not follow that this state does not possess legitimate rights to sovereignly
steer its trade policy. Brock’s human rights framework is well suited to stay clear of this issue. This is because the list of human rights reflects an almost universally accepted, expressive commitment of states themselves. Human rights practice aimed at fulfilling and promoting the aims of the UDHR, in turn, is widely accepted as the normative baseline against which states’ relations with each other and with individuals is to be evaluated. This means that a measurement of legitimacy against human rights practice is both practically relevant and internal to the commitments of international law and politics. Assessing legitimacy in this way works around the problem that there will be reasonable disagreement about what counts as normatively impermissible, because the relevant actors have already affirmed the relevant normative standards.

Nevertheless, I think we can give an alternative sense in which actions may be judged impermissible for legitimate states to pursue. There is a widespread sense in the literature that there are all-things-considered moral wrongs which states cannot legitimately inflict on outsiders. Human rights violations may be such wrongs; but the categories are analytically distinct, and such wrongs need not be conceptualized in human rights terms. For example, Blake (2020: 127–130) argues that there are (discriminatory) rationales for excluding would-be migrants which are wrongful all-things-considered, and that state action based on such rationales is thereby illegitimate. Similarly, Mendoza (2017: ch. 5) has argued that not all means of immigration enforcement are permissible, with some constituting all-things-considered wrongs which undermine the legitimacy of authority over subjects of enforcement. Both arguments make do without a reliance on human rights practice, instead referring to the importance of persons’ being treated respectfully and as moral equals. This may sometimes best be cashed out in human rights terms; but this need not be the case. One part of the imperative of respectful treatment is that the state ought to refrain from harming persons. While a harm does not necessarily constitute an all-things-considered wrong – there are harms that are not wrongs, and some hold that there are wrongs which do no harm (Ripstein 2006) – it is impermissibly disrespectful to thwart someone’s interests without strong and convincing justification. To this effect, Sarah Fine (2013) has argued that if state self-determination inflicts significant harms on outsiders, its very legitimacy becomes challenged – an argument with the implication that if such harm should turn out to be wrongful all-things-considered, it would constitute an illegitimate expression of self-determination.

This is where we return to evaluating the legitimacy of state action in deportation in terms of harm-infliction. It is plausible that the perpetration of all-things-considered moral wrongs cannot count as legitimate state action. Harm-infliction need not but can constitute an all-things-considered moral wrong when not adequately justifiable. To ascertain if harm-infliction is impermissible in this way, we need to construct a framework within which we can systematically evaluate relevant evidence and weight conflicting interests. Disentangling harm-based concerns from Brock’s overarching human rights argument and developing them within a freestanding normative framework then constitutes a better way of evaluating how states may legitimately deport. In the next and final section, I outline such a harm-based framework and provide an unsophisticated but suggestive approximation of a systematic discussion of Brock’s tacit-approval case under such a framework.
(Im-)permissible harms and deportation: a sketch

We have already ascertained that states should refrain from harming persons, ceteris paribus. However, all things considered, it can sometimes be legitimate for the state to inflict harm, if the degree and kind of harm and reasons for inflicting it are of the right sort. It is important to make sure that such possibly legitimizing reasons are identified and adequately assessed. Buckinx’ and Filindra’s (2015) harm-based critique of deportation practice recognizes this necessity. They concede that significantly harmful deportations may nevertheless sometimes be legitimately conducted, when ‘the continued residence of potential deportees inflicts significant harm on citizens’ (Ibid: 408). This is important: deportations serve certain ends, which can potentially be of weighty moral importance. A harm-based approach should then be based on a broad calculus which appropriately evaluates the forcefulness of all normatively salient claims that seek to legitimate or delegitimate a particular case of deportation, and relate such claims to one another. Buckinx and Filindra provide a lengthy elaboration of US-American legal history negotiating if deportation constitutes punishment, and if so, how it could be justified (Ibid: 404–409). While they do not utilize this exercise to build a comprehensive harm-based framework to systematically analyse the full range of admissible evidence, they extrapolate two important desiderata which need to be satisfied for harmful deportations to be all-things-considered permissible: necessity and proportionality (Ibid; also cf. Hosein 2019: ch. 3).

Both necessity and proportionality, I argue, need to be assessed on two levels. First, a more abstract level is negotiated: given that deportation is harmful, is it even principally necessary to achieve an important end? And if so, are the harms that a person suffers simply in virtue of her deportation-induced relocation proportionate to that end? Second, the level of on-the-ground enforcement must be tackled: if the means employed during and to the end of deportation are harmful, are they necessary, that is, are they the least harmful ones which can be deployed to achieve deportation? And even if they are, is the harm caused perhaps still so significant that it must be deemed disproportionate to the importance of the state’s cause?

Assessment within the category of necessity takes as its starting point the idea that states (can) pursue morally important ends for their subjects. To assess the legitimacy of a deportation case, we thus start by identifying which important end the deportation is meant to serve. For example, we might investigate if and to what degree enforcing state sovereignty, the legal order, the will of the citizenry, public security, or other interests are important ends for the state to pursue. We then go on to consider thoroughly if and in which way the deportation is necessary to achieve such ends. If the more abstract level of necessity negotiation yields an affirmative result, we go on to the level of enforcement. Is the enforcement of deportation only as harmful as is necessary to successfully achieve deportation? We can gather evidence as to the necessity of enforcement practices, for instance, by gathering information about best practices around the world. We can also use human rights as a first indicator: widespread disregard for human rights may be a first sign of unnecessarily harmful enforcement. Furthermore, we can assess compliance with procedural standards. Where enforcement transgresses existing legal standards that aim to minimize harm by rendering the decisions and actions of the state and its agents non-arbitrary, contestable, and accountable to
impartial norms and adjudicators, or where such standards are absent altogether, we may perhaps conclude that harm is being caused despite the availability of better, harm-avoiding options, therefore violating necessity (cf. Lenard 2015).

If necessity is affirmed on both levels, the next step is to evaluate proportionality. Here, states will have to demonstrate both that the cause they pursue is compelling enough to outweigh the harm a person suffers simply in virtue of her deportation-induced relocation and, if this succeeds, that the actual enforcement of the deportation inflicts only such harms which are proportionate to the strength of the state’s justification to deport. Let us once again start on the non-enforcement level. The significance and intensity of the harms inflicted by the consequences of deportation will vary greatly according to differing factors, such as long-settledness, the deportee’s health, the social, political, and economic circumstances of the receiving country, her connection to that country, and others. These will have to be carefully evaluated on a case-by-case basis. The extent to which the state’s aims outweigh the significance of its harm-infliction will also depend on the significance and intensity of the threat averted by deportation, and, connectedly, on whether and to which extent a deportee may have made herself liable to suffer harm. Irregular migration, one might argue, blatantly violates state rules and subverts the law; this might entail that immigrants who act in this manner lose their claim to protection from harmful consequences. But even if so, this does not settle how much or how intense harm one becomes liable to. As part of a bigger bundle of important factors, human rights here become highly salient again. While the UDHR list is widely held among philosophers to be too extensive and idiosyncratic a list to represent a full collection of universal moral rights, it is plausible that the list provides at least some such rights, such as a right to physical and psychological security (e.g. Miller 2012). One might then argue that irregular immigration never makes anyone liable to the kind of harm that transgresses such basic rights, and that legitimate states have stringent responsibilities never to deport when deportation would lead to persons’ deprivation of such basic rights. Therefore, there will be some cases of deportation in which the consequential harm suffered will be so intense that it will require exceptional circumstances for the state to adequately justify deportation, or even of a kind that cannot be justified by the state at all. But it may also mean that there will be some cases in which deportation is easier to justify in principle (for instance, recall my hermit-example).

Human rights also play an important role for evaluation on the enforcement level. For instance, one may argue that the harms of enforcement are always disproportionate when enforcement violates basic human rights, such as rights against torture or degrading treatment, because no one is ever liable to incur such harms. In the real world, deportation enforcement often violates basic human rights. Indeed, there is a worry that states might be unable or unwilling to ensure that deportations are reliably enforced and conducted without basic human rights violations, or that deportation is simply not the kind of thing that can be reliably enforced in accordance with basic human rights. For the sake of argument, I am for now simply assuming that deportation enforcement can be conducted in sufficient accordance with basic human rights, reserving judgement for the contingent cases in which there are manifest basic human rights violations. It is also clear that basic human rights do not exhaust the range of considerations which are relevant to the proportionality of deportation enforcement.
Nevertheless, I will leave it at this for now, yielding to space constraints. While this sketch needs more careful and sophisticated elaboration, the upshot is that any given case of deportation that cannot jointly satisfy the desiderata of necessity and proportionality in harm-infliction, both on a more abstract and on an enforcement level, constitutes an impermissible wrong and can therefore not count as legitimate state action.

Having had difficulty with establishing within the bounds of Brock’s framework that it is impermissible to deport persons who immigrated irregularly at a time when there was tacit approval for such immigration, we may now be able to argue that the harm inflicted will often be unnecessary and disproportionate, and thereby constitute an impermissible wrong. Brock’s case is not concerned with the means of enforcement, so we can limit the analysis to the more abstract level. We could start the analysis by noting that the fact that not too long ago the state was wholly disinterested in such infractions of entry regulations might suggest that, in absence of major changes in the country’s condition, it is hard to argue that the deportation of such immigrants should suddenly be necessary for some legitimate purpose. We might then have to confront the counterclaim that deportation had always been necessary for a good purpose; the state simply had not lived up to its responsibility until now. We may either debate this claim or concede it and move on to the proportionality desideratum. Here, the first thing to note could be that the long-settledness of potential deportees will often, though not always, render the harm inflicted highly intense and significant. The extent to which this is true cannot, however, be determined by exclusively considering long-settledness; while it is a good first indicator, a thorough analysis requires more detail about the lives of those under threat of deportation, which Brock does not provide. This lack of detail, however, goes both ways. The case does not stipulate the persons in questions to be security risks or even burdens of any sort. We thus have good reason to believe that, on this picture, the harm averted by deporting them is either insignificant or wholly inexistent. The state may perhaps claim that deporting such persons averts the threat of disobedience to its entry rules becoming ubiquitous, causing lawlessness with greatly harmful consequences. But this is doubtful, as research shows that deterrence and enforcement do not reliably prevent migration flows (for instance, cf. Mendoza 2017: 97–98; Cohen 2020: ch. 1). Given that in cases of long-settledness, deportation will almost always entail some harm simply in virtue of indefinite relocation, this insignificance or absence of harm aversion by deportation does not bode well for the prospects of establishing proportionality. The insignificance or absence of harm aversion also weakens the case that these irregular immigrants have made themselves liable to incur some significant extent of harm, since liability to incur such harm is more plausibly established when substantive ills rather than only a mere subversion of formal rules are threatened. Moreover, even this weak argument towards the establishment of some liability to harm, citing the subversion of formal rules, seems largely inapplicable here, since Brock stipulates that the kind of irregular immigration under discussion was at the time tacitly approved by the state, sending a clear message of encouragement.

This analysis tentatively suggests that the harms inflicted by deportation merely in virtue of removal are often disproportionate in the tacit-approval case, even if these harms are sometimes not particularly intense (which they will nevertheless often turn out to be). This, in turn, yields the conclusion that deportation in this case will usually
constitute an impermissible wrong which is not construable as legitimate state action, even after all normatively pertinent factors have been considered. While a more expansive and detailed analysis is needed, we can now see how such a framework would negotiate the salient concerns and likely bolster Brock’s intuitions.

I have suggested that the human rights framework spanning across Justice for People on the Move is ultimately unsuccessful in systematically and convincingly explaining when and why deportation is all-things-considered impermissible, and I have tried to construct an alternative framework to rectify this issue. However, I do not mean to say that Brock’s framework is not valuable. On the contrary: I believe it does highly important work. First, in practice, many cases of impermissible deportations will be graspable within a human rights framework, since the horrible reality is that states routinely deport in violation of basic human rights. The methodologically distinct account I have provided here will often end up agreeing with Brock’s prescriptions. Moreover, expressing normative critiques of the state system in human rights language is politically powerful. Human rights language and human rights norms have proved immensely effective in motivating diverse actors to strive for a better world. Justice for People on the Move is an exciting book of great practical ambition, and its human rights framework facilitates its considerable capacities for action-guidance.

Acknowledgments

I am grateful to Vincent Harting, Andrea Sangiovanni, and two anonymous referees for helping improve previous versions of this essay. I am especially indebted to Gillian Brock for inviting me to engage with her important work.

Disclosure of potential conflicts of interest

No potential conflict of interest was reported by the author(s).

ORCID

Lukas Schmid http://orcid.org/0000-0003-0746-1195

References

