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Justice in immigration

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Abstract
Legitimate states have a general right to control their borders and decide who to admit as future citizens. Such decisions, however, are constrained by principles of justice. But which principles? To answer this we have to analyse the multifaceted relationships that may hold between states and prospective immigrants, distinguishing on the one hand between those who are either inside or outside the state's territory, and on the other between refugees, economic migrants and 'particularity claimants'. The claims of refugees, stemming from their human rights, are powerful though limited in scope: they hold against eligible states generally rather than the specific one to which they apply for asylum. Economic migrants cannot claim a right to be admitted as such, but only a right to have legitimate selection criteria applied to them. Particularity claimants, such as those seeking redress for harms inflicted on them or reward for the services they have rendered to the state, must show why awarding a right to enter is the appropriate response to their claims. Finally, does justice enable us to establish admission priorities between these different categories of migrants?

Keywords
Immigration, borders, refugees, human rights, discrimination, reparation

Introduction

Immigration currently comes high up on the list of contested topics in most, if not all, liberal democracies. What is immediately striking is the large gulf that separates popular attitudes on this subject – inevitably reflected in mainstream political discourse – from the discussions that occur in academic settings. Broadly speaking the public assumes that states have (and should have) very considerable leeway in deciding upon immigration policy – who to admit and on what terms – subject perhaps to some obligation to admit (genuine) refugees; whereas among academics who write about immigration, border controls are usually regarded with suspicion, as potentially involving breaches of human rights, and there is a strong disposition to advocate open borders, again with a small rider to the effect that some control might be necessary if the inflow turns into a torrent.[1] One side sees immigration policy as barely an issue of justice at all; the other regards current policies, at least, as inflicting multiple injustices on those who are excluded.

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In this article, I develop a framework for thinking about the constraints that justice places on the regime of immigration that a state may rightfully put in place. Within these constraints, states are free to select the policy that best realises their other goals, taking into account considerations such as economic growth, cultural diversity, population size, the age distribution of the current inhabitants, and so forth. It follows, of course, that immigration policies may be criticised on multiple grounds: they may be badly judged, or counter-productive, or ungenerous to immigrants, without being unjust.

It is also important to distinguish between the *justice* of an immigration policy and its *legitimacy*.[2] An illegitimate immigration policy would be one that exposed the state not just to censure but to outside sanction: presumably it would involve a severe breach of immigrants' human rights, and therefore be one that the state had no right to implement. Justice in immigration requires that the policy chosen should be legitimate, but it requires more than that – for instance, as we shall see later, that it does not discriminate between prospective immigrants on unjust grounds.

There are broadly two ways in which we may approach the issue of justice in immigration. On the one hand, we can focus on the specific nature of the relationship between state and potential immigrant and ask what justice demands within that relationship. On the other hand, we can look more widely at questions of distributive justice, either social or global, and examine how a proposed immigration policy might bear on those questions. For example, we could ask what impact an immigration regime would have on equality of opportunity within the receiving society, or what impact it would have on global poverty. In line with the contextual understanding of justice in general that I have defended elsewhere (Miller, 2002), I adopt the first approach in this article. I ask what claims immigrants in different categories can make against the state they seek to enter, and what corresponding obligations of justice fall upon the citizens of that state. This initial approach is not meant to exclude the possibility that a policy that may initially appear just when considering only the relationship between immigrant and receiving state will be compromised when we consider its wider impact.[3] For example, were such a policy to be severely detrimental to the human rights of those not involved in the practice of immigration itself, this would certainly count heavily against it. So an initial narrowing of focus to the direct relationship between immigrant and receiving state is not meant to foreclose wider questions of social or global justice, even though it may appear perverse to those who hold non-relational theories of justice, such as utilitarianism or the global difference principle.[4] As I shall try to show, there are ambiguities in that relationship which need to be addressed if we are going to understand the claims that immigrants have against the state they are trying to enter. In order to gain clarity, we need to create a framework into which different categories of immigrants can be placed.

A framework

In their relationship to the receiving state, immigrants differ along two main dimensions: first according to whether the immigrant is physically present on the state's territory, and therefore already subject to its jurisdiction, or in contrast is attempting to enter from the outside; second, according to the nature of the claim that the immigrant is making to justify his or her admission. Let me say a few words about each of these dimensions and their significance.

In the first case, a line is being drawn between a person who is currently resident in state A and who makes an application to enter state B, and a person who is currently inside state B but has not yet been granted permission to enter. This might be because she has entered illegally or because she has entered on a fixed-term permit that is due to expire. Now there may also appear to be an intermediate case, which is that of somebody standing physically at the border between states A and B, for instance in front of an immigration official at a land border or an airport. In order to handle this third possibility, we need to know why it matters whether a person is physically present on state B's territory or not. To answer this question, we must call upon a normative account of rights to territory. On the account that I favour, a legitimate state that claims territorial rights must offer certain protections to all those who are physically present on the territory in question (see further Miller, 2012a). Such a state claims a right of jurisdiction – that is it claims the right to make laws and apply them to everyone *on* the territory – and to make good that claim it must at a minimum protect the basic rights of those present to a sufficiently high standard (it does not matter for present purposes exactly how that standard should be set). So, in relation to the prospective immigrant who has already arrived on its territory, the receiving state asserts its right to apply its laws to him – to arrest him if he has committed a crime, for instance – but in return it has an obligation to protect certain of his rights (see further Miller, 2013b). The point for now is that none of this applies to the person who applies to join state B while residing in state A. State B does not assert its authority over such a person; it does not attempt to make her subject to its laws.[5] Whatever obligations the state has to this person do not arise as a corollary of the exercise of jurisdiction.

It is true of course that state B's decision may have a significant *impact* on the life of the state A resident. Indeed from one perspective the impact is the same whether the person involved is currently inside state B or not: either they are permitted to become a resident and perhaps future citizen of state B or they must remain in/return to presumably less attractive state A. But although impact in this sense is something we will have to consider is due course, I am assuming that this is by no means the only thing relevant to the justice of an immigration decision or policy. As indicated earlier, I take for granted here a contextual view of justice, and from this starting point the relationship between an individual person and the state under whose jurisdiction he currently falls is normatively significant. By virtue of being subject to the state's laws and policies, he has a reciprocal claim against the state that it should *at least* protect his human rights, not merely by refraining from violating them, but by making available the resources and the procedures (such as access to the legal system) that will allow him to enjoy these rights in practice.

What then about the intermediate case, the person who stands physically at the border? Such a person is not yet subject to the jurisdiction of the receiving state. It cannot tax him, conscript him, charge him for past crimes, etc.[6] For so long as he continues with his attempt to enter, he must of course comply with the immigration rules that the state has imposed, but so must the person who applies to enter while resident in state A. If he meets whatever entry criteria the state has set, then he has a right to enter, but this applies equally to the person who has not yet come to the border. If he tries to enter regardless, then he may be subject to physical coercion to prevent him from doing so, but again the same can be said about the person still

located within state A, the difference being only that coercion won't be applied to the latter until she comes to the border and makes the attempt. So does being at the border make any difference at all? I think that it imposes on the receiving state an immediate duty of care.[7] This becomes most apparent if we think of someone arriving by sea on a hostile shore. If state officials are not willing to admit such a person to the territory, they must ensure that he is escorted to a place of physical safety: they cannot simply turn his boat around if it is likely to sink.[8] The duties that apply at land borders and airports follow the same logic. They arise merely from the fact of physical proximity coupled with the capacity to assist, in the same way as does my duty to find help for someone who collapses on my doorstep; I need not take her into my house but I may have an obligation to take her to hospital or to a shelter. It goes without saying that state officials also have duties of civility towards the immigrant. In refusing entry they should explain why admission cannot be granted, they must not be abusive, etc. These are general duties of respect for another human being that are triggered by the fact of physical presence.

All of this applies regardless of the kind of claim that the prospective immigrant is making, so let me now turn to this second dimension along which immigrants may differ. I suggest that they can be placed into three broad categories. First, there are refugees, people who are applying to enter on the grounds that their human rights can only be protected by leaving their current state of residence, whether this is due to state persecution, state incapacity or prolonged natural disasters.[9] Second, there are applicants whose claim is simply that their interests will be better served by moving to the host society; the interests in question might be of different kinds – opportunities to find work, to acquire skills, to engage in forms of culture or religion not available in their country of origin, and so forth (I shall use 'economic migrants' as a convenient label for this group even though strictly speaking 'economic' is too narrow a designation). Third, there are immigrants who have what we might call a particularity claim against the state they are trying to enter. Such a claim might be backed up by different kinds of reason. For example, the claim might be reparative in nature: the immigrant claims that he is owed admission by way of redress for what the receiving state has done to his own society and his life prospects within it. Or it might be a claim of desert: the immigrant has served the receiving state in some capacity in the past.[10] These claims may carry different weight, but what they have in common (and what differentiates them from the first two categories) is that they are claims against *this particular state*. In contrast, immigrants who are either refugees or economic migrants may have reasons to launch their claim against one state rather than another, but the claim itself could be made against any state able to supply the resources needed to meet it (sanctuary, opportunities).

Prospective immigrants might make claims under more than one of these headings. A person might apply for admission as a refugee while at the same time claiming that he deserves admission for his past services to the state (for instance someone who has served as a translator for an army engaged in a foreign war and who now fears for his life if he remains where he is). But for purposes of analysis it is helpful to distinguish the three categories. I believe the distinctions drawn above will make sense even to those who wish to defend a human right to immigrate, and therefore hold that people in all three categories have a right to enter. They can take this position while at the same time granting that those who are refugees or

who have particularity claims might justifiably take precedence over economic migrants if priorities in admission have to be set.[11]

A justice-compliant immigration policy must therefore be sensitive both to the physical location of the immigrant ('inside the state', 'outside the state', 'at the border') and to the kind of claim for admission she can make ('refugee', 'economic migrant', 'particularity claimant'). The discussion that follows attends mainly to the second dimension, beginning with the case of refugees.

Refugees

The justice claim of a refugee stems from the fact that his human rights are currently under threat. So to make sense of that claim, we must assume that all agents, individual or collective, share in a responsibility to protect the human rights of vulnerable individuals. Although, as we shall soon see, there is a problem about how this general responsibility gets assigned to particular agents, the assumption itself does not seem controversial.[12] At any rate, I am going to take it for granted here. The responsibility obtains regardless of national or other boundaries, which is why it can form the basis of a justice claim made by a refugee against a state that is not her own. And initially the claim appears to be a strong one, for human rights encapsulate the most urgent moral demands that one human being can make against another.[13]

But we must immediately take notice of two respects in which the refugee's claim is qualified. First, its scope is limited to whatever is necessary to protect her human rights. It does not extend in any immediate way to the full set of rights and opportunities that a state may make available to its own citizens. And the claim may be time limited as well. Because it arises from a present threat that the refugee would face by remaining in her state of origin, it ceases to exist when the danger passes – that is when it becomes safe to return to the country of origin. In other words, the refugee's claim is initially a claim to sanctuary or asylum: to being provided with a place of safety where her human rights are protected for so long as she remains in danger.

Second, since the initial responsibility is global in scope – it falls on all agents who are capable of protecting a vulnerable individual's human rights – a question arises about how it can become a justice claim against a particular state. In practice, of course, the responsibility is assigned by the refugee arriving at the border of the state (or entering without permission) and applying for asylum. Since it is usually an arbitrary matter which state the refugee chooses to approach (recall that particularity claims will be dealt with separately), it might appear problematic from the receiving state's perspective that it should be required as a matter of justice to respond to a claim that arises in this way. However, the problem can be avoided so long as we are clear about what the receiving state is required to do. By way of analogy, think of an individual person who is approached by someone in desperate need. This is also a demand that falls arbitrarily on the person approached. But he is nonetheless obliged to respond to it, as a matter of justice. What he is required to do, however, is to find a way in which the need can be met, and this may be a matter of calling upon other people, or on competent institutions, to provide the necessary support. He is not required to carry the burden single-handed. Returning to the case of a state against which a claim for asylum has been lodged, the state's first responsibility is to

establish, using a reliable procedure, whether the claim is justified. This is not the place to investigate what form such a procedure should take, what kind of evidence must be collected, etc. but the essential aim is to identify individuals who belong to groups that are under threat in their society of origin by virtue of religious affiliation, sexual orientation, political dissidence, etc. or are unable for other reasons to lead a minimally decent life while remaining there. Once this is established, the state must decide how to respond. It may decide to admit the refugee on a temporary or permanent basis. But it may also provide asylum outside of its borders by agreement with another state on condition that human rights requirements are fulfilled there.

Such agreements are particularly appropriate when we reflect that the initial responsibility to protect human rights was global in scope, which suggests that the burden of discharging it should be shared fairly among capable parties. Ideally, then, refugee flows would be managed by an international body applying burden-sharing principles and assigning refugees to particular receiving states on that basis. In practice such a scheme may be hard to devise because of disagreement about how to weight the relevant principles (for discussion, see Anker et al. (1998), Hathaway and Neve (1997), Kritzman-Amir (2009), Part I and Schuck (1997)). In the absence of an international procedure, states may legitimately try to limit their responsibility to what they reasonably judge to be a fair share of the total burden. One way to do this, as just indicated, is to enter into bilateral or multilateral agreements for placing refugees in different safe havens. In practice, this will often mean richer countries paying poorer countries to accommodate refugees, as a glance at the current worldwide distribution of refugees suggests.[14] Is this objectionable? Might individual asylum seekers have a justice claim to be admitted specifically to the state where they lodge their claim to asylum?

It is difficult to see what might support such a claim. As I have argued, by applying to a particular state, asylum seekers create an obligation on the part of that state to assess their refugee status and to provide immediate human rights protection. But the state has discretion over whether to do more than this for any given individual. It does not seem that the interest a refugee might have in moving to one state rather than another could be sufficient to ground a claim of justice against the favoured state. What is crucial is that the destination offered should provide adequate protection for the refugee's human rights. This may be affected by her expected length of stay: accommodation in a purpose-built refugee camp may be adequate if the period of asylum is likely to be short, for example, but if it will stretch many years into the future, then human rights such as the right to work, to practise religion, to raise a family, and so forth will become more relevant. At some point, only full integration into the receiving society may provide sufficient opportunities, in which case the general standard of life in that society becomes a relevant factor when destinations are being decided.

Another issue is whether a state that wishes to accommodate refugees up to a maximum number but to arrange for the remainder to be placed elsewhere is entitled to choose which refugees to take in, on the basis of criteria such as work skills, or whether it must use a random method of selection. Here I think it matters whether what is being offered is only what justice requires – protection of human

rights for as long as proves to be necessary – or something more than that. A state that offers more – for example gives refugees permanent rights of residence with the possibility of moving towards full citizenship – may use relevant criteria to select them, of the same kind as it uses for economic migrants. It is providing a discretionary benefit over and above what justice itself demands, so provided the distribution of this benefit is governed by defensible principles, no injustice is done to those who are not chosen. Clearly an arrangement of this kind works to the advantage of the ones who are selected, and some of those who are rejected and offered asylum elsewhere will be worse off than they might have been if a randomised method of selection had been used, but such comparative considerations do not come into play when the underlying claim is one of human rights. We do not violate the human rights of some merely by doing more than human rights demand for others, provided the others are chosen on relevant grounds. On the other hand, if state chooses only to provide the bare conditions of asylum, then if it is going to take in some and transfer others elsewhere, this selection should take place using random methods such as a lottery or first come first serve.

I have argued that states are only required as a matter of justice to carry a fair share of the burden of admitting refugees, which entitles them to make arrangements to transfer refugees to other places of safety once that quota has been exceeded. However, given that the initial process of establishing refugee status and then arranging transfer may itself be quite costly, how far may states go in deterring initial applications? At present, states (such as the UK) which are among the more popular destinations for asylum seekers expend considerable effort in preventing refugees from reaching their borders.[15] They have imposed 'carriers' liability' on airlines and other transport providers, requiring them to check that their passengers have entry visas and levying high fines if this is not done. Since it may be difficult for refugees to obtain documentation while still in their countries of origin, the effect may be to prevent genuine claims for asylum from being lodged at all. This is clearly indefensible at the bar of justice. In principle there is nothing wrong with having a monitoring system for refugees within their countries of origin, but it must be possible for the people concerned to get access to the system without fear of reprisals – and this can be problematic.

In my discussion of the justice claims of refugees, I have stressed that asylum should be regarded in principle as a short-term measure that lasts until human rights conditions have improved in the refugee's country of origin. In practice, however, the period of asylum may stretch to the point where the refugee acquires a claim to permanent residence in the receiving state. The rationale for this is that a decent human life requires relatively stable conditions such that the person in question can plan for the future, develop a career, educate her children, and so forth, which cannot happen if there is an ongoing possibility of removal at short notice. So beyond a certain point, hard to specify exactly, the refugee can claim residence, and eventually admission to citizenship, as a matter of justice. This claim is not unconditional. The host state can lay down (reasonable) conditions for acquiring these rights, as it can for all categories of immigrants.[16] These will include observing the law and adjusting in other ways to the public culture of the receiving

society. But providing these conditions are met, it is a matter of justice that rights of permanent residence and access to citizenship should be granted in due course.

Economic migrants

I turn next to explore the constraints of justice that apply to immigration policies for economic migrants, those whose human rights are not at risk by remaining in their country of origin but who have a personal interest in moving to the new society for employment or other reasons.[17] In so labelling them, I already make one assumption, which is that their human rights are not infringed by the very fact of being subject to immigration controls – in other words that there is no general human rights to immigrate. I have defended this assumption elsewhere (most fully in Miller, forthcoming, and more briefly in Miller, 2013b) and will not repeat the full defence here. In brief, I understand human rights to be rights whose joint fulfilment provides their bearer with the opportunity to live a minimally decent human life, and the right to cross borders is not an essential member of that set. Most people can lead decent lives while remaining in their present countries of residence, and although in the case of refugees the right to move to a new society becomes instrumental to protecting their human rights generally, this does not make the right to immigrate *itself* into a human right, any more than there is a human right to the anti-malarial drug chloroquine, say, because for some people this is what is needed to fulfil their human right to health care.[18] So although economic migrants can properly demand that the state they are trying to enter should respect their human rights while in the process of making a decision – so should not, for instance, treat them inhumanely while they are present on the state's soil – they cannot appeal to human rights as the basis for their claim to enter.

For this category of immigrant, states are not under constraints of justice with respect to how many to admit; they can close their doors entirely if they choose to do so. But they may be constrained in the selection criteria they use if they choose to admit some but not others. This is less strange than it might appear at first sight. Justice may not require the provision of some good or service, but if the good is going to be provided, it may dictate how it should be distributed; in particular it may outlaw certain forms of discrimination. To borrow Michael Blake's example, a state is not required as a matter of justice to supply each citizen with a car, but if it decides to go into the business of providing cars, it cannot then provide them to white people but not to blacks (Blake, 2008: 970). But it might be said in reply here that this stems from a general principle of equal treatment that a state is required to follow in its dealings with citizens, and since we are here following a contextual approach to justice, it cannot be assumed that the same principle will apply to the state's interactions with outsiders. Why, therefore, should a state not select economic migrants on any basis it likes, even including race? Intuitively we feel that there is something wrong about this, but why exactly should it be regarded as unjust?

One reason that might be given is that there is a human right against discrimination, and this applies to all policies that discriminate between people on the grounds referred to in the relevant international documents, such as the

International Covenant on Civil and Political Rights, which prohibits (in Article 26) discrimination on grounds such as 'race, colour, sex, language, religion, political or other opinion, . . .' (see Nickell, 2007: 22). But this right clearly stands in need of interpretation. Its scope cannot be deduced from the formal statement in Article 26. There are presumably many contexts in which one or other of these criteria may properly be used for purposes of selection. It would not, for example, be considered a breach of human rights if a political party decides to draw up an all-women short list to select its candidate in a particular constituency, if a public broadcaster chooses only among those able to read the news in Welsh or if a church confines membership to those who belong to its own faith. But these are examples of discrimination on the grounds of sex, language and religion, respectively. Indeed the European Convention on Human Rights goes to the other extreme when it confines the right against discrimination to discrimination in securing the *other* rights and freedoms set out in the Convention, which would fail to exclude many instances of discrimination that we would intuitively find objectionable. Somewhere in between, we want to be able to identify cases in which discrimination impacts on a person's life in such a way that it falls below the threshold of minimal decency; this would allow us to identify the scope of the human right against discrimination. But as I have argued elsewhere (Miller, 2013b, section v) this would not cover invidious discrimination among economic migrants. The human rights approach is not going to provide the answer we are looking for.

An initially more promising avenue is to argue that selecting immigrants on grounds of, say, race or religion is an injustice to some existing citizens, namely those who belong to the group or groups that the immigration policy disfavours.[19] By discriminating in this way, the state appears to be labelling these people as second-class citizens. As Michael Blake has put the point, 'the state making a statement of racial preference in immigration necessarily makes a statement of racial preference domestically as well' (Blake, 2002: 284). This will often provide states with strong reasons not to pursue discriminatory admissions policies, but a limitation of this approach is that it would not apply to a state that was already religiously or ethnically homogeneous and whose members wished it to remain so.[20] Notice also that the argument hinges upon the injustice that is done to existing citizens whose status is lowered by the discriminatory policy, not on any wrong that is done specifically to the excluded candidates for admission. We might therefore think that the focus is in the wrong place: the primary injustice of a discriminatory immigration policy is the one done to those whom it excludes, while the signal it sends out to existing citizens is a secondary (though still important) matter. But given the assumption that no economic migrant has a prior right to be admitted, what explains that injustice?

We need to consider the kind of claim that an economic migrant can make against the political community that she is seeking to enter. For reasons already given, she cannot claim that she has a right to enter such that the state is obliged to admit her. But typically she will have a strong interest-based claim to lodge: given the degree of personal dislocation that migration involves, she must anticipate becoming considerably better off by moving to the new society – for example by virtue of being able to

find work that is not available where she currently lives. So if the state is going to turn down her request, it must provide a relevant reason for doing so. To show this we need only to invoke what I have elsewhere called the weak cosmopolitan premise,

> the idea that we owe all human beings moral consideration of some kind – their claims must count with us when we decide how to act or what institutions to establish – and also that *in some sense* that consideration must involve treating their claims equally. (Miller, 2007: 27)

Suppose that an immigrant could be admitted at absolutely no cost to the receiving state, but at considerable advantage to him. Then to turn the application down arbitrarily would mean that no consideration at all had been given to this person and his interests – he had been treated as though he were morally insignificant. Granting the weak cosmopolitan premise, an immigration policy that admits some but not others must offer relevant reasons to those excluded.

What could count as a relevant reason here? The criteria used to select among economic migrants must connect plausibly to the general goals of the political community. It is legitimate to favour those who are predictably going to be more valuable members of the community, for example those who will bring in skills for which there is a high demand, or those who can contribute actively to its cultural or political life. Now these reasons are, in a sense, internal to the receiving community, since they depend upon the values embedded in its public culture (economic development, democratic politics, etc.). So there is no guarantee that they will also count, directly, as reasons for the immigrant whose claim is refused. Yet he must in turn recognise the interest that the citizens of the receiving state have in political self-determination, and therefore in using immigration policy as one of several means to further the goals that they have chosen to pursue collectively. What matters is that the reasons are given sincerely, and are comprehensible, not that the immigrant must be able to accept them as reasons for *him*.

How can this approach be used to explain the injustice of (invidiously) discriminatory immigration policies, such as those based on race or gender? The use of such criteria cannot be linked in any remotely plausible way to the values that a political community may wish to pursue.[21] So someone who is refused entry on one of these grounds is having her interests set back without being given a reason that could justify her in being treated less favourably than her counterpart – a white male, say. She is being denied equal consideration, in violation of the weak cosmopolitan premise.

How far can this line of argument be taken? Consider the case of discrimination on grounds of religion. A political community may regard it as one of its objectives to promote the religion that most of its members adhere to, and therefore decide to give preference in admissions to those who already belong to that particular faith. A religious preference of such a kind would not be acceptable in a liberal democracy since it would violate the equality of citizens.[22] But in a theocratic state it might count as a good reason. So there is unavoidably a contextual element to this aspect of justice in immigration. A policy that would count as unjustly discriminatory when applied by one state may not count as such when applied by another that can link the discrimination to the sincerely held aims of its members.

Overall, then, justice only supplies relatively weak constraints on admission policies for economic migrants. They have no general right to be admitted; the grounds on which they can be selected or rejected may be quite wide, depending on the goals and principles that form part of the public culture of the receiving state.

Particularity claimants

I turn finally to consider the class of potential immigrants whose claim is that they already have a particular relationship with the receiving state that justifies their request to be admitted. One example would be a group of people who have been explicitly promised admission under certain circumstances: their right, and the state's corresponding obligation, is so clear as not to warrant further discussion here. I will also not discuss family reunification claims, important though these are in practice. The reason is that, along with others, I regard these claims as arising from the right of *existing* citizens to have the opportunity for a family life, and therefore to be able to bring their spouses and other immediate family into the country.[23] In other words, they are really claims of social justice stemming from citizenship, rather than claims that arise from the relationship between state and prospective immigrant, which is the focus of this article.

I shall consider two possible ways in which particularity claims to immigrate may arise: as claims to reparation and as claims of desert. In the first case, a right to immigrate is being asked for as a way of redressing some wrong that the receiving state has inflicted on the prospective immigrant; in the second case, the claim is that the person deserves to join the society by way of reward for some service she has performed on its behalf. The logic of these claims is plainly different, so they need to be treated separately.

Immigration as a form of reparation has been defended by James Souter (2014), who applies it specifically to asylum seekers. His argument is that if a state bears some responsibility for the harm involved in making somebody into a refugee, then it owes them reparation, and granting asylum is very often the most fitting way in which this can be done. This argument seems valid, but notice that by focusing on asylum seekers, it raises the question of whether reparation is really the main source of the justice claim here. One could describe the situation differently: the refugee has a claim for human rights protection which potentially could be lodged against any state able to offer her asylum, but if one state is chiefly responsible for bringing the condition of refugeehood about, then that state will also bear remedial responsibility for correcting it.[24] The idea of reparation may be less important than the idea of singling out some state as the one that bears the relevant responsibility. In order to disentangle reparation as such from the general responsibility to protect human rights, we should focus on cases in which the person claiming reparation is *not* a refugee. Her claim is simply that she has been harmed by the state's policies in such a way that allowing her to immigrate is the only, or at least the best, way of repairing the harm.

Considered abstractly, this clearly makes sense as a claim of justice. In general, there is no problem in considering states as agents whose members bear collective responsibility for the harms that they cause (see Butt, 2009, esp. ch. 6; Miller, 2007, chs. 5–6). This can be so even if the harms are brought about as a side effect of

policies that are beneficial overall. The bigger difficulty, I believe, is to show why granting the right to immigrate is the appropriate response to harmful behaviour. Suppose for example that one state inflicts environmental damage on the territory of another: one of its ships causes an oil spill that pollutes the coastline or it diverts water from a river that is needed for agricultural production. Clearly it has harmed many of those who live within the affected state. But the right way to make reparation would be to remedy the damage directly – to clean up the oil spill or to restore the river to its previous volume – and meanwhile to offer compensation to those whose livelihoods have been impaired. Since the purpose of reparation is to return the victims as nearly as possible to the position they would have been in had the wrongful event not occurred, it is better to try to rectify the situation on the ground than to move them to entirely new surroundings.[25] However, there could be cases in which full physical reparation is impossible, with the result that the affected territory is less able to support human life, and then reparation might appropriately take the form of providing entry rights to at least some of its inhabitants.

At first sight, an even clearer instance of immigration as a form of reparation would be territories that become unable to sustain human life as a result of global warming, where no physical form of repair is possible. The complication is that here the harm is the joint product of the behaviour of many states, so it is unclear why a right to immigrate could be asserted against any one state in particular. But perhaps, in the absence of an agreed scheme for resettling those whose land has become uninhabitable, a right to reparation could be asserted against any state that has contributed significantly to the warming.[26]

What next of desert as a source of particularity claims to immigrate? The problem here will be to show that immigration rights are an appropriate way of recognising the deserts of non-citizens who have conferred benefits on the receiving state. The most relevant examples seem to be cases of military service. The French Foreign Legion, for example, has a rule whereby anyone who has served in the legion 'with honour and fidelity' for three years or more is entitled to apply for French citizenship.[27] For those who cannot wait that long, there has been since 1999 a further law according to which those who are wounded in battle while fighting for France can apply immediately – becoming 'Français par le sang versé'. Although no doubt incentive considerations also played a part in the introduction of these measures, they have a clear desert rationale: how better to recognise and reward those who are willing to shed their blood for the country than to give them the right to live there (in the French case as full citizens)?[28]

As noted earlier, a similar case was made, successfully, on behalf of Gurkhas who had served in the British Army and in retirement wanted to move from Nepal to Britain. But the experience of a number who have since moved has proved to be an unhappy one, and the British Gurkha Welfare Society has been campaigning for enhanced pension rights which would allow retired Gurkhas to live comfortably in Nepal rather than having to rely on meagre state-provided pension and housing benefits in the UK.[29] This suggests that what foreigners who have contributed military service to the state really deserve is something like 'the conditions for a comfortable life', rather than the right to immigrate as such. While immigration might indeed be the only way of providing these

conditions in some cases, it does not seem that there is an internal link between desert and reward such that the only way in which desert of this kind can properly be recognised is by awarding the veteran rights of residence and/or citizenship.

This brief review of particularity claims reveals that they often carry considerable weight but do not always translate into rights to immigrate. Although it may be perfectly clear which state is the proper target of the claim, its content – in the sense of what, specifically, is required to meet it – is less determinate. Plausible alternatives to immigration rights may therefore present themselves. Perhaps, then, our conclusion should be that particularity claimants may need further reasons beyond reparation or desert to back up their requests to immigrate. This thought is taken up in the following section.

Conclusion: Weighing the justice claims of immigrants

Justice in immigration requires in the first place that the state should respond fairly to the claims of individual people who want to join it. As we have seen, these claims can be of different kinds, depending on how, physically, the would-be immigrant is positioned vis-à-vis the state, and the reason she gives for admission. Since states will want to place limits on the overall volume of immigration, and these will very likely be lower than would be necessary to meet all claims, we should consider how competing claims might be adjudicated. Could they, for example, be placed in lexical order such that all immigrants in category A must take priority over the rest, then we move to category B, and so forth?

We have seen that refugees and particularity claimants have, in general, stronger claims to be admitted than economic migrants. But does either of these two categories take precedence over the other? It is difficult to say so confidently. Refugees have very strong claims to be admitted *somewhere*, based on their human rights, but may not have strong claims against *this particular state*. Particularity claimants may have strong claims to be shown favourable treatment by a particular state, but it is less clear that the favourable treatment must consist in being granted the right to immigrate. What we can say, however, is that those who fall into the intersection of the two categories – qualify for refugee status, but also can make reparative claims or claims of desert against the receiving state – should have lexical priority. This by itself is not a trivial finding, because these may not be the immigrants who the state most wants to attract: for example they may not possess (or may no longer possess) skills that the existing citizens are most in need of. So by saying that justice requires their admission, we will be placing clear but limited constraints on the state's preferred immigration policy.

Is there more to be said about precedence as between refugees and particularity claimants? Let me put some flesh on otherwise dry bones. Suppose the UK Border Agency has (for some reason) to make a choice between two applicants for admission: a refugee from South Sudan, who can credibly show that her life is in danger because she has been an outspoken critic of the regime, but who has no previous connection to the UK, and a young man from Iraq who worked as a translator for the British Army during the Gulf War, but who can no longer find work (so he is

poor but not yet in desperate straits). Who should be taken first? Well, perhaps the Sudanese, since time is of the essence and she needs immediate help. But maybe she can claim less than the Iraqi eventually: if the Agency has made an arrangement for refugees from Sudan to be accommodated in neighbouring Kenya, that may offer sufficient protection for her human rights. The Iraqi man, on the other hand, may have a desert claim that can only be redeemed if he is provided with the opportunities that come with being allowed into Britain. If those judgements are correct, we cannot construct a simple order of priority beyond the top category noted earlier.

Moreover, we cannot entirely ignore those questions about social and global justice that I have been bracketing off so far. There may be social justice reasons for admitting particular classes of immigrants, such as those who help to provide essential welfare state services that for some reason locals are unable or unwilling to provide. There may also be global justice reasons *against* admitting those very same immigrants if the effect is to deprive people elsewhere of services that are essential to safeguard their human rights.[30] These reasons will come into play when criteria of selection are being formulated for economic migrants, and also, as argued earlier, for some asylum seekers. So justice in immigration will very often be a matter of weighing claims. A just immigration policy will be one that establishes an unconditional right of admission for a small group of refugees, while beyond that it is a matter not only of developing consistent criteria of selection, but of responding to claims *appropriately*, with treatment that matches the circumstances of each prospective immigrant.

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Notes

1. The most influential of these academics is undoubtedly Joseph Carens, beginning with Carens (1987) and continuing through a long series of articles to culminate in Carens (2013). But see also Cole (2000), Dummett (2001), Hayter (2004), Kukathas (2005) and Steiner (1992). Among dissenting views are those of Blake (2003), Miller (2005), Walzer (1983), ch. 2 and Wellman (2008).
2. For a discussion of the legitimacy of immigration policy, see Terry Macdonald's article in this issue.
3. Samuel Scheffler (2013) has argued that because of the role that immigration restrictions play in reinforcing global inequalities, we should hesitate to call our preferred immigration policy just even if no better policy is available.
4. See, for example, the utilitarian stance of the Singers, for whom 'immigration policy in general, and refugee intake in particular, should be based on the interests of all those

affected, either directly or indirectly, whether as an immediate result of the policy, or in the long run' (Singer and Singer, 1988: 121).

5. Of course the state does apply its immigration rules to the person when deciding to admit her. But she is not subject to the whole body of the state's law prior to being admitted, and she can at any time escape even the immigration rules by withdrawing her application.
6. For this reason, I do not regard the relationship between state and prospective immigrant as essentially coercive in nature. This is disputed. See my exchange with Arash Abizadeh on this point: Abizadeh (2008, 2010) and Miller (2010).
7. This does not mean giving the person who has arrived at the border without an entry permit any kind of favourable treatment as far as immigration itself is concerned. States are justified in requiring all prospective immigrants to follow the same application procedures and to resist queue jumping. The issue here concerns the duties of *assistance* that follow from the bare fact of proximity.
8. Strictly speaking the relevant border here is the outer limit of the state's territorial waters, since the state asserts its right of jurisdiction within those waters. This raises the question of why more is owed to immigrants in need of assistance who have crossed that line than to equally endangered immigrants who have not. The answer is that the duty to assist is *assigned* to a particular state by virtue of being already on its (extended) territory. I hope to address the vexed question of what is owed to boat people who get into difficulties in international waters in future work, but it seems likely that the duties here will be humanitarian in kind, rather than duties of justice.
9. Definitions of 'refugee' are hotly contested. The one I use here is broader than the Geneva Convention definition, according to which a refugee is someone with 'a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion' in his country of origin. However, this has itself been broadened in later international declarations to respond to the variety of circumstances in which refugee flows may be created. On this see Loescher and Milner (2011): 191.
10. Consider the case of the Nepalese Ghurkhas who, after serving in the British Army, have sought the right to reside in Britain after retiring. This right was granted to them by a High Court decision in 2008. According to the actress Joanna Lumley who spearheaded their campaign, 'The whole campaign has been based on the belief that those who have fought and been prepared to die for our country should have the right to live in our country'. I shall examine their case more fully below.
11. Philosophers who defend open borders but nevertheless recognise the special claims of refugees include Carens (2003) and Dummett (2001), chs. 2–3.
12. Libertarians may argue that there is only a *negative* responsibility not to act in such a way that the human rights of others are violated, as opposed to a positive responsibility to ensure that human rights are fulfilled. They might however add that we have humanitarian reasons (as opposed to reasons of justice) to respond to cases in which human rights are put at risk by the actions of others. So the practical difference may not be so great in the cases that concern us here.
13. I rely here on the general account of human rights I have given in Miller (2007, ch. 7, 2012b). Other prominent accounts of human rights that emphasise their moral urgency include Nickel (2007) and Shue (1996).
14. There are, in any case, strong arguments to justify rich states making substantial payments to poor countries that are harbouring large numbers of refugees. 'Capacity' must feature as a relevant criterion for allocating refugees to states, and in one sense poor states may well have capacity, since they are more accessible to refugees fleeing civil wars or famines in neighbouring states. But in another sense they lack the capacity to provide,

since they are already struggling to meet the basic subsistence and other rights of their own nationals. Hence a just international refugee regime should include transfer payments even if no refugees are being physically relocated.

15. For analysis of the range of measures employed, see Gibney and Hansen (2005). For vivid descriptions of how this works in practice, see Harding (2012). For a critical appraisal, see Price (2009), ch. 6.
16. For partially but not completely overlapping accounts of what these reasonable considerations are, see Carens (2005) and Miller (2008).
17. I shall restrict the discussion to those who immigrate with the intention of becoming permanent members of the receiving society, i.e. I shall not consider temporary migrants and guest-worker programmes because these deserve a full, separate treatment for which there is not sufficient space in this article.
18. My claim is that the following argument form is invalid:
    There is a human right to X
    For some people, having Y is necessary to securing X
    Therefore, there is a human right to Y.
    Those people who need Y have a human-rights-based claim to receive it. But this is not the same as having a human right to Y. If there were such a right, then everyone would have a right to Y whether they needed it or not, and this is indefensible.
19. It is followed in Carens (2003), and at greater length in Blake (2002, 2003). I also used the argument in an earlier discussion, Miller (2007), ch. 8.
20. This is conceded by Blake in Blake (2002: 285). See also Walzer (1983: 35–51) and the discussion in Blake (2003).
21. But what should we say about a society that declares racial purity for its own sake to be one of its goals, and accordingly refuses to accept immigrants who do not belong to the favoured race (I leave aside here the question whether 'race' is a meaningful category in the first place)? First, this *is* a hypothetical case: societies that are racially discriminatory have always as a matter of fact made false empirical claims about the behavioural or moral correlates of racial identity, and they can be challenged on that ground. But if we imagine a society that simply asserts the intrinsic superiority of 'whites', say, without giving reasons, then this violates the weak cosmopolitan premise cited above, and an admission policy based on that conviction would accordingly be unjust.
22. I agree therefore with Carens when, discussing policies used by liberal states in the past to exclude immigrants on the basis of religion, he states that 'no plausible interpretation of liberal democratic principles is compatible with the exclusion of people on such grounds' (Carens, 2003: 104–105) while emphasising that the argument as stated applies only to liberal democracies.
23. See Carens (2003: 96–99) and Lister (2010).
24. C.f. Miller (2001), where I propose this way of understanding remedial responsibilities.
25. Against this, Souter (2014: 337–338) argues that reparation in the form of asylum provides *immediate* protection of rights, whereas programmes of aid and development (and the same would apply to restoration programmes of the kind discussed here) take longer to implement. This shows, however, that on-site reparation would need to be accompanied by forms of compensation to cover the victim's short-term losses if it is to be morally preferable to asylum.
26. There are of course other grounds on which one can argue that people driven from their land as a result of climate change have rights of resettlement elsewhere. For one such alternative, see Risse (2009).

27. See http://www.legion-recrute.com/en/faq.php#f4.
28. Or as the Legion's own statement puts it, 'La République peut-elle mieux témoigner sa reconnaissance qu'en offrant à ces combattants étrangers touchés dans leur chair de devenir Français à part entière?', http://www.legion-etrangere.com/modules/info_seul.php?id=165.
29. See 'Was Lumley Campaign Good for Gurkhas?' at http://www.bbc.co.uk/news/world-south-asia-13372026.
30. Though this argument has to be made with considerable care, as Kieran Oberman (2013) has shown.

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