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## Morally evaluating human smuggling: the case of migration to Europe

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### ABSTRACT

Much of the recent debate on immigration to Europe has focused on how many refugees should be allowed to enter and how refugees should be distributed among EU member states, but there has been less academic focus on under what conditions, if any, human smuggling is morally permissible. How should we morally assess those who make a business out of helping migrants reach their desired destination and those who pay smugglers to reach their destination? We argue that human smuggling is morally permissible under some conditions even if it is illegal. Human trafficking, by contrast, is immoral and should be illegal. The moral conditions for permissible human smuggling are sometimes being met on the route from Africa to Europe (but are all too often grossly violated). We consider and rebut objections based on the arguments that a legal prohibition on human smuggling must translate into a moral one, and that human smuggling violates the rights of individuals to freedom of association in receiving countries. We conclude with policy implications.

**KEYWORDS** Human smuggling; human trafficking; human rights; liberalism; migrations; Libya

### Introduction

Many individuals have contradictory moral intuitions regarding those who assist people to move illegally across state borders. Participants in the Underground Railroad, a network of abolitionists in the United States that snuck enslaved African Americans to freedom in the North and present-day Canada in the 1800s, sometimes at great personal risk, correctly receive acclaim (Foner, 2015). So do the volunteers who helped Jews flee Europe before and during World War II (Halamish, 1995). Yet today, many condemn those who engage in human smuggling across Africa to Europe.

In this paper, we address the question of under what conditions, if any, the illegal smuggling of humans across state borders is morally permissible, and to what extent these moral requirements are being met for contemporary illegal

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immigration from Africa and especially Libya to Europe. We contend that under certain conditions, human smuggling is permissible because it is voluntary and may improve the lives of those who are undertaking the perilous journey, or others, and does not harm third parties. Specifically, we argue that human smuggling for a reasonable profit or some other material interest is permissible when the following conditions are all met: both the smuggler and client consent to a smuggling agreement, neither the smuggler nor the client intend to or do violate anyone's human rights, the client's or others' lives may be improved if the client reaches the destination, and the smuggler adequately accurately portrays the risks to the client and takes steps to mitigate severe risks at reasonable costs.

The paper is laid out as follows. First, we present our normative account of under what conditions human smuggling is permissible and why. In the second main section, we show that these conditions sometimes obtain, but often are grossly violated, in migration to Europe especially from Africa via the Mediterranean Sea. We then consider and rebut several objections to our account and analysis, including that breaking the law always renders an action impermissible and that smuggling undermines the liberal right to collective self-determination. We conclude with some policy implications.

## **Normative analysis**

In this section, we present our account of when it is permissible to engage in human smuggling. Before doing so, however, we provide some basic definitions that are necessary for the remainder of the paper.

In order to maintain a focus on smuggling per se and not the ethics of immigration more generally (Carens, 2013; Fine, 2010; Miller, 2016; Wellman, 2008), we make the following assumption. We stipulate that if illegal immigration is morally permissible, then human smuggling resulting in that illegal migration will generally be as well. Starting from widely held liberal cosmopolitan assumptions allows us to delve into the specific conditions under which human smuggling may be permissible, for we cannot address here the whole range of objections to immigration. Building on four widely accepted categories—legal and morally permissible, legal but wrong, illegal but morally permissible, illegal and wrong—we argue that only human trafficking belongs to the last category. Human smuggling, by contrast, should fall into one of the first three depending on the circumstances under which it is practiced.

## **Definitions of smuggling**

According to the UN Protocol Against the Smuggling of Migrants by Land, Sea, and Air, an annex to the UN Palermo Convention against Transnational

Organized Crime, smuggling is ‘the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident’ (United Nations, 2000a, pp. 54–55). The UN Protocol demands that all signatories criminalize smuggling by adopting all the necessary legal measures allowing for the prosecution of human smugglers (United Nations, 2000a, p. 55).

Other legal definitions resonate with the UN Protocol. For instance, the Human Smuggling and Trafficking Centre of the US State Department defines smuggling as ‘the facilitation, transportation, attempted transportation or illegal entry of a person(s) across an international border, in violation of one or more countries laws’ (United States State Department, 2006, pp. 2–3). As stressed by the State Department, smuggling is often conducted in order to obtain a financial or other material benefit for the smuggler. However, ‘financial gain or material benefit are not necessarily elements of the crime,’ and smuggling may be perpetrated for other reasons, such as reuniting families (United States State Department, 2006, p. 2).

Legal documents of the European Union and its member states do not usually refer to smugglers but use the broader notion of ‘facilitation of illegal migrations’ (EU Council, 2002), an action that may not necessarily take place in exchange for a financial profit. While conceding that prosecution may be waived if such an action is perpetrated for humanitarian reasons, the so-called Facilitation Directive asks its member states ensure the prosecution of all those who aid the crossing of its external borders (Carrera, Guild, Aliverti, Manieri, & Levoy, 2016; European Council, 2002).

In sum, existing legal definitions do not all have financial motives as a necessary condition. In our paper, however, we only focus on financially motivated facilitation. If human smuggling that generates a reasonable profit is permissible, profitless human smuggling, carried out with the aim or helping family reunification or some other humanitarian reason, will generally be permissible too. For that reason, we only further discuss monetarily profitable human smuggling.

While varying in the emphasis they attach to financial motives, all existing definitions differentiate human smuggling from human trafficking. While smuggling is voluntary, trafficking is a coercive action perpetrated against the will of those who illegally enter a state (Gallagher & David, 2014; Kleemans, 2009). Regulated by a different, specific Protocol of the Palermo Convention, trafficking amounts to ‘the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability ... for the purpose of exploitation’ (United Nations, 2000b, p. 42). The distinction between smuggling and

trafficking is useful to delimit the scope of our paper, which only focuses on smuggling.<sup>1</sup>

### ***Existing scholarship on the ethics of smuggling***

Several scholars have addressed the normative aspects of human smuggling. Javier Hidalgo and Julian Müller make two of the most important contributions to the discussion of normative accounts of smuggling (Hidalgo, 2016; Müller, 2018). Hidalgo (2016) argues that it is sufficient for human smuggling to be permissible when the smugglers help protect the human rights of the individual in question, when it is not exploitative, and when smugglers do not violate others' human rights. Müller (2018) also emphasizes the protection of human rights (pp. 3–4, 11–13). To preview our argument, we distinguish our argument from Hidalgo, Müller, and others' in the following ways. First, we argue that even if individuals are not at risk of human rights violations, smuggling can be permissible if it can improve the lives of the client or others. This could occur by migrants sending remittances home. Second, we also argue that smugglers have obligations to portray risks accurately and to take steps to mitigate risks to clients. Third, we argue that both smugglers and smuggled individuals have widely accepted obligations to not commit or willingly contribute to human rights violations.

### ***The just cause of human smuggling: protecting human rights of clients and improving lives***

A just cause for human smuggling means that there is a reason why a client and a smuggler may permissibly engage in smuggling. It does not mean that smuggling is morally permissible all things considered. It is a necessary, not a sufficient, condition for human smuggling to be permissible. Like with just war theory, even if a just cause is satisfied, other conditions must be met too in order for an action to be all things considered morally permissible.

Several leading accounts of when a just cause is met for human smuggling focus on credible threats that would constitute a human rights violation against the smuggled individual. Hidalgo argues that it is permissible to smuggle humans if there are threats to clients' human rights (Hidalgo, 2016, pp. 312, 313, 316, 317, 322, 323). For instance, he writes that he 'will defend the view that people smugglers act permissibly when they help refugees to escape threats to their human rights' (Hidalgo, 2016, p. 312). Hidalgo argues that threats to human rights are a sufficient condition to meet the just cause of human smuggling but does not provide a lower limit of what if anything would be necessary to satisfy as a just cause. Øverland (2007) similarly

argues that human smuggling should be decriminalized if the individual being smuggled has a 'warranted claim on protection' or the smuggler believes this to be true (pp. 192, 194). He frames this in terms of refugee law and asylum (Øverland, 2007, p. 192). Kukathas (2013) likewise implies that smugglers 'help people reach places where they can make application for their cases for asylum to be heard'. Müller too discusses a paradigmatic case where someone is 'unjustly persecuted and whose minimal needs are not satisfied by his home country' (Müller, 2018, p. 3) or whose 'human rights are severely threatened' (Müller, 2018, p. 4) and later emphasizes a client's basic needs or as a refugee (Müller, 2018, pp. 11–13).

These accounts are overly restrictive or do not address the lower bound of what could be a just cause for human smuggling. Although protecting the human rights of the smuggled individual in question is undoubtedly important and should count as a just cause for being smuggled, there are other considerations that should permit human smuggling. We argue that there should be a just cause for smuggling whenever the client judges being smuggled may improve his or her life, or others' lives. The possibility to improve the lives of others is especially important given the large scale of remittances that migrants send back to their families and friends each year.

Our account of a just cause for human smuggling has several components. First, it relies on the client to decide when employing a smuggler may improve his or her life. Note that we do not claim that an individual's life *must* be improved in order for smuggling to be permissible. Smuggling is risky, both in the journey and in the destination. There is no guarantee that the smuggled individual will certainly have a better life if and when she reaches her destination. Sadly, many die en route. Nonetheless, we think it should be the choice of the individual to decide whether this risk is worth taking. Second, the point regarding the improving the lives of others besides the client is especially important. This is because individuals often travel to Europe and other destinations in order to improve the livelihoods of family members, friends, and communities in the countries they left. One way the lives of those left behind can be improved significantly is through remittances. As examples of how these can contribute to others' well-being, these funds can allow individuals to buy food, pay for school fees, or purchase adequate housing and medical care. Remittances could also allow individuals to move out of a conflict-affected region or a high crime neighborhood.

Why do we not limit the permissibility of smuggling to a higher standard, say only when it could protect human rights or significantly improving lives? We do not impose such restrictions for several reasons. To justify such a higher standard, there would have to be some benefit for doing so that would outweigh the standard liberal view that permits consenting adults to make decisions about their own lives. This benefit is not present. First, such

a view is paternalistic. Typically, we think consenting adults can enter into a wide variety of voluntary economic and social arrangements even when it would only marginally improve their lives, or indeed when it could even make them worse. Violations of human rights by the client or smuggler should be a reason why smuggling is morally wrong, but seeking to avoid human rights violations of the migrant in question should not be a necessary condition for its permissibility. To be sure, relying on smugglers to help individuals enter countries by sea or by other means may endanger the life of migrants. These risks may appear unacceptable to us. As stressed by the work of anthropologists, however, 'risk acceptability is mediated by life opportunities' (Hernández-Carretero & Carling, 2012, p. 413). Consequently, migrants may willingly consider dangerous journeys to reach Europe as preferable not only to staying in war-torn Syria but also to facing extreme poverty in Bangladesh or Sub-Saharan Africa. As widely held by migration scholars, the view that migrants are always ill-informed and exploited by smugglers and therefore need to be protected by their own ostensibly irrational choices is both morally questionable and empirically problematic (Mainwaring & Brigden, 2016).

To see the benefit of this account, imagine the situation of Amadou Anne, a Senegalese national whose story *New York Times* reporters chronicle (Searcey & Barry, 2017). Anne tried to travel to Italy in order to improve his life and remit earnings to his family but tragically died trying to reach Europe (Searcey & Barry, 2017). Suppose that Anne was not at any elevated risk of human rights abuses in Senegal, but that his family was extremely poor, and there was little domestic opportunity for advancement. Suppose furthermore that extreme poverty substantially increases the risk of ill health and premature death, even when this wouldn't constitute a human rights violation. Even if remittances are not as large as judged by middle-class standards in the West, they may substantially improve the lives of recipients. Suppose that Anne and those like him had been able to reach Italy and remit €50/month to his family. Singer (2009) estimates that to save one life from poverty-related causes costs between \$200 and \$2000 (p. 103). MacAskill (2015) estimates that a one-time sum of \$3400 could save one life (p. 54). Adjusting Singer's estimates for inflation from 2009 to 2017 approximately cancels out the different purchasing power of the dollar and euro with the exchange rate as of the summer of 2017 of €1 = \$1.15. We can roughly estimate that a migrant who remits €50/month could save one life each ~ 4.5 years. Anne or anyone like him might be earning some wage in her home country if he stayed, so the time necessary to make the marginal difference would be somewhat longer. Even if one were to double the time (for example), it is still staggering that just moving from one location to another could give one such power—especially given such relatively little money that is (hypothetically) remitted each month. It is

admittedly unlikely that a migrant's remittances would be as efficient as the charities by which Singer and MacAskill make their calculations, but nonetheless such figures provide a measure by which to show that even relatively small remittances are likely to have important effects.

Many use remittances to offset everyday scarcity and suffering. Imagine the remittances would have decreased Anne's family's deprivation by allowing them to comfortably feed themselves and decrease the risk of infant mortality of a newborn sister by one-third because they could afford basic medical care. However bad, suppose that the nutrition of the family and the risk of death of his younger sister would not have constituted human rights violations but would have substantially increased the well-being of the family. Part of why poverty causes suffering is due to the mental anguish of knowing one cannot provide even basic services to oneself or one's family. Knowing that if a child gets ill or if a family member suffers an accident, there are no reserve funds to provide medical care. Thus, even if the child does not obtain a life-threatening disease, the family could be significantly better off because of the mental health benefits of the extra funds. It is unclear on Hidalgo, Kukathas, Øverland, and Müller's accounts whether smugglers would be able to permissibly accept Anne as a client if he were not at risk of human rights violations. We believe that it was permissible for smugglers to have helped Anne reach Europe.

Another benefit of this account is that it covers individuals whose human rights are at risk but who cannot or choose not to take the risky journey. Children and elderly are especially vulnerable to certain types of threats to their well-being and human rights. For instance, they are especially at risk of health-related harms. Others may decide that even though they are at risk of severe harm and perhaps human rights violations, they would prefer to take those risks at home rather than traveling in order to try to fulfill them. They may feel special obligations to children or parents, or their broader community, and decide that the best way to meet those obligations is to remain physically present for those individuals.

A third benefit of our more expansive account turns on epistemic reasons. Requiring a smuggler to assess and determine with some reasonable level of confidence that a client is at risk of a human rights violation is an unrealistically demanding burden to place on a smuggler or smuggling organization. Governments have elaborate systems in place in order to assess the claims of those seeking refugee status. Although risks of human rights abuse are far broader than the legal requirements to be a refugee, requiring a smuggler to understand the political climate in a given country, assess the reliability of an individual's claims, and do the investigative work to corroborate such information takes resources and skills that are unlikely to be available to a smuggler. As stressed by the existing scholarship on migrations, the distinction between those fleeing from widespread



violations of human rights and economic migrants is blurred and questionable. Most of the individual presently crossing the Mediterranean Sea from Libya into Europe are 'stranded migrants' (Collyer, 2010) who fall into a legal gray zone. Although initially motivated by economic reasons in their desire to work in Libya rather than reach Europe, these people nevertheless faced severe abuses and deprivations. Consequently, they should be entitled to some form of international protection. The simplistic dichotomy between economic migrants and refugees is incapable of capturing the ambiguity surrounding many migrants' status. By making a broader case for the permissibility of smuggling regardless of whether the smuggled people are in danger of immediate human rights violations, we avoid the pitfall inherent in existing refugee and human rights law, which are in danger of leaving a large number of vulnerable people without any protection.

Our account improves on Hidalgo, Kukathas, Øverland, and Müller's views in two ways. First, we suggest that a potential client need not have his or her human rights be threatened in order for a just cause to be met. She may simply want to improve her life. Some of these accounts, such as Hidalgo's, wouldn't exclude such just causes. His sufficient conditions, however, leaves open what other reasons could also qualify as a just cause. Second, a client might have family members, friends, colleagues, or contacts who are suffering hardships, including human rights violations, whose lives could be improved if the migrant were able to reach the target country. This is because the remittances that the migrant could send home could be the key difference between life and death, or at least improve the life, of those the migrant left behind. Because of the risks of such a journey, the difficulty of leaving behind loved ones, and the nonofficial means of traveling, smugglers can safely assume that their clients expect to improve their or their loved ones' lives compared with the opportunities at home. This includes threat to a client's human rights, but it goes beyond it.

### ***Duties of smugglers to their clients***

Smugglers have certain role-specific duties to their clients they must fulfill in order for their work to be morally permissible. First, they should portray the risks as accurately as possible to their clients (Müller, 2018, p. 10). The reason why the first duty is important is because it is a vital part in order for the client to be able to consent to the journey. Second, smugglers should of course not violate any of their clients' human rights, or expose their clients to excess risks. This is because it is unfair to place high risks of serious harm on clients when the risks could be reduced at reasonable costs. Third, the clients should not exploit them, because exploitation is by definition unfair.

First, consider the duty of providing sufficient and sufficiently accurate information. Coercing individuals into traveling is human trafficking or

kidnapping (or both) and is wrong because it is not consensual (among other reasons). But there are other ways of undermining consent than coercion. Portraying the risks accurately to clients is important because smuggling is only permissible if the client consents to it. Consent at least requires adequate relevant information and an adequately free choice situation. Inadequate or false information would impinge on one aspect of consent, thereby undermining this important aspect of when smuggling is permissible. For instance, smugglers could withhold relevant information, such as the risk of crossing the Mediterranean or the risks of waiting for a boat on land in Libya. Or they could lie about these risks by underplaying them. Either way, the client would not be able to be adequately informed in order to consent to the journey. As part of their duty to provide accurate information, smugglers must keep their promises. Violating this obligation would wrong the client. For example, the smuggler may abandon the client part way into the journey, when the smuggler promised to take the client the whole way. There is also some risk that smugglers transform into traffickers or hand their clients off to them, thereby becoming complicit in this wrong. This would count against the permissibility of smuggling.

Second, smugglers should respect and protect the human rights of their clients. This is a standard duty that all individuals have to those in their care, but it is especially important when there are numerous severe risks such as dehydration, drowning, kidnap, enslavement, torture, and so on. The smugglers must bear some reasonable costs in order to decrease such severe risks to their clients. This is related to but distinct from exploitation. Suppose a smuggler could buy a cheap inflatable raft at the cost of €1000 that has a 70% of sinking or €5000 for a boat that has a 10% chance of sinking. Suppose that smuggler could still make a reasonable profit by purchasing the more expensive boat. Although where exactly to draw the line regarding how risky is too risky, it seems plausible in this situation that the excess profit the smuggler will make would not justify the larger imposition of risk on the clients.

Third, smugglers should not exploit their clients. For the purposes of this paper, we define exploitation as taking unfair advantage of another person with whom one has an agreement that is to some degree voluntary. While all trafficking involves exploitation, some but not all smuggling does (Campana & Varese, 2016, p. 94). Smugglers can exploit their clients in multiple ways. First, they can charge them extremely high and above market fees, which are unfair. On the journey or on arrival, the smuggler could require the client do exploitative work, as happens all too often (Campana & Varese, 2016, pp. 97–99).

One might think that charging very poor individuals even reasonable market rates could be exploitative. This is because given their penury, asking for even a modest profit would leave the client with little to no savings, and

it is unfair to make a profit from someone so poor. There are several responses to this objection. First, it is unclear why it would be exploitative to simply offer a service to someone who would be poor if they decided to purchase that service and the profit margins are reasonable. By definition, clients would choose to spend their money on a human smuggler. Even if this decision were made under far from perfect conditions, it seems fairer to allow someone to choose what she thinks is their best way to advance her life aims than it is to restrict them.

Second, without a profit motive, there would likely be fewer human smuggling services in many parts of the world. Clients opt to pay smugglers because there are not reliable, legal traveling services. Rendering profitable smuggling that meet the criteria we outline here legally permissible would likely increase supply, leaving potential human smuggling clients, their families, and their communities better off than they otherwise would be. Concurrently, it would also likely lower the profit margins and thereby make it more accessible to those seeking to improve their lives because the risk for the smuggler would decrease.

Third, the view that profitable human smuggling is sometimes permissible even if it leaves the poor with very little or no saving is consistent with views such as Thomas Pogge's that there is global structural injustice. Pogge argues that global elites violate the negative duty not to contribute to severe harm in the form of human rights violations because elites maintain a global economic system that foreseeably and avoidably causes widespread poverty-related human rights violations (Pogge, 2002). Pogge's view is consistent with the claim that given global economic structures those making a reasonable profit of their situation in the form of human smuggling is permissible because it allows clients and potentially their associates one way of escaping the injustice of acute poverty.

To see why charging individuals reasonable market fees is permissible even if it would leave some people with no savings, consider similar cases in wealthy countries. In the United States, many individuals have very little in savings. For instance, nearly half the US adult population would have to borrow or sell something to pay a bill of just \$400 or more (Gabler, 2016). If exploitation meant that one could not charge prices on major life-improving goods or services (such as rent or a car), many transactions would be wrong that we typically take to be morally permissible. For instance, charging a market rate for rent to a person in the lower half of the US net wealth could very well leave her insufficient funds at the time for next month's rent.

Finally, even if some human smugglers charge fees that are exploitative because excessively profitable, and the smugglers are blameworthy in this respect, we do not think this means that smuggling should be illegal all things considered. The reason is that individuals should have the right to decide how to spend their hard-earned money, and they are in the best

position to assess how their money should be spent. Robert Meyer and others offer similar reasons why it may be better to allow certain types of exploitation than prohibiting them. As Mayer (2007) puts it, 'When exploitative cheating is beneficial to its victims policy makers confront a dilemma' (147). Either policy makers can prohibit it and make the vulnerable even worse off, or they can permit it and implicitly accept wrongful exploitation (Mayer, 2007, p. 147). Wertheimer (1996) similarly argues that 'we should be reluctant to let our anger at A's exploitation of those unjust background conditions prevent B from making his or her situation less unjust or unfortunate than it already is' (p. 299). He goes on to argue that '[g]iven those choices, it seems callous not to allow B to improve on his or her condition, simply because the transaction arises out of unjust background conditions' (Wertheimer, 1996, p. 299).

Consider a case to illustrate the point. A hiker is stranded in the desert, needs water immediately in order to survive, and the only person who passes by in time to save her life offers to sell her a bottle of water for \$1000 and nothing less (Zwolinski & Wertheimer, 2017). Should the sale be legal? We think it should be, because of the great benefit and indeed lifesaving potential, even though it is wrong to exploit the misfortune of the stranded hiker by charging \$1000 for a bottle of water. The water bottle seller is blameworthy in that it is exploitative to sell a bottle to a vulnerable individual at such an exorbitant price (the seller takes unfair advantage of the situation of the lost and thirsty hiker), but it would be far worse for the hiker if she were not permitted to buy the water and save her own life, or the exploitative seller were not permitted to sell the bottle at this price. Insofar as exploitation is wrong, the exploitative human smuggler is doing something immoral, but this wrong must be weighed against the autonomy and respect for the potential migrant who should be able to make her own life choices, even under such bad-choice situations. Moreover, existing scholarship on smuggling shows that smugglers' fees are to a large extent influenced by market laws of supply and demand (Toaldo, 2015). Border control and anti-smuggling policies inevitably translate into higher fees for migrants. If policy makers' concerns were really focused on smugglers' exploitation of migrants, offering safe and lawful border crossing to a larger number of migrants and asylum seekers would reduce the costs of illegal crossing by providing migrants with legal and cheaper alternatives to smugglers' services.

### ***Shared duties of smugglers and the smuggled to others***

Smugglers and those being smuggled share some general duties that include avoiding personally committing or willingly knowingly materially supporting human rights violations. Smugglers should take reasonable

steps to avoid transporting terrorists or others intent on causing unjust harm to innocent civilians. Similarly, smuggled individuals must refrain from committing such human rights violations or materially supporting them. Although the threat of terrorist attacks perpetrated by migrants is minuscule compared to the large numbers of migrants arriving in Europe each year, migrant smugglers should take some reasonable steps to not assist those who are intent on committing unjust attacks.

### **Human smuggling along the Central Mediterranean Route**

The above analysis may be persuasive, but such conditions might never obtain in the real world. We argue that in fact they do sometimes obtain (although they are often blatantly violated) for those seeking to reach Europe. We do so by briefly examining migrations along the so-called Central Mediterranean Route, whereby migrants departing from Libya seek to reach Europe. We choose migrations from Libya for several reasons. First, after the March 2016 deal between the European Union and Turkey, the Central Mediterranean Route has become the most traveled avenue for human smuggling. In 2016 only, over 181,459 people traveled from Libya to Italy (International Organization for Migration, 2017; UNHCR, n.d.). Second, migrants departing from Libya primarily fall under the category of economic migrants. The Eastern Mediterranean Route, leading to the European Union through Turkey and the Aegean Sea, has been used by a large number of people enjoying the protection of refugee law, most notably Syrians. By contrast, the Central Mediterranean route is primarily resorted to by economic migrants from Subsaharan Africa and Bangladesh. While migrants who are likely to be granted the status of refugees such as Syrians and Eritreans sometimes cross the Central Mediterranean, those amount to a relatively small minority of the total. According to the European Border Agency Frontex, 'motivation for migration may vary among individuals, but most are believed to be pushed by economic motivations' (FRONTEX, European Border and Coast Guard Agency, 2016, p. 42). The largest nationality is Nigerian, which has experienced a 166% increase after 2015, recording a total of over 37,000 Nigerian migrants in 2016 (FRONTEX, European Border and Coast Guard Agency, 2017, p. 18). On the other hand, migrants whose nationalities enjoy refugee status have decreased over the last year. The number of Eritreans, for instance, nearly halved between 2013 and 2016, dropping from over 39,000 to less than 20,000 (FRONTEX, European Border and Coast Guard Agency, 2016, pp. 16–20). Third, the Central Mediterranean is currently the deadliest migratory route. Due to smugglers' use of increasingly unseaworthy boats, casualties increased dramatically during 2016, amounting to at least 4517 estimated deaths at sea. Casualties in 2017 have decreased due to the

reduced number of crossings but remain dramatic, amounting to 2784 as of 18 October 2017 (UNHCR, *n.d.*). As these estimates are primarily based on media coverage, they are most likely to be underestimated (Last et al., 2017).

As the illegal crossing of the Mediterranean from Libya into Italy primarily involves migrants who did not initially flee from gross human rights violations and translates into a large number of casualties at sea, it is arguably a least likely case for permissible human smuggling. Consequently, we decided to focus on smuggling from Libya in order to provide a hard test for our argument.

To be sure, we do not intend to make the case that all Libyan human smugglers engage in morally permissible activities. Indeed, evidence shows that Libyan human smuggling networks subject migrants to exploitation and inhuman treatment, including systematic detention and torture (Bellis, 2017b; Toaldo, 2015). In fact, due to the pervasiveness of detention and torture and the fact that migrants are sometimes forced on unseaworthy boats on a gunpoint (Crawley, Düvell, Jones, McMahon, & Sigona, 2016; Toaldo, 2015), an increasing segment of Libyan human smuggling is more akin to human trafficking, which as we stressed earlier is never permissible. Moreover, human smuggling in Libya is often either directly conducted by or indirectly funded by Libyan militias, thereby contributing to the continuation of the civil war. In cases where smuggling is conducted by militias with a view to fund other illegal and coercive activities, it arguably harms third parties and should not be considered as morally permissible either.

However, human smuggling from Libya into Europe is a complex phenomenon and defies sweeping categorizations. Due to the paucity of information on the situation in Libya, academic research on smuggling is underdeveloped and offers little to no systematic data (Baird & van Liempt, 2016). However, while official documents and the policy discussion tend to depict all the smugglers assisting people in crossing the Mediterranean as part of vast, exploitative criminal networks, recent research calls into question these assumptions. Indeed, 'smugglers are embedded within migrant social networks and that there are significant differences between them, both in terms of the different types of functions they provide, as well as the degree to which they exploit their "clients"' (Crawley et al., 2016, p. 53). Moreover, as already documented by studies on smuggling in other regions (Khosravi, 2007), interviewed migrants do not always share the depiction of smugglers as villains. Indeed, interviewed migrants often consider reliance on smugglers as a necessity, and a small number even 'took care to mention that smugglers had been kind to them' (Crawley et al., 2016, p. 56). Other studies note that migrants do not differentiate between smugglers and local state officials but consider both actors as profiting from them (Schapendonk, 2017).

Even in Libya, where smugglers are often abusive and exploitative, substantial differences in smuggling behavior exist. Migrants from Western Africa are often sold to traffickers by militias, who exploit them before forcibly placing them into

unseaworthy, overloaded boats, sometimes put at sea in adverse weather conditions (Leman & Janssens, 2015; Porsia, 2017; Toaldo, 2015). Consequently, the large majority of smuggling from Western Africa borders on human trafficking and should not be considered morally permissible. This is not always the case, however, for those traveling from East Africa. Migrants from East Africa, for instance, such as not only Eritreans but also Somalis and Ethiopians, seal a personal deal with smugglers from their own kin (Arnone, 2008; Belloni, 2016a, 2016b). Although they pay higher prices than Western Africans, they sometimes pay for their crossing only after having safely reached their destination thanks to a traditional payment system shared by people with the same ethnic background and religious beliefs known as Hawala (Arnone, 2008; Belloni, 2016b; Crawley et al., 2016; Leman & Janssens, 2015; Porsia, 2017). Eastern African migrants have often travelled to Europe in less unseaworthy vessels, and some smugglers seem to have taken some precautions to ensure the safety of their clients (Heller & Pezzani, 2017). While a case-by-case assessment would be necessary in order to determine whether the behavior of specific smugglers at a given moment is permissible, smuggling from East Africa through Libya might sometimes be justifiable.

Moreover, smuggling from Libya does not always take the form of a unified, transnational criminal network. Sometimes, migrants seeking to reach Europe through Libya have resorted to local middlemen or fishermen with no direct association to larger smuggling networks but simply assisted migrants in the last, maritime leg of their journey (Crawley et al., 2016). Such individuals merely sold migrants a boat and the necessarily supplies, sometimes guiding them until international waters. In such cases too, migrants may be able to obtain a safer crossing in exchange for a higher price. Such a type of smuggling, which was more prominent in the past years, has been now driven to the sidelines by the emergence of large-scale smuggling networks, considered as an unintended effect of the EU criminalization of smuggling (Andersson, 2016). Smaller scale smuggling groups still exist in Libyan coastal cities, however. During his research fieldwork offshore Libya, one of the authors of this article had the opportunity to encounter a group of 45 migrants from various Middle Eastern countries on a wooden boat in the international waters offshore Libya. The boat had a functioning engine and was not too overloaded, which allowed the migrants to carry some belongings and to cross in relative safety. Moreover, migrants reported that they were able to negotiate who would do the crossing with them and how many would be allowed on board. In such cases too, the activities of those who help migrants attempting the crossing may be seen as morally permissible.

## Objections

### *Law and ethics*

As Hidalgo (2016) notes, a reason one could object to human smuggling is that by definition it entails breaking the law (p. 321–23). One way of addressing this objection is to ask whether there are moral, content-independent reasons to obey all laws (Hidalgo, 2016, p. 321). These are reasons to obey all laws no matter what that law entails. Breaking some laws, such as the legal prohibitions against rape and murder, is morally reprehensible. But is it the breaking of the law that renders such actions wrong, or is it that the underlying actions are morally wrong? To see why it is the latter, consider other law breaking that seems morally neutral. Jaywalking when there is a huge amount of space that permits one to see that there is no one coming and that would therefore not impose any additional risk on anyone hardly seems wrong (Hidalgo, 2016, p. 321). Indeed, as the opening example of the Underground Railroad suggests, breaking some laws can even be morally praiseworthy. Perhaps breaking some laws might even be morally required (Walzer, 1967). Where does human smuggling fit into this typology? Is it impermissible, permissible, supererogatory, or required? With Hidalgo, we argue it is permissible under some circumstances because the harm caused by violating the law is not sufficiently grave to outweigh the potential benefit to those smuggled or others they assist. There is an important category of actions that are wrong but legal. Whereas smuggling should generally be permissible, if the smuggler charges prices that were so high that it would constitute exploitation but otherwise meet all other requirements for human smuggling; this should be legal because it helps the smuggled individual or her family, but it could be morally wrong because of the exorbitant price.

Importantly, this is true even if one accepts our argument concerning when smuggling is permissible. As we argued above, our view relaxes that the client be at risk of a human right's violation if one remains in the country of origin. Hidalgo's argument that the benefits of smuggling outweigh the legal prohibition on it still holds even with our account because the benefits to the client or others may be large. The immigration of the client may permit others to avoid threats to their human rights, as we discussed above, either to by affording certain basic goods and services or it may simply significantly improve their lives even if such improvement wouldn't necessarily equate to preventing a violation of a human right.

### *The right to freedom of association*

If there is a moral right to exclude people from a country, smuggling could be wrong because it could violate this moral right. Some like Altman,



Wellman, or Walzer might argue that human smuggling is wrong because it violates a right each individual has as a community member to decide who to allow into their political community (Altman & Wellman, 2009; Walzer, 1983; Wellman, 2008). Consider one prominent account of the right to exclude based on the freedom of association and how critics might respond to it.

Altman and Wellman (2009) argue that even if individuals in wealthy states have 'extremely demanding duties of global justice, we conclude that a legitimate state has no duty to admit into membership any potential immigrants or even to open its border to refugees desperately seeking asylum from incompetent or current political regimes that are either unable or unwilling to protect their own members' human rights' (p. 158).<sup>2</sup> They base this claim in the liberal right of each person to freedom of association, which includes the right to exclude.<sup>3</sup> Just as rich individuals need not marry or spend their time with poor ones, even if they have duties to distribute some of their riches to impoverished people, they argue, rich countries similarly have a right of association to exclude poor people (or whomever) (Altman & Wellman, 2009, pp. 172–73). Responding to the concern that extremely demanding duties of global justice might require more open borders, they say this could be addressed through more foreign aid. They claim that a state can 'fully discharge their global distributive duties without including the recipients in their political union, simply by transferring the required level of funds abroad' (Altman & Wellman, 2009, p. 173). States can do so not only by foreign aid but also by foreign interventions, including military ones if necessary (Altman & Wellman, 2009, p. 181). Although they do not target this objection at smuggling, the objection also applies to it.

There are several ways to respond to this objection. Sarah Fine helpfully differentiates 'between a state's right to exclude outsiders from its territory (from simply crossing its borders), its right to exclude them from settling within that territory, and its right to exclude them from membership of the political community (from acquiring citizenship status)' (Fine, 2010, pp. 342–43). If the worry is that immigrants would capture or even significantly control domestic political institutions just because they reside in the host country, this concern is already obviated because illegal immigrants cannot vote, run for office, or otherwise officially engage in policy making. States generally do not immediately confer legal or illegal immigrants the same rights as citizens, calling into question whether such immigrants would undermine collective self-determination. As Fine (2010) argues, they therefore cannot participate in political life in ways that would threaten collective self-determination, at least not like someone who could vote and run for office could (p. 344). In other words, only if a state can legitimately claim that it can exclude individuals from entering its borders (the first claim

Fine discusses), would smuggling then be wrong on the ground of violating a right to association.

There are ways to respond to Fine but we have insufficient space to respond to all accounts that aim to defend individuals' or a group's right to exclude others. We concede that *if* there is a right to exclude, smuggling may be impermissible under some circumstances. However, *even if* we grant that citizens of a country have a right to exclude, smuggling could still be permissible if an additional condition were met. This condition is that once a migrant reaches a target country, she presents herself to officials for processing. Countries routinely do this for individuals who want to claim asylum. In fact, only a few countries have asylum-processing centers outside of their territory, such as France in Niger (Nossiter, 2018). This would allow the people of a state to decide whether the individual in question is deserving of entering their territory, for how long, and at what level of political participation and hence not violate the right to exclude. Second, there might be a conflict of rights. Individuals might have a right to immigrate if this is the only way to guarantee their (and others') human rights (Oberman, 2016). On the other hand, if individuals in countries do not have a right to exclude, smuggling would not interfere with this right.

A related concern is that making human smuggling permissible under some circumstances would increase immigration of poor individuals, and this may be too large of a burden on the host country because of the resources necessary to house and feed them, and assess any asylum claims. This is especially important for our argument because we think economic reasons can be a just cause for smuggling. We can accept for the sake of argument that no state should have to bare undue burdens related to immigration. But this is an argument about how many immigrants can be admitted and how they should be fairly distributed, rather an argument against all immigration or human smuggling per se. European countries are not carrying anywhere near the comparable burden of poor immigrants compared with countries like Turkey, Lebanon, or Jordan. This suggests that most European countries would not have an undue burden placed on them by accepting more migrants, at least up to a point.

## **Policy implications and conclusions**

We have argued that there are good moral reasons to think that some types of human smuggling are permissible and that these conditions sometimes obtain (but are often horribly violated) for those trying reach Europe. In addition to our theoretical and empirical arguments, there are practical benefits of our account, which suggest a number of specific policy implications. First, given limited police and legal resources, focusing prosecutorial and police efforts on human traffickers and smugglers who do not meet the

standards elaborated in this paper is preferable to attempting to prosecute everyone who smuggles or randomly selecting some. Disclosing such a prosecutorial strategy could, on the margins, incentivize an improvement in conditions of migrants employing human smugglers because the smugglers would know that if they followed certain guidelines they would be at decreased risk of detention and prosecution. In fact, the ICC's chief prosecutor, Fatou Bensouda, has signaled that she is considering prosecuting only Libyan human traffickers (Nichols, 2017). Such a prosecutorial strategy could contribute to creating a more competitive market whereby the principles we outline above, such as duties of smugglers to take reasonable precautions to ensure migrants' safety, would be more likely to exist because of the increased choices migrants have to avoid lying and excessively risky smugglers.

A large strand of scholarship has demonstrated that the criminalization of smugglers has compromised the ability of individuals to access protection. As argued by several migration scholars, existing policies focused on combatting smuggling at large have been both ineffective in reducing the flow of migrants and conducive to an increase in the lethality of crossings. This trend has been widely documented worldwide. Indeed, a large literature now exists on the humanitarian consequences of strict border controls and criminalizing illegal crossings (Cusumano 2018, Andersson, 2016; Bigo & Guild, 2005; Carling, 2007; Gammeltoft-Hansen & Sørensen, 2013; Heller, 2015), widely documented in a variety of theatres such as the US-Mexico border, South-East Asia, and the Aegean sea alike.

This trend is especially true offshore Libya (Andersson, 2016; Basaran, 2015; Cusumano, 2017a; Heller & Pezzani, 2017; Tazzioli, 2016). In 2015, the European Union launched a Common Security and Defence Policy operation named EUNAVFOR Med 'Sophia', aimed at 'saving lives by reducing the crossing' (European External Action Service, 2017; Riddervold & Bosilca, 2017). As argued by human rights advocates, the EU efforts to prevent migrants from leaving Libya are morally and legally problematic due to the systematic evidence of abuses perpetrated against them (Bellis, 2017a). Moreover, EUNAVFOR Med anti-smuggling policies, primarily consisting in the destruction of boats used for the crossings, prompted smugglers to use increasingly unseaworthy dinghies, and is therefore one of the main factors accounting for an increase in the number of casualties at sea in 2016 (Cusumano, 2017a; Heller & Pezzani, 2017). Targeting Libyan smugglers as villains through operations like EUNAVFOR Med has resulted in hazards being 'transferred downwards, from provider to client' (Andersson, 2016, p. 1061). His trend toward high-risk crossing informed by European crack-down on smuggling is clear by examining the transformation of smuggling from North Africa over the last 25 years. During the 1990s and 2000s, sturdy fishing boats often piloted by migrants and provided by individuals or small

groups were often able to reach Italian shores. Over the last years, by contrast, predatory smuggling networks, systematically abusing migrants and resorting to flimsy vessels with no chance to withstand the open sea, have become the rule rather than the exception (Andersson, 2016, p. 1061).

The unintended consequences of existing anti-smuggling policies call into question the argument that anti-smuggling policies as they are currently formulated are conducted in the interest of migrants themselves. As summarized by Tazzioli, anti-smuggling operations are the outcome of a policy of containment conducted in the name of the humanitarian goal of protecting migrants (Tazzioli, 2016). Furthermore, existing anti-smuggling policies and narratives have resulted in a decreased propensity to conduct maritime

rescue operations. The concern that rescuing migrants would facilitate smugglers' business, for instance, dissuaded the European Border Agency Frontex from conducting more proactive rescue operations (Cusumano, 2018). The fact that Frontex assets were too few and dispatched too far north to conduct large-scale rescuing operations is the main reason why casualties at sea increased abruptly in the spring of 2015 (Heller & Pezzani et al., 2016). The discourse criminalizing human smuggling is a 'toxic narrative' (Heller & Pezzani, 2017) that has also been conducive to a delegitimization of non-state humanitarian actors such as the NGOs involved in maritime rescuing offshore Libya (Cusumano, 2017b). At the moment of writing, the NGO Jugend Rettet—is under investigation by Italian authorities for abetting illegal immigration (Cusumano, 2017b), and SOS-Méditerranée was denied permission to disembark migrants in Italian ports (Kirchgaessner, Tondo, & Jones, 2018). As maritime rescuing a long-standing social norm and a principle of *ius cogent* codified by several international conventions (Aalberts & Gammeltoft-Hansen, 2014; Mann, 2016), criminalizing those assisting migrants at sea is both ethically and legally problematic. The risk of prosecution has already discouraged merchant vessels and NGOs alike from assisting those in distress at sea (Aarstad 2015; Basaran, 2015; Cusumano, 2017b), further increasing the risk of dying while crossing the Mediterranean. A more nuanced political discourse acknowledging that under certain circumstances smuggling may be permissible and focusing primarily on combatting human trafficking could prevent the criminalization of maritime rescuers.

## Notes

1. There could be exceptional circumstance where for humanitarian reasons coercive movement of someone across a state border could be permissible if the person in question forfeited some of her rights. For example, it might be permissible if someone arrested an ISIS fighter who was committing grave

human rights abuses in order to bring him to trial. We do not explore such exceptional cases here because they are so rare.

2. They argue for this even though they are 'personally inclined towards more open borders' (Altman & Wellman, 2009, p. 165, emphasis in original).
3. See too (Wellman, 2008).

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## Disclosure statement

No potential conflict of interest was reported by the authors.

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