

# Examining hidden coercion at state borders: why carrier sanctions cannot be justified

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## Abstract

Sanctions placed upon airlines and other operators transporting persons without the required paperwork are called ‘carrier sanctions’. They constitute a key example of how border control mechanisms are currently being outsourced, privatized, delegated, and moved from the border itself to new physical locations. These practices can lead to a phenomenon referred to in this paper as ‘hidden coercion’. This paper argues that, while hidden coercion is commonplace in the reality of migration policy in most states, it is so far neglected in theoretical discussions of state coercion. Moreover, the discussion of carrier sanctions demonstrates that this neglect is problematic, since hidden coercion is not justifiable even within a framework that legitimizes state border coercion.

**Keywords:** *coercion; carrier sanctions; border control; justice; immigration*

‘Carrier Sanctions’ are those sanctions placed upon airlines and other operators transporting persons without the required paperwork. This paper argues that they constitute a form of what will be called ‘hidden coercion’, which is not justifiable, even within a framework that generally legitimizes state border coercion. At the heart of border control lies a specifically directed kind of state coercion. By outsourcing and delegating it to different agents (both private and public) operating in a variety of locations (inside and outside state as well as at the border), it becomes difficult to isolate the agents and objects of the coercion. Moreover, as coercion is dissipated, it becomes hidden and thereby also unscrutinized.

These instances of hidden coercion, it will be argued, are problematic for practical, legal, and moral reasons, so that the normative problem raised is not only a philosophical puzzle but also an urgent matter to be addressed. Conversely,

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understanding how this normative problematic works can help to explain how to move towards improving legal responses.

This paper begins by noting the sorts of liberal justifications usually offered for border control and other forms of state-based coercion, as well as sketching some of the debate surrounding them that has been recently revived by the discussion between David Miller and Arash Abizadeh. It then goes on to define what will be referred to in this paper as ‘hidden coercion’, presenting two dimensions of this hiddenness: its ambiguous location, and its delegation. In a next step, this will be illustrated by a key example, the case of carrier sanctions. After revisiting and reinforcing practical and legal problems with carrier sanctions which tend to be neglected in the theoretical debate, this paper explores a new notion of ‘hidden coercion’, as a normative problem that should not be ignored, even within a liberal theoretical framework that justifies substantial border control.

## STATE BORDER COERCION

Coercion at a state’s border and coercion within the state are different: They differ with regard to the eligible coerces, the function, the type of justification offered and the normative implications. This section analyzes these differences by: (1) offering a general definition of coercion; (2) analyzing state coercion; and (3) introducing the specific case of border coercion.

Contemporary discussions of coercion arguably began with the work of Robert Nozick and Gerald Dworkin in the 1960s. For Nozick, coercion requires that there be a coercer and a coercee, and that the coercer both aims and succeeds in keeping the coercee from choosing some action, A. The coercer does this through making it known to the coercee that the coercer will make doing A less desirable than not doing A.<sup>1</sup> While Nozick provides an analytical definition of how coercion functions, Dworkin emphasizes the involuntary character of actions performed under coercion by considering that ‘whenever coercion takes place, one will is subordinated to the other. The coerced is no longer a completely independent agent’.<sup>2</sup> This also implies that coercion interferes with the core liberal values of liberty and autonomy which rely on an independence from any obstruction. Although most elements of Nozick’s definition have been contested in one way or another,<sup>3</sup> the core of his account still forms the *status quo* of what can be regarded as a general understanding of coercion. This paper adopts Nozick’s approach as a working definition, such that: coercion successfully takes place when one agent intentionally makes another agent perform an action against her will. Two additional aspects should be noted. First, the definition also applies to negative action (such as the action of not doing A). For example, a highwayman could either demand ‘Your money or your life!’ or only ask the driver not to go where she had intended. An agent can, then, be coerced either to perform or to refrain from an action. Further, this theory posits that coercion can operate through either threats alone or threats backed by physical force.

Internal state coercion operates according to this mechanism, threatening unfavorable consequences to compel someone to act in a desired way. Drivers, for instance,

are more likely to respect the speed limit when they know that violating it will incur a fine. State coercion differs from the *general kind* of coercion described above in two respects. First, it is institutionally different in that coercive power is concentrated, that is monopolized, in the state, from where it can potentially simultaneously reach more coerced. Second, state coercion is exercised through state institutions or officers that are specifically so-authorized.

Since, as it was said, coercion conflicts with values such as autonomy and liberty, demands of justification arise. The common liberal stand on this demand is well summarized by Christopher J. Eberle who argues that:

[T]he claim that respect requires public justification provides a basis for the central component of the justificatory liberal's ethic of citizenship: the norm of respect imposes an obligation on each citizen to discipline herself in such a way that she resolutely refrains from supporting any coercive law for which she cannot provide the requisite public justification.<sup>4</sup>

The centrality of this position has recently become visible in the debate on global justice, i.e. the question of whether duties of justice only hold among co-nationals or whether they also apply *vis-à-vis* foreigners. In this context, authors such as Michael Blake and Thomas Nagel claim that only relationships marked by state coercion can possibly ground duties of justice between individuals.<sup>5</sup> This argument has led to a wave of criticisms. In particular, authors like Arash Abizadeh have argued that relying on the claim that state coercion triggers justification toward those at its target commits Blake to accepting that those demands arise equally when coercion is exercised at the state border.<sup>6</sup>

Border coercion is different from internal state coercion. It is a complex sort of coercion with a different scope and a different aim, and its legitimacy is harder to establish than internal state coercion. While classic contemporary liberal political theory had assumed the legitimacy of border coercion, this position has been problematized especially in Joseph Carens' 1987 article, *Aliens and Citizens: The Case for Open Borders* and Phillip Cole's 2000 book, *Philosophies of Exclusion*.<sup>7</sup> Cole argues that if liberal political theory is unable to make sense of the border, or at least acknowledge its illegitimacy, the project of liberal theory has failed. Carens argues more positively, that by valuing freedom of movement, three important schools of political theoretic thought (Rawlsianism, Utilitarianism and Nozickian Libertarianism) must all conclude in favor, at least in theory, of open borders if they take their own principles seriously. Both Cole and Carens (and a number of other contemporary authors) contend that border control cannot be justified in the same way as coercion *within* the state. This is both because of problems of scope (in particular, those coerced by the external border of the state are not within the scope of the legitimizing *demos*) and because there are some accepted anomalies at the border that would not be acceptable at the state level. For example, it is usually assumed that certain categories of persons are not proper subjects of border coercion (namely, citizens of that state, as well as some other groups). These arguments have been made by key writers in this area, from Phillip Cole<sup>8</sup> to the more recent analysis

by Bas Schotel. Schotel argues that it is exclusion (and so border coercion) that needs to be justified, rather than the usual approach of assuming exclusion.<sup>9</sup> This paper acknowledges this problem.

The use of the lens of coercion to analyze the legitimacy of border control has been taken up again in a recent debate between David Miller and Arash Abizadeh,<sup>10</sup> with Abizadeh arguing that democratic justification usually chosen as the way out of the liberal legitimacy deadlock also fails to justify border control since:

democratic theory either rejects the unilateral right to close borders, or would permit such a right only derivatively and only if it has already been successfully and democratically justified to foreigners. This is because the *demos* of democratic theory is in principle unbounded, and the regime of boundary control must consequently be democratically justified to foreigners as well as to citizens.<sup>11</sup>

That is, the coerced (i.e. the would-be-immigrants) have no chance to take part in any justification process.<sup>12</sup> Miller disagrees, claiming that border coercion does not constitute coercion at all and does not pose a threat to autonomy, so that there is no need to offer a justification to the would-be-immigrants. His argument is based on a distinction between coercion and prevention. Prevention, on his definition, rules out one option only from a set of options, while coercion forces someone into a *specific* action.<sup>13</sup> Border control itself is not, for him, coercive, but generally preventive and therefore does not threaten autonomy and, consequently, does not trigger a need for justification. Although intuitively appealing, it quickly appears that what Miller characterizes as prevention includes many cases that are ordinarily regarded as instances of coercion. A case in point would be a police barrier blocking one motorway exit.

Moreover, prevention *does* form a conceptual part of coercion for a relevant group of coercion theorists in the sense that the 'inducement to perform specific acts typically follows on the ability to prevent many or even all other acts'.<sup>14</sup> This means that for these theorists prevention constitutes the primary way in which coercion functions. Preventing a person from taking the relevant alternatives to the desired course of action in this sense of prevention usually entails the power to shape and define the institutional context of the coerced<sup>15</sup> and can be imagined like a path where all branch-offs are blocked. In sum, it appears that, whatever understanding one adopts, Miller's distinction between coercion and prevention is hard to sustain.

Abizadeh himself acknowledges the limits of his account. In particular, he stresses that his argument is 'internal to democratic theory'<sup>16</sup> and that therefore other justifications for the practice of border control might apply. Likewise, he admits that, for instance, his assumption of a global *demos* does not correspond to an empirically existing reality.<sup>17</sup> However, border control aims at sustaining the state's territorial integrity<sup>18</sup> and the functioning of its institutional body. Its justification, then, would have to draw, not only on democratic legitimacy, but also on the respect that state receives from the international community and the legitimacy of the mechanisms involved in sustaining the system of states. In other words, coercion at the state border *does* constitute a case of state coercion (albeit a special case). This paper does

not need to conclude in favor or not of border coercion. In this section, it was argued only that border coercion *is* a form of coercion and that it is different from *internal* coercion within a state. In what follows, it will be argued that even if border coercion were to be justifiable, *hidden* border coercion is not.

## **HIDDEN DIMENSIONS OF STATE BORDER COERCION**

It will be the object of this section to explore the concept of what has been called ‘hidden coercion’. ‘Hidden coercion’ as discussed here is hidden in two respects: first, by its ambiguous location outside state borders; and second, by its delegation to non-state actors who are themselves coerced by the state. Like money laundering, hiding coercion in this way makes it difficult to track, to scrutinize, and to justify.

Having established the distinction between:

- A. Internal coercion; and
- B. Border coercion;

It is now useful to introduce a third dimension, one which has also been widely discussed in theories of global justice.<sup>19</sup> This is:

- C. The coercion of one state over the persons living in other states.

Coercion can be hidden at the transitions between each of these dimensions: between (A) and (B); and between (B) and (C). For example, Elspeth Guild has noted that the real ‘fortress Europe’ occurs within the European states, not at states’ borders, that is, it is found in the preventative measures stopping people who are physically within the state’s borders (no longer affected by (B)) from entry into the community of the state (unable to enter the community officially affected by (A)).<sup>20</sup>

Another type of hidden coercion that can be ambiguously located is in the various forms of non-entry measures. That is, stopping persons who are leaving their states (leaving (C)), from reaching the border of another state (unable to access (B)). This paper focuses on one form of non-entry measure, known as ‘carrier sanctions’ which puts pressure upon transport carrier companies not to transport certain persons whom they suspect of breaking a state’s immigration rules and regulations, forcing private transport operators to facilitate the return of any immigration-rule-breakers that they carry. There are also many other forms of non-entry measures, including those carried out by state officials, those that are delegated, and more ambiguous measures. This includes the placing of border guards in third countries or enlisting the help of border control guards in ‘buffer states’. It also involves the use of various data collection and management measures, including those carried out by private companies. This can even include measures such as those adopted by the US, European countries, and others, of requiring carrier companies to provide passenger data ahead of arrival. This development is also interesting in another respect, as it uses the fact that private companies can operate in other countries to collect data that would not otherwise be available to immigration officials.<sup>21</sup> With some of these measures, and particularly carrier sanctions, it is not clear exactly where the border control is physically taking place.

With Guiraudon and Lahav, one can observe a three-way shift in the devolution of decision making in the entry of immigrants away from the state level:

1. Upwards (to intergovernmental *fora*);
2. Downwards (to local elected authorities); and
3. Outwards (to private actors, such as airlines, and also to other countries).<sup>22</sup>

Legitimacy of border coercion is usually only considered with regard to the action of a state. However, when the coercion is delegated in these ways, it becomes more difficult to apply traditional theorizing. Coercion at the border is now increasingly delegated by states to private actors.<sup>23</sup> Consider the companies, Worldbridge, VFS, Gerry's and G4S, for example. Visa applications to the UK, Australia, and Germany may be made through Worldbridge.<sup>24</sup> Meanwhile, VFS Global, working in the area of visa biometric testing, has 41 client governments, and has processed over 55 million visa applications.<sup>25</sup> Gerry's International supports visa applications to 14 different countries made from Pakistan, and<sup>26</sup> G4S supports the securing of ports, airports, and other immigration facilities.<sup>27</sup> In Australia and the UK, immigration detention centers are staffed by Serco<sup>28</sup> and Reliance, and other private operators. This paper focuses on a third type of delegation, this time to transport carriers. This paper argues that this form of delegation is particularly problematic because both the coercive action and the decision-making are hidden (note that the coercion in the other forms of delegation can also often contain hidden elements of a sort that will not be discussed here).

## CARRIER SANCTIONS

Carrier sanctions, which will be discussed as an example of hidden coercion in this section, represent the situation where a state imposes sanctions in the form of fines (or in some cases lost landing privileges), alongside the assumption of responsibility for accommodating and repatriating migrants without papers, or with incorrect papers, upon airlines and shipping companies,<sup>29</sup> and land transport companies.<sup>30</sup> In such a situation, the coercion that is usually carried out by the state at its border is shifted to private companies operating on the territory of another state. However, these companies are also, indirectly, charged with setting conditions of entry, as they must second-guess which persons they will be required to return, thus making the conditions of entry narrower than those officially set by the state.

The sanctioning of shipping and airline companies has been around for a while. Already in 1793, Britain required the masters of vessels to declare information about certain foreigners or face a fine,<sup>31</sup> while America's 1902 Passenger Act began more closely to resemble the sort of carrier sanctions under discussion here.<sup>32</sup> The contemporary version of carrier sanctions developed from the late 1970s, and appeared in many more countries in the 1980s and early 1990s. The contemporary trend began in Germany, Belgium, and the UK all introduced Carrier Sanctions in 1987.<sup>33</sup> In the UK, the 1987 Immigration (Carriers Liability) Act introduced a fine

of £1,000 per passenger lacking valid travel documents upon the transport operator bringing them into the country.<sup>34</sup> In the 1980s and 1990s, the law was strictly applied, with 3,921 demands in 1987, 4,211 in 1988, 6,337 demands in 1989, and 4,431 in 1990. Indeed, between March 1987 and October 1997, fines totaling £89 million were imposed on airlines and shipping companies.<sup>35</sup>

The developments in the 1980s and 1990s led to much public and academic debate on the practice, which has since petered out. Despite this, the practical, legal and normative problems with the policy have not been resolved, and the imposition of carrier sanctions is still going strong.<sup>36</sup> The establishment of databases with passenger records, such as the US Adaptive Passenger Information System, or the EU Passenger Name Record, following the attacks on September 11, 2001 underline this. Each of these types of problem will be considered in turn.

In a practical sense, the imposition of carrier sanctions leads to a situation which fulfills the definition of coercion developed above, where the coercer is the state and the coercee is the carrier company and only indirectly the actions of the potential migrants are coercively altered. That is, there are at least two levels at which coercion takes place: that between the state and the carrier and that between the carrier and the would-be-immigrant. The state makes the carrier take mandatory action, where mandatory action is defined to be a situation in which a third party is required by law to undertake certain actions in the advancement of law enforcement. It is often the responsibility of airline staff to check paperwork themselves, putting insufficiently trained personnel in a situation of having to perform specialist roles. That said, the current system of carrier sanctions is supported by training from the International Air Transport Association.<sup>37</sup> It is easiest to see the problematic nature of the measure by examining the resulting situation for particularly vulnerable migrants.

Irrespective of information problems, this delegation of the decision-making process forces airlines to carry the risk, and to decide how to offset humanitarian and economic concerns (for example, when deciding whether to transport a person presenting humanitarian need, at the risk of penalty if the state does not then recognize their humanitarian status). Indeed, as Erika Feller has noted, 'A high risk-taking and profit-oriented transport carrier cannot reasonably be expected to make humanitarian decisions based only on a possibility that sanctions will later be waived [if the person's case is found to be humanitarian], particularly where the burden of proof is on the carrier'.<sup>38</sup> This leads to a legal problem, to be discussed below.

In some cases, such as for migration to the Netherlands, and in some cases, to Belgium, and the UK, for example, Immigration Liaison Officers (ILOs) check the documents and 'advise' airlines, though 'the final decision whether or not to carry a passenger lies with the airlines',<sup>39</sup> forcing private companies to assume responsibility for difficult decisions. For example, in 2004, in over 99% of Dutch cases, the advice of ILOs was followed by the airlines.<sup>40</sup> This relocation of responsibility and decision-making is also problematic for what Bas Schotel calls 'normal migrants' as, even if state border coercion were to be justifiable to them, in this case, the state is not *taking the responsibility* for its decision to exclude.

Today, a Travel Information Manual, maintained by the International Air Transport Association, and 14 of its member airlines, provides information on carrier sanctions, visas, and other entry requirements around the world.<sup>41</sup> And although the UK Home Office, for example, holds that airline staff are not expected to ‘act as immigration officers’, and are required only to ‘check papers rather than persons’, this does not remove the practical problem that the use of carrier sanctions means that *in effect*, ‘those persons who are required to carry out controls (i.e. the personnel of transport companies) are neither qualified nor permitted to take into account the human rights obligations of the Member States.’<sup>42</sup> Indeed, carriers are forced to take financial responsibility, not only for the humanitarian decisions that will be discussed below, but also for passengers that destroy papers whilst in transit, or for recognizing forgeries.

The most obvious practical problems with the imposition of carrier sanctions relate to the effect that such measures have upon the asylum system. This can be seen best by considering the international legal situation. A person can usually only seek asylum in a state once on its territory. However, carrier sanctions, by preventing travel by those with suspect travel documents, will have the most significant effect precisely upon those moving under emergency conditions. This is because, as stated in a UNHCR position document, ‘in view of visa regulations, many persons seeking protection are compelled to enter the EU [or any state] in an irregular manner’.<sup>43</sup> This means that a state can, in effect, engage in *refoulement* without the problematic implications in international law, as will be explained in the following paragraphs.

There are three main legal instruments which are important to consider in the discussion of carrier sanctions, as they are currently enacted in several states. These are: the 1944 Chicago Convention on Civil Aviation; the 1951 Refugee Convention, and its 1967 Protocol; and the Acquis on Article 26 of the Schengen Implementation Agreement (this only affects those European states party to the Schengen Agreement).

The 1944 Chicago Convention is sometimes seen as the instrument allowing states to impose carrier sanctions in the first place. This derives from two articles in the Convention:

Article 13: The laws and regulations of a contracting State as to the admission to or departure from its territory of passengers, crew or cargo of aircraft, such as regulations relating to entry, clearance, immigration, passports, customs, and quarantine shall be complied with by or on behalf of such passengers, crew or cargo upon entrance into or departure from, or while within the territory of that State.

Article 29: Every aircraft of a contracting State, engaged in international navigation, shall carry the following documents in conformity with the conditions prescribed in this Convention: ... (f) If it carries passengers, a list of their names and places of embarkation and destination;



Despite the apparently clear nature of the wording of the Convention, there is debate as to whether Article 13 imposes an obligation upon the carrier to enforce visa requirements, or whether it merely puts this requirement upon individual passengers.<sup>44</sup> Since the Chicago Convention came into effect, this question has been complicated by the adoption of the 1951 Refugee Convention, which constrains the sorts of regulations a state may impose upon entry in the first place. Two paragraphs are of particular interest:

Article 31 (1): The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

Article 33 (1): No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The penalties of carrier sanctions are not imposed upon those seeking asylum themselves, but upon the carriers bringing them, and the state is not itself performing the *refoulement*. Still, carrier sanctions can come into conflict with Article 31(1) (see the discussion of the Schengen Implementation Agreement, below). Meanwhile, the swift removals that constitute part of the practice of carrier sanctions, and the *de facto refoulement* that takes place on behalf of the state both conflict with Article 33(1).<sup>45</sup>

Article 26 of the Schengen Implementation Agreement, which arose in the 1990s, emphasized that sanctions must be in accordance with the 1951 Convention and its 1967 Protocol. In response to this, some states waive the fine on the carrier, if that person enters the asylum procedure (irrespective of the outcome of the latter). However, some states like Germany, Denmark or the UK do not do this in the case that humanitarian status is not granted.<sup>46</sup> It is not obvious that this charging of fees contravenes the letter of the 1951 Convention Article 31(1), yet it seems clear that it contravenes the spirit of it.

It is states that are signatories to these agreements, rather than private companies, so it could be argued that this delegation of decision making and action puts the resulting non-admission of migrants outside the remit of these Conventions. In the case of carrier sanctions, however, although the decision to exclude someone from the state is not made directly by the state authorities, and the relevant legal instruments discussed above address states and state action, there is an argument under international law that a state imposing carrier sanctions still acts unlawfully. The argument is that it fails to meet its obligations, because of both the intention found in the implementation of carrier sanctions and the responsibility of the state to *protect*

(rather than just *respect* as in the case of private enterprises) human rights.<sup>47</sup> Some commentators have noted that:

By preventing migration at the source and therefore making sure that would-be asylum-seekers do not reach the territory of receiving countries, governments no longer have to refuse possible asylum-seekers and other migrants at the border. They no longer need to expel failed asylum claimants – with the risk of violating the prohibition against *refoulement* – they simply make sure they cannot reach the border.<sup>48</sup>

However, carrier companies in fact also carry out *refoulement*,<sup>49</sup> making the situation even more legally problematic.

Further, the United Nations High Commissioner for Refugees is particularly concerned by ‘all measures applied by a state, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land air or sea, and making their way to the country of prospective destination’,<sup>50</sup> as this will contravene the 1951 Convention. Carrier sanctions do more than this, as they in effect reduce entry further than is required by national law. This is because, if private companies are going to be heavily sanctioned for bringing in persons with incorrect paperwork, they are incentivized to err on the side of caution when checking documentation.

It is necessary to note that carrier sanctions have been seen as positive by some legal scholars, for their potential contribution to reducing trafficking. For example, the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime endorses carrier sanctions as a way to prevent trafficking offenses.<sup>51</sup> Article 11 of this act requires (in paragraph 2) that states should adopt measures aimed at removing potential means of transport for trafficking. Explicitly included in this are measures affecting commercial carriers. The act goes on:

3. Where appropriate, and without prejudice to applicable international conventions, such measures shall include establishing the obligation of commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving state.

4. Each State Party shall take the necessary measures, in accordance with its domestic law, to provide for sanctions in case of violation of the obligation set forth in paragraph 3 of this article.

It is important to recall that, while carrier sanctions may help in the struggle against harmful trafficking activities, they are at the same time intercepting those who may use people smugglers as the only means to escape dangerous conditions.<sup>52</sup> This narrowing of options is imposed by the proliferation, for example, of the sort of pre-entry measures described in this paper. Carrier sanctions are a blunt

instrument and both practically and normatively inappropriate as a means to save people from dangerous trafficking relationships<sup>53</sup> (denying the possibility of movement for all in order possibly to save a minority from traffickers). Indeed, it can be argued that the use of measures like carrier sanctions even increases the market available for trafficking enterprises, as it reduces the available safe ways to make such journeys.<sup>54</sup>

Thus far, the power relations involved in carrier sanctions have been too simplistically portrayed. Indeed, Janet Gilboy characterizes carrier sanctions as a *quid pro quo*, arguing that state enforcers actually have comparatively little leverage.<sup>55</sup> As a result, she claims, 'agency officials may be particularly dependent on private enterprise to accomplish government goals'.<sup>56</sup> For instance, state officials, keen to avoid detaining individuals (as this leads to more drawn-out investigations and decision changes), need airlines to cooperate to ensure swift removal. This reflects another potential accountability problem, as not only is state coercion hidden, but also modes in which states are themselves subjected to coercion are obscured. Indeed, the situation is more complex than this, with interests sometimes hard to trace in the relationship between carriers, states, as well as security companies and airport authorities. The situation is, indeed, even further complicated by the fact that the directors of these departments and companies may move between roles and private companies in the form of carriers, airports and other privatized migration control sectors have powerful political lobbies and interests.<sup>57</sup>

Coercion on both sides, this does not negate the problem of the hidden state coercion. If anything, it makes it worse. Frances Nicholson, for example, refers to an interview with a Nigerian Airways official, who, after being required to pay hefty outstanding fines in the UK, described it as regrettable but unavoidable if the airline wants to continue to fly to the UK.<sup>58</sup> More research would be needed to establish, on a practical level, how the power relations play out, but in any case, the normative justificatory problems raised here remain.

It could be argued that the imposition of carrier sanctions is just an example of one of the common constraints imposed on major multinational corporations, like other fines and taxes. However, this does not take into account the particular affects of carrier sanctions on migration, and on the human rights of migrants and would-be-migrants, and emergency migrants in particular. In 1990, four major airlines (Lufthansa, Swissair, Iberia and Alitalia) refused to pay the fines levied against them by the UK government, on the grounds that they were being asked to 'act as immigration officers'.<sup>59</sup> The British Home Office responded that if the airlines did not pay, they may lose their landing rights.<sup>60</sup> This is clearly an attempt to coerce in some form, as described earlier in this article, irrespective of the wider nature of the relationship, and the coercion is related to the border. However, the coercion is not explicitly directed by the state towards the potential migrants, but hidden through other coercion/coercer relationships. For this reason also it should be seen as 'hidden coercion' and analyzed as such.

## HIDDEN COERCION AND THE LIBERAL–DEMOCRATIC JUSTIFICATION OF BORDER CONTROL

With the adoption of carrier sanctions the coercion is hidden in two key ways. It is delegated to private agents, and it is moved beyond the state borders. When the coercion is so-hidden, this reinforces the problems of legitimacy discussed in State Border Coercion section. To see this, problems will now be considered both with regard to the liberal–democratic approach generally and with regard to Abizadeh’s and Miller’s positions respectively.

As we have seen above, the liberal problem with coercion is that it violates individual freedom and autonomy. If, therefore, coercion is to be used by a political system self-defining as liberal, it must be justified with regard to these values of autonomy and freedom in order to be legitimate. This is achieved by assuring that the coerced are also the authors of coercion.<sup>61</sup> The above discussion, particularly of Abizadeh’s arguments, has shown that this justification can no longer be upheld when it comes to border coercion.<sup>62</sup>

In the case of hidden coercion, the normative challenges are even higher. This has to do first with the lack of transparency and second with a lack of control. First, in order to be able to justify a certain practice and thereby to render it legitimate, this practice must be sufficiently transparent and public. Transparency, however, is lost in the practice of hidden coercion in that it is moved into a gray area that is largely invisible to the *demos*. This occurs in two ways. The first way in which a policy like carrier sanctions hides the coercion is that the true meaning of the policy-making by the state is obscured because the policy is drafted in a context where it will necessarily be reinterpreted by non-state actors in the process of its enforcement. That is, for example, if a state makes clear that it will accept all those with level of proof of a humanitarian claim to protection X, and most of those with level of proof Y, then the private company with tight profit margins will be incentivised to refuse those who only have level of proof Y, for fear of sanction, and accept most of those with level of proof X. The second way in which a policy like carrier sanctions hides the coercion is that there are, in effect, two levels of coerced. The intended coerced at the border is the potential migrant, however the state channels this through the carrier companies, so that the state only indirectly engages in the border coercion.

Second, the delegation to private actors removes coercion from democratic as well as legal–constitutional control mechanisms. Coercion exercised by state actors, be it within the territory of the state or at the state borders, meanwhile, is usually subject to relevant control mechanisms such as judicial review and is bound by rule of law principles. This is shown, for example, in the analysis of the international legal documents regulating the practice of carrier sanctions. This analysis is useful, both because it shows the state of affairs in the real world, an understanding of which will enable real-world normative theorizing in this area to develop, and because it reflects the liberal norm that the coercion of the state should be subject to such control mechanisms in order to be legitimate. Moreover, public actors underlie democratic control. Private actors, such as airlines, by contrast, are not subjected to the same

legal regime, nor can they be controlled democratically. Hidden coercion, therefore, is not only not justifiable to those persons subject to it (as it was the case with traditional border coercion), but is also no longer justifiable by any legal–democratic means at hand.

It was stated above that there are some justifications that potentially apply to border coercion and which draw on considerations of sovereignty and the integrity of the state. These justifications fail with regard to hidden coercion for two reasons. First, it is doubtful whether there could already be a threat to sovereignty when the borders of the country are not reached. Second, it is problematic since at the hidden border, private actors are endowed with the power of border control, while the justifications offered are for states (and state actors) and their institutional role.

On this basis, one can return to the debate between Abizadeh and Miller. This paper's analysis of the practice of hidden coercion alters the assessment of Abizadeh and Miller's arguments. In particular, it demonstrates that, in the case of hidden coercion, Abizadeh's criticism that border coercion is incompatible with the liberal–democratic justification is stronger, since the exercise of state coercion is particularly problematic when removed from sight and effective control.

With regard to Miller's arguments, some of his points can be refuted even more strongly in the case of hidden coercion. That is, hidden borders, and in particular the treatment of asylum-seekers, is a case against Miller's claim that border coercion merely is hypothetical coercion as opposed to a subjection to coercion, because coercion only becomes actual when the border is reached. When border control mechanisms are hidden, they are already present at stages where the actual border as well as the intention to reach or cross it, is not yet theoretically in question.

Finally, consider a further minor remark on Miller's distinction between coercion and prevention. Miller argued that coercion 'involves forcing a person *to do* some relatively specific thing, while prevention ruled out one specific option only; in other words prevention means forcing a person *not to do* some relatively specific thing while leaving other options open'.<sup>63</sup> In the light of hidden coercion, this distinction becomes even more difficult to uphold. It has been shown above that coercion works equally by ruling out one or a few options only or by making some options highly unattractive. Practices of hidden coercion support this in that disallowing a person to board a plane technically prevents that person from taking one route only, namely that single flight, but practically precludes various ensuing options such as applying for asylum. With this additional aspect of precluding important prospective options by prohibiting one minor one at an earlier stage, hidden coercion can even be said to make use of the (according to some) seemingly less harmful mode of prevention to exert what it is *in fact* border coercion on would-be-immigrants.

## **CONCLUSION**

This paper has introduced the notion of 'hidden coercion' to refer to an obscured form of state border coercion. Through the example of carrier sanctions, it has demonstrated two ways in which border coercion can be obscured (through delegation to

other actors, and through moving the location of the coercive activity beyond the state borders). Hiding coercion in these ways poses problems for the liberal–democratic view presented and discussed above. Crucially, it becomes difficult to identify the role of the state in the coercion. The problem raised here is not so much, then, that private individuals are involved in migration control functions *per se* but that the state’s role is thereby obscured. This is stated most bleakly by Tally Kritzman-Amir:

While carriers are threatened with sanctions if they err and allow entry to undocumented migrants, they are not subject to any sanctions if they effectively deny entry and admission of asylum seekers. There are thus incentives to err on the side of caution which in this case means to refuse to transport asylum seekers who wish to enter clandestinely.<sup>64</sup>

The state is able to hide the nature of the border coercion through the coercion of another sort levied against private carriers. Indeed, the levels of delegation are usually more complex than there was scope to detail here. As both the force and the decision making in border coercion is delegated and delegated again it becomes difficult to trace the border coercion itself and the state’s role in it.

Although this is normatively problematic whoever the migrants are, it becomes particularly legally and practically problematic in the case of asylum. This is because, though there are differences of understanding about the function of the Refugee Convention at the border (before refugee status is acknowledged), asylum seekers represent a group theoretically legally entitled to contravene state border rules (even closed-border theorists like Michael Walzer allow this<sup>65</sup>). However, carrier sanctions mean that, without a refusing state officially making a decision either way, such persons are prevented from entering and are also returned to situations of persecution. This is legally problematic, as *refoulement* in fact takes place. It is practically problematic because of the threat to life it causes, the pressure put on untrained individuals to make immigration decisions, and the difficulty of tracing the responsibility for those decisions. Importantly, it is also normatively problematic and difficult to justify, as the relationships between the various coercers and coerced are obscured. Analyzing the legal and practical problems involved here has made it possible to locate this problem and to recognize its urgency.

State border coercion is becoming increasingly hidden. It is being ambiguously located, particularly through pre-entry posts and checks, and it is being delegated, sometimes through complex networks. Hiding the coercion in this way, as has been argued, is deeply problematic, yet surprisingly, it is given only little attention in the literature. The problem of hidden state border coercion raises difficulties for coercion theory, and sets up a problem for those justifying border control in general. Moreover, this paper has presented that hidden border coercion measures like carrier sanctions are in fact problematic for international law and endanger the lives of certain migrants. Thus, as well as a troubling theoretical difficulty, the growing phenomenon of unjustifiable hidden state border coercion is of urgent practical concern that will be best addressed by understanding its normative problematic.

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## NOTES

1. Nozick's complete list of criteria corresponds to the following (where P is the coercer, Q the coerced):  
P threatens to do something if Q does or refrains from doing A;  
P makes the claim in order to get Q do or not do A;  
Q knows that P has announced the consequences of his action or inaction;  
P's claim indicates that if Q performs A, then P will bring about some consequence that would make Q's A-ing less desirable to Q than Q's not A-ing;  
Q believes P in that he would bring about the threat;  
Q does not do A;  
Part of Q's reason for compliance is to avoid or lessen the consequence which P has threatened to bring about. See Robert Nozick, 'Coercion', in *Philosophy, Science and Method: Essays in Honour of Ernest Nagel*, ed. Sidney Morgenbesser, Patrick Suppes, and Morton White (New York: St Martin's Press, 1969), 440–72, at 445.
2. Gerald Dworkin, 'Acting Freely', *Nous* 4 (1970): 367–83, at 367.
3. See Scott Anderson, 'Coercion', *The Stanford Encyclopedia of Philosophy (Winter 2011 Edition)*, ed. Edward N. Zalta, <http://plato.stanford.edu/archives/win2011/entries/coercion/> (accessed June 4, 2013).
4. Christopher J. Eberle, *Religious Conviction in Liberal Politics* (New York: Cambridge University Press, 2002), 12.
5. Michael Blake, 'Distributive Justice, State Coercion, and Autonomy', *Philosophy and Public Affairs* 30 (2002): 257–96; and Thomas Nagel, 'The Problem of Global Justice', *Philosophy and Public Affairs* 33 (2005): 113–47.
6. E.g. Richard J. Arneson, 'Do Patriotic Ties Limit Global Justice Duties', *The Journal of Ethics* 9 (2005): 127–50; Arash Abizadeh, 'Cooperation, Pervasive Impact and Coercion: On the Scope (not Site) of Distributive Justice', *Philosophy and Public Affairs* 35 (2007): 318–58; and Ryan Pevnick, 'Political Coercion and the Scope of Distributive Justice', *Political Studies* 56 (2008): 399–413.
7. Joseph Carens, 'Aliens and Citizens: The Case for Open Borders', *The Review of Politics* 49 (1987): 251–73; and Phillip Cole, *Philosophies of Exclusion: Liberal Political Theory and Immigration* (Edinburgh: Edinburgh University Press, 2000).
8. Cole, *Philosophies of Exclusion*, 55. Note that this point is slightly different to the more commonly made one that there should be a right of entry if there is to be a right of exit. Instead, Phillip Cole emphasises the difference in entry rights.
9. See Bas Schotel, *On the Right of Exclusion: Law, Ethics and Immigration Policy* (London: Routledge, 2012), 139.
10. See Arash Abizadeh, 'Democratic Theory and Border Coercion, No Right to Unilaterally Control Your Own Borders', *Political Theory* 36 (2008): 37–65; David Miller, 'Why Immigration Controls are not coercive: A Reply to Arash Abizadeh', *Political Theory* 38 (2010): 111–20; and Arash Abizadeh, 'Democratic Legitimacy and State Coercion: A Reply to David Miller', *Political Theory* 38 (2010): 121–30.
11. Abizadeh, 'Democratic Theory and Border Coercion', 39.
12. Abizadeh makes this argument in several articles. See Abizadeh, 'Cooperation, Pervasive Impact and Coercion', 351; and Abizadeh, 'Democratic Theory and Border Coercion', 48.
13. Miller, 'Why Immigration Controls are not Coercive', 114.

14. Scott Anderson, 'The Enforcement Approach to Coercion', *Journal of Ethics and Social Philosophy* 5 (2010): 1–31, at 9.
15. Anderson, 'The Enforcement Approach to Coercion', 9.
16. Abizadeh, 'Democratic Theory and Border Coercion', 39.
17. Abizadeh, 'Democratic Theory and Border Coercion', 57.
18. Similarly, Charles Beitz has expressed the worry that open borders lead to a corruption of local politics and culture. He refers to this as the 'dilemma' of global politics. Charles Beitz, 'Cosmopolitan Ideals and National Sentiment', *The Journal of Philosophy* 80 (1983): 591–600, at 600.
19. The perhaps best-known argument in this sense has been made by Thomas Pogge who claims that the international institutions have been designed by the richer states so as to coercively exploit and oppress the poor. See Thomas Pogge, *World Poverty and Human Rights*, 2nd ed. (Cambridge: Polity, 2008), 30, 76. Laura Valentini also develops an account of systemic international coercion. See Laura Valentini, *Justice in a Globalised World: A Normative Framework* (Oxford: Oxford University Press, 2011).
20. E.g. Elspeth Guild, *Security and Migration in the 21st Century* (Cambridge: Polity, 2009).
21. Detailed data on this is found in Tendayi Bloom, 'Extended Report: Statelessness and the Delegation of Migration Functions to Private Actors', *Policy Report* No. 02/04 (Barcelona: UNU-GCM, 2014).
22. Virginie Guiraudon and Gallya Lahav, 'A Reappraisal of the State and Sovereignty Debate: The Case of Migration Control', *Comparative Political Studies* 33 (2000): 163–95, at 164.
23. Bloom, 'Extended Report: Statelessness and the Delegation'.
24. World Bridge Visa Services, [https://www.visainfoservices.com/Pages/dest\\_org.aspx](https://www.visainfoservices.com/Pages/dest_org.aspx) (accessed June 4, 2013).
25. VFS Company profile, <http://www.vfsglobal.com/> (accessed June 4, 2013), for a more thorough overall analysis of this phenomenon see Bloom, 'Extended Report: Statelessness and the Delegation'.
26. Visa Processing Services, Gerry's Group, <http://www.gerrys.com.pk/visa-main.asp> (accessed June 4, 2013).
27. Homeland Security, G4S, <http://g4s.com/en/What%20we%20do/Sectors/Government/Homeland%20security/> (accessed June 4, 2013).
28. Serco have also done research on the effects of immigration detention by private companies. 'Immigration Detention', Serco, <http://www.serco.com/instituteresource/market/Justice/immigration/index.asp> (accessed June 4, 2013).
29. Amnesty International, *No Flights to Safety: Carrier Sanctions; Airline Employees and the Rights of Refugees*, November 1997 ACT 34/21/97 SC/RC, 1, <http://www.amnesty.org/en/library/info/ACT34/021/1997> (accessed June 4, 2013).
30. E.g. Huyen Pham, 'The Private Enforcement of Immigration Laws', *The Georgetown Law Journal* 96 (2008): 777–826.
31. Frances Nicholson, 'Implementation of the Immigration (Carriers' Liability) Act 1987: Privatising Immigration Functions at the Expense of International Obligations?' *International and Comparative Legal Quarterly* 46 (1997): 586–634.
32. Guiraudon and Lahav, 'A Reappraisal', 185.
33. Amnesty International, *No Flights to Safety*, 3–6.
34. Antonio Cruz, 'Carrier Sanctions in Four European Community States: Incompatibilities between International Civil Aviation and Human Rights Obligations', *Journal of Refugee Studies* 1 (1991): 63–81, at 71.
35. Amnesty International, *No Flights to Safety*, 6.



36. E.g. see Gallya Lahav, 'The Rise of Nonstate Actors in Migration Regulation in the United States and Europe: Changing the Gatekeepers or Bringing Back the State?' in *Immigration Research for a New Century*, ed. Nancy Foner, Ruben G. Rumbaut, and Steven J. Gold (New York: Russel Sage Foundation, 2003), 215–40.
37. Training Courses, IATA Training and Development Institute, <http://www.iata.org/training/Pages/index.aspx> (accessed June 4, 2013).
38. Feller, 'Carrier Sanctions and International Law', 57.
39. Sophie Scholten and Paul Minderhoud, 'Regulating Immigration Control: Carrier Sanctions in the Netherlands', *European Journal of Migration and Law* 10 (2008): 123–47, at 138.
40. Scholten and Minderhoud, 'Regulating Immigration Control', 138.
41. Travel Information Manual, IATA Training and Development Institute, <http://www.iata.org/publications/Pages/tim.aspx> (accessed June 4, 2013).
42. Quoted in Nicholson, 'Implementation of the Immigration (Carriers' Liability) Act'.
43. UNHCR Position on the Proposal for a Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals, 2.
44. E.g. see Ruwantissa I. R. Abeyratne, 'Air Carrier Liability and State Responsibility for the Carriage of Inadmissible Persons and Refugees', *International Journal of Refugee Law* 10 (1998): 675–87.
45. E.g. see Maryellen Fullerton, 'Restricting the Flow of Asylum-Seekers in Belgium, Denmark, the Federal Republic of Germany, and the Netherlands: New Challenges to the Geneva Convention relating to the Status of Refugees and the European Convention on Human Rights', *Virginia Journal of International Law* 33 (1988–1989): 35–114, at 96.
46. Ece Basaran, 'Evaluation of the "Carriers' Liability" Regime as a Part of the EU Asylum Policy under Public International Law', *Uluslararası Hukuk ve Politika* 4 (2008): 149–63, at 154.
47. As part of the 'Protect, Respect and Remedy' framework, the Guiding Principles on Business and Human Rights set out these different types of obligation. For an analysis of how these may operate in the case of delegation of migration enforcement, see Tendayi Bloom, 'Extended Report: Statelessness and the Delegation'.
48. Scholten and Minderhoud, 'Regulating Immigration Control', 129.
49. Such examples are discussed in Frances Nicholson, 'Implementation of the Immigration (Carriers' Liability) Act 1987: Privatising Immigration Functions at the Expense of International Obligations?' *International and Comparative Legal Quarterly* 46 (1997): 586–634, particularly at 591.
50. UNHCR EC/50/SC/CRP.17.2000, also quoted in Basaran 'Evaluation of the "Carriers' Liability" Regime'.
51. E.g. see Natalie Klein, 'International Migration by Sea and Air', in *Foundations of International Migration Law*, ed. Brian Opskin, Richard Perruchoud, and Jillyanne Redpath-Cross (Cambridge: Cambridge University Press, 2012), 260–82, at 266.
52. See elaboration of the distinction, for example, by François Crepéau in François Crepéau, *Keynote Address Towards the 2013 High-Level Dialogue on International Migration and Development: The Legal International Framework in Place to Protect Migrants, 20 February 2013*, 2.
53. Klein, 'International Migration by Sea and Air', 267.
54. Tendayi Bloom, 'The Business of Migration', (paper offered at IS Academy Conference in UNU-MERIT, Maastricht, Netherlands, 22–24 January 2014).
55. Janet Gilboy, 'Implications of "Third-Party" Involvement in Enforcement: The INS, Illegal Travelers, and International Airlines', *Law and Society Review* 31 (1997): 505–30, at 507.
56. Gilboy, 'Implications of "Third-Party" Involvement', 508.

57. Bloom, 'Extended Report: Statelessness and the Delegation'.
58. Nicholson, 'Implementation of the Immigration (Carriers' Liability) Act', 595.
59. Cruz, 'Carrier Sanctions in Four European Community States', 72.
60. Cruz, 'Carrier Sanctions in Four European Community States', 72.
61. It is of no importance for the argument made here whether the justification relies on consent – whether expressed, tacit, or hypothetical – or a democratic procedure. For a consent-based approach cf. e.g. Thomas Nagel, *Equality and Partiality* (Oxford: Oxford University Press, 1991); for a democratic approach cf. e.g. David M. Estlund, *Democratic Authority* (Princeton: Princeton University Press, 2008).
62. Cf. State Border Coercion section of this paper.
63. Miller, 'Why Immigration Controls are not Coercive', 114.
64. Tally Kritzman-Amir, 'Privatization and Delegation of State Authority in Asylum Systems', *Law and Ethics of Human Rights* 5 (2011): 193–215, at 203.
65. Walzer writes: 'There is, however, one group of needy outsiders whose claims cannot be met by yielding territory or exporting wealth; they can be met only by taking people in. This is the group of refugees'. Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983).