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Text

[*963]

The act of immigration alters several forms of human relationship simultaneously. It represents a change in physical location and so alters the relationship between persons represented by geographic concepts such as territory and property. In immigrating, immigrants acquire a new place in the world that they may understand, in some sense of the word, as their own. Immigration also alters a political relationship insofar as the immigrant acquires a new political status in virtue of that new home in the world. The immigrant ought to be understood as creating through the act of immigration a new set of relationships to other persons who share the immigrant's liability to the coercive institutions of a political state. Finally, immigration represents a change in social relationships, insofar as the individual joins not simply a political society but a social world constituted by the norms and practices of a culture and a civil society. Immigrants are both entitled and obligated to engage in the practices constitutive of membership in the society that they have joined.

A full analysis of the political morality of immigration would have to deal with all three of these aspects. Immigration involves the alteration of a "place," a "polity," and a "people" simultaneously. However, philosophers have only recently begun to examine the issue of immigration, and so have not come to terms with the independent moral force each of these exerts - let alone the complex interplay of these related concepts. [*964] The notion of place in particular has been underexplored in recent discussions of immigration, which is not surprising given the scant attention paid to territoriality in political philosophy more generally. ¹ It is more surprising to find that the distinctively political aspect of immigration has similarly been undertheorized. Instead, the most common form of ethical thinking about immigration begins with a notion of social or national community and derives its conclusions from the effects of immigration on the people, rather than on any more distinctively political concepts such as democracy or justice.

² We should be slightly surprised that in immigration we tend to begin with an analysis of culture and social

¹ Mathias Risse and I have, however, written a paper applying geographic reasoning to immigration. See Michael Blake & Mathias Risse, Migration, Territoriality and Culture, in *New Waves in Applied Ethics* 153 (Jesper Ryberg et al. eds., 2007).

² See, for example, Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* 35 (1983), and Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* 125 (1995). Both argue that we can only restrict immigration by making reference to the national community the state is set up to defend.

relatedness, and only then proceed to politics; after all, in domestic political analysis, we usually proceed in the opposite direction - starting with political notions of justice and fair play, and disciplining issues of nationalism with reference to these concepts. It would be interesting to see what effect proceeding in this manner would have upon our discussions of the morality of immigration.

I have already discussed elsewhere why this is likely to be a difficult task.³ The usual methods and tools of political philosophy are hard to apply to this issue because most of these tools assume we already know the identity of the parties entitled to political equality and now want to know how to understand such equality. A central moral question for immigration - the identity of the people who are entitled to be treated as equals - is assumed rather than argued for. Those who think that all persons everywhere are entitled to treatment as political equals tend to be advocates for open borders; if the community of people to whom rights are distributed includes everyone, then restrictions on immigration are inherently unfair.⁴ Those who think that only members of the local community have a right to equal political treatment, conversely, tend to think of immigration as a matter of charity and discretion, with perhaps a few exceptions for the most needy foreigners.⁵ Both sides tend to [*965] assume away the truly interesting questions of immigration either by making the prospective immigrants already fully equal in standing to current citizens or by ruling their interests out more or less completely. Neither side has produced especially compelling answers.

In this paper, I begin the process of developing an alternative to these methods, one that will play upon the idea that being a prospective immigrant - submitting one's self to the coercive authority of a state for purposes of admission - is itself a form of political relationship. As such, the norms of equal treatment undergirding the concept of justice in politics must apply with force to those engaging in this relationship. The relationship, however, is not the same as that experienced by those who are current citizens. Prospective immigrants are not subject to the coercive control of the government in civil law, criminal law, and the like; instead, they are seeking to become subject to these legal forces and so have subjected themselves to the coercive authority of the state in that state's process of adjudication. Focusing on this fact will enable us to avoid the two extreme responses to immigration discussed above. We can begin with the idea that political equality is one expression of the more basic ideal of moral equality, while acknowledging contextual differences in how political equality is to be interpreted in distinct circumstances. We can legitimately differentiate between current citizens and prospective immigrants, based not upon the supposed greater moral importance of the former, but upon the distinct political contexts in which their claims against the state are made. On this analysis, prospective immigrants are entitled to treatment as moral equals - both to each other, and to current residents and citizens. This moral equality, however, does not demand that prospective citizens have the same panoply of political rights and duties as current citizens. In the end, we can distinguish between citizens and prospective immigrants without abandoning the ideals of moral equality that make liberalism an attractive ideal of political life.

In this paper, I aim to introduce this idea and suggest its contours. I will not examine its implications for the geographic and the nationalist aspects of immigration - the place and the people, that is.⁶ A full account of immigration, as I say above, would require independent attention to all of these aspects. However, I will not provide a full account of even [*966] the distinctively political aspects of immigration. In particular, I will ignore what is likely the most pressing issue in immigration: how we might identify that set of people whose antecedent circumstances are bad enough to warrant an independent right to immigration. In other words, I will avoid entirely any discussion of refugee or asylee status or any related status that might be introduced in a fuller account of immigrant rights. I assume, of course, that any plausible theory of immigration must have a place for such rights. The question to

³ Michael Blake, Immigration, in *A Companion to Applied Ethics* 224, 224-25 (R. G. Frey & Christopher Heath Wellman eds., 2003).

⁴ See Joseph Carens, *Aliens and Citizens: The Case for Open Borders*, 49 *Rev. of Pol.* 251, 251-52 (1987). Will Kymlicka uses similar reasons in *Multicultural Citizenship* to defend the idea that in the absence of nationalist reasoning, liberal theorists would have no moral basis for restrictions on immigration. Kymlicka, *supra* note 2, at 125.

⁵ Walzer, *supra* note 2, at 33.

⁶ I do think what I say here can have some effects upon permissible forms of national community, but I will not explore this here in any detail.

which I attend here is one that begins where such rights leave off. When no individual applicant has a right to enter a given state, and there are more prospective immigrants than the state wishes to admit, what character of reasons might be given to justify differentiating between these prospective immigrants? What rights does a state have, consistent with its self-description as liberal, to pick and choose among those who want to enter it? I have already discussed this question in relation to the ethnic and racial makeup of the society in question; where the state has a certain minority group, I claim, it is impermissibly illiberal to discriminate against prospective immigrants belonging to that group. This policy would send a message of social and political inequality to current citizens belonging to that state's population.⁷ I want here to begin the more difficult process of examining this question from the perspective of nonmembers, rather than members.

As above, I suggest that we begin to answer this question by acknowledging the moral centrality of the ideal of moral equality. To be liberal, a liberal state must acknowledge the moral importance of all persons - not simply citizens, but persons generally. To do otherwise is to place an illegitimate range restriction on the applicability of liberalism's moral guarantees, which would indeed place a notion of feudal birthright privilege back into the heart of liberal equality. The notion of moral equality, however, does not determine a unique set of political entitlements. Moral equality will demand different packages of rights and obligations in different institutional contexts. An easy example of this is found in the conventional analysis of voting rights. The French government, to consider itself liberal, must regard both French citizens and American citizens as morally equal; there can be no legitimate sense in which it is permissible to regard French people as morally superior in virtue of their citizenship. Nonetheless, the French government is entirely correct to extend voting rights in French elections only to French citizens, rather than to both French and American citizens. Nothing in this restriction offends the notion that Americans are equal in dignity to the French. **[*967]** The restriction recognizes, rather, the distinct institutional contexts in which French and American citizens are situated. French citizens, being coercively ruled by a set of French legal and political institutions, are entitled to guarantees of political equality simply inapplicable to the set of both French and American citizens. Nothing here is a denial of moral equality. The different set of political entitlements reflects the distinct implications of moral equality in distinct institutional circumstances; it respects, rather than abandons, the notion of moral egalitarianism.

I want to be clear about the moral framework I am suggesting. I am arguing that moral egalitarianism is in fact compatible with differentiated packages of rights; when people live under different institutional circumstances, it is only appropriate for us to infer different sets of mutual duties and rights. To do otherwise runs the risk of treating entities that are not alike as if they were alike - which is itself a violation of equal treatment. I do not, therefore, argue that coercion creates moral duties out of thin air; rather, I argue that when individuals face the shared web of coercion constitutive of a modern political state, they acquire distinct duties to one another in virtue of this fact - but that these duties are simply one specific form of a moral general duty to treat all individuals with equal concern and respect.⁸ State coercion must be justified specifically to those individuals coerced, and such justification may require the provision of certain institutional and material goods; in particular, I think that rights of democratic citizenship and material equality may stand as the precondition of legitimate state coercion. Only by the provision of such rights, I argue, can the ongoing fact of state coercion be transformed into the morally acceptable terms of reciprocal agreement and cooperation.

Nothing I say here, however, argues that only state coercion towards citizens stands in need of justification. Indeed, all forms of coercion require some form of justification to be understood as morally permissible. This fact will have implications in a wide variety of contexts; much of international trade and diplomacy, after all, has a distinctively coercive flavor.⁹ The point I make here is more modest and methodological: I **[*968]** argue only that each case of

⁷ Michael Blake, Discretionary Immigration, 30 Phil. Topics 273, 284 (2002).

⁸ Michael Blake, Distributive Justice, State Coercion, and Autonomy, 30 Phil. & Pub. Aff. 257, 257, 266 (2001).

⁹ This fact is emphasized by Thomas Christiano in his excellent contribution to this volume. I would note in response to him only that the analysis of state coercion I offer does not insist that such coercion is the only relationship creating specific moral duties above those of shared humanity. However, it is a form of coercion that creates special duties of political equality, so that such coercion might be - as much as possible - understood as a process of ongoing consent and cooperation. Each form of coercion,

coercion must be understood as *prima facie* morally impermissible and therefore needing justification or elimination. However, each case of coercion will give rise to different forms of justification, which in turn will give rise to distinct moral rights and duties. Not all coercion, after all, looks quite like the ongoing and pervasive power of a political state over its citizens.

A valid analysis of the morality of immigration will have to take account of these facts. Prospective immigrants ought to be regarded as having a certain highly specific institutional relationship to the state to which they seek immigration. Their relationship is distinct from that held by current citizens. For example, prospective immigrants are not yet enmeshed in the set of civil and criminal laws maintained by the state; they are under no obligation to pay taxes to that state, nor can they invoke the machinery of that state in the settlement of private disputes. As such, it would be a mistake to regard their mobility rights as being in any way comparable to those of current members. As I have said elsewhere, it is one thing to deny someone from Toronto the right to move to Boston; it is, morally speaking, quite another to deny someone from Buffalo the right to move to Boston - a conclusion which follows even if we assume citizenship to be a morally arbitrary fact of birth.

But if the relationship of prospective immigrants to the state is not that of current citizens, neither is it the relationship of foreign nationals more generally. Even if the world is sufficiently interconnected that no one is without some ties to some foreign state, prospective immigrants have a highly specific tie to a state that is not their own. Through their voluntary action, they have placed themselves within the coercive grasp of a foreign state for at least one act of adjudication. Prospective immigrants have voluntarily come to a border, whether literally or through the legal act of application, and have agreed to have the legal machinery of the state determine their application for membership. That this determination is ultimately coercive is hard to deny. As Joseph Carens notes, "Borders have guards and the guards have guns."¹⁰ Prospective immigrants have voluntarily placed themselves within the power of those guards by accepting the legitimate authority of the state to determine the result of their claims.

I take it for granted that this coercion stands in as much need of moral justification as the more standard case of state citizenship. Coercion, after all, is always *prima facie* an act in violation of moral equality; it [*969] replaces the will of an individual agent with the will of another. Coercion, then, stands in need of justification, and this justification must take the form of reasons we may provide to those who are coerced. Following Tim Scanlon, I regard the search for justification as the search for reasons we could not reasonably reject for the actions and circumstances to which we are subjected.¹¹ Our task thus becomes that of finding reasons we can give to prospective immigrants to justify the coercive threats they face in the course of applying for entry.

We begin with the idea of consent. To the extent that prospective immigrants have voluntarily accepted the coercive regime to which they are subject, that regime might be viewed as justified through their giving of consent. This would seem to give some reason we might cite in showing that prospective immigrants have no right to regard the use of force to exclude them as illegitimate. We might further note that in seeking admission to the state, prospective immigrants are asking for a benefit to which they are not, by hypothesis, already entitled. We must remember that we are not dealing with a claim by a refugee or someone whose antecedent conditions would make admission morally pressing. Prospective immigrants who cross the border without permission seek to acquire something to which they have no right - whether this thing is understood in terms of place, polity, or people. As such, the state exercising coercion may justify itself with reference to the legitimacy of coercive force in the prevention of unjust acquisition. The state may legitimately defend itself against those who seek a good to which they have no right, and the prospective immigrant here would seem to have no cause to complain.¹²

however, demands its own form of justification and thus gives rise to its own set of rights and duties. See Thomas Christiano, Immigration, Political Community, and Cosmopolitanism, [45 San Diego L. Rev. 933, 940 \(2008\)](#).

¹⁰ Carens, *supra* note 4, at 251.

¹¹ T. M. Scanlon, What We Owe to Each Other 21, 45 (1998).

¹² Arash Abizadeh has impressed upon me the idea that state coercion holds even upon those who do not perform the actions invoking such coercion - just as the domestic law against murder might be thought to coerce even a peaceful citizen who would never dream of harming another person. If this is so, then why does the coercion of the border here not extend to all persons in

[*970] One must remember that in the cases we are examining, admission to citizenship is a discretionary benefit. However, it is also important to remember that political justice requires equal treatment for all of those people who share the same institutional relationship to the state. The just state may not treat people who are similarly situated, as regards the state, in a manner demonstrating an illegitimate moral contempt for some subset of that group. The set of prospective immigrants does not have the same rights as the set of current members before the state; however, prospective immigrants do have certain rights to be treated as equal to one another in determining what benefits they receive. We should also remember that these conclusions continue even if what the state is providing is a purely discretionary good, which the government might legitimately decide to extend to no one. That is, political equality can be violated by unequal provision even of those things no one has a moral right to receive. We see this easily in the domestic context; a state which gave new cars to all and only white men would be guilty of racial discrimination even if it had no duty to give cars to anyone. Those who did not receive such cars would quite rightly complain that no valid principle could ground such a discriminatory form of distribution. Their complaint would not be mollified by the response that the state, in giving cars, was providing a benefit it had no obligation to provide to anyone. The complaint, instead, looked to the idea that a valid reason - a reason that could not be reasonably rejected - must be provided to justify the distribution of any good provided by a political and coercive entity such as a state. Such a reason would have to treat all of those members of the society as moral equals, rather than treating some members as simply more deserving or better individuals than others.

This fact might be the beginning of our understanding of the rights of prospective immigrants. The mere fact that they are seeking a benefit to which they are not entitled, and so have voluntarily placed themselves within a political and coercive relationship in the pursuit of this benefit, does not mean that the state in question has a right to use that coercive power in any manner it might choose. Instead, if we take the relationship of prospective immigrants as a *sui generis* form of political relationship, we arrive at the conclusion that a just state has an obligation to treat such prospective immigrants as equal to one another, in virtue of the more general obligation such states, in their exercises of coercive power, have to treat individuals as moral equals. The state does not have the obligation to treat such prospective immigrants as political equals to current citizens; for instance, it is not illegitimate to refuse prospective immigrants **[*971]** rights to vote or to invoke the civil law prior to their admission to the status of immigrant. The distinct institutional circumstances of citizens and prospective immigrants mean that nothing in that treatment will violate moral equality. But the state surely does violate its duties when it treats prospective immigrants as morally unequal to one another. The reasons it gives for distinguishing among such immigrants, that is, must be reasons that could not be reasonably refused even by those whose claim to admission is denied. On this model, the state has a general right to keep out prospective immigrants; egalitarianism does not demand open borders. But when the state selects only some prospective immigrants for admission, it must rely upon reasons that reflect the moral equality of all prospective immigrants - reasons that ought to be accepted in the end even by those excluded. This is all that political equality among prospective immigrants ought to demand.

What would this mean in practice? It is helpful to examine here more closely the idea of having reasons that we could not reasonably reject. If they are to meet this test, the reasons we give to persons must take their interests seriously as separate and inviolable moral persons. What this would mean is always difficult to determine with any degree of specificity. It will always depend upon the specific institutional context in which the guarantee of equality is to be applied. The justification of state actions to current citizens, for example, may require quite a thick package of rights and duties, including some guarantees of material equality. What is required in the context of prospective immigrants, by contrast, will be more simple, given that what is to be justified to equal persons is not an entire set of

the world, rather than to only those who seek admission? I would note, in response, that border coercion does in fact hold against all persons - and is justified, in general, by the fact that the person who seeks to immigrate without right is taking a benefit to which he is not entitled. The coercive threat, here, is justified through the very procedural means of citing the unjustified nature of the border crossing imagined. Thus, I am indeed coerced by the immigration policies of Guatemala - even though I have no particular desire to go there - because of the coercive threat of violence if I were to choose to cross Guatemalan borders. Such a coercive threat, however, is justified simply by virtue of the fact that I would be joining Guatemalan society without permission were I to enter Guatemala without submitting to Guatemalan legal authority for adjudication. Once again, all this holds only in those cases in which I have no antecedent moral right to enter another country; the analysis here would change significantly were Guatemala not morally permitted to use force to exclude me from entering its territory. I am grateful to Abizadeh for discussion of this point.

coercive political institutions, but a single coercive decision regarding admission. What we seek here are not the political guarantees of equal citizenship but the more thin forms of equal treatment appropriate to this context. Thus, the justification must be of a character that takes seriously the moral equality of persons and that could be accepted by those to whom it is addressed without requiring them to agree to their own moral inequality.

There are several principles that states use to differentiate between prospective immigrants that could meet this test. In what follows, I want to describe two potential principles of differentiation that might be acceptable - and one that definitely would not. The two principles I describe are principles commonly cited by states in defense of their policies and so might be thought to be relatively friendly to the exclusionary policies of current governments. As I will explain at the end, this impression is [*972] only partly correct; for these principles to be justly used to differentiate between prospective immigrants, certain factual conditions must hold true, and it is not clear how often this will be the case. As such, defenders of closed borders may find less comfort here than they might originally have expected.

Thus, we seek categories of reasons in justification of coercion that might be accepted by those who are coerced, where such reasons respect the ideal of moral equality. As such, the reasons must reflect concerns that can be expected to resonate with all parties to the interaction, rather than relying either covertly or overtly upon the diminished moral status of some portion of the population. Two categories might be introduced here, although I think they are likely far from exhaustive. They both have to do with the preconditions of success as a democratic community, which we may assume reflect a set of considerations whose importance we regard as sufficient to motivate a legitimate distinction between prospective immigrants. The first category is "economic success." To some greater or lesser degree, all states do privilege scarce job skills in the selection of immigrants. It is difficult to regard this as objectionable from the standpoint of social justice - bearing in mind, as above, that we are discussing here only individuals with no individual right to status as immigrant. If a state seeks to distinguish between two individuals, neither of whom has any title to entry, based upon how much each immigrant is able to provide for the economic health of the society in question, it is hard to see how this principle offends the normative equality between persons we endorse. The moral equality of persons, after all, requires us to give reasons to people that they could not reasonably reject; it rules out reasons that demand the moral denigration of some segment of the population in question. Moral equality does not, however, demand that we refuse to make distinctions based upon genuinely relevant considerations. Economic success ought to be recognized as at least a potentially legitimate subject for government policy; after all, the development of a competitive economy with a sufficient tax base is one of the most central policy imperatives of any society. As such, it seems that we can legitimately distinguish between prospective immigrants based upon this category without worrying that reliance upon this category implies an abandonment of moral equality.

There are, of course, some deep moral worries about even this category. It might be thought that using such justifications is itself morally problematic, in that it simply accepts as part of the moral world facts that are themselves subject to moral analysis. Imagine, for example, that women tend to be less well-educated than men as a result of ongoing gender hierarchy or institutional sexism in many foreign societies. To prefer the well-educated in this context is to give privilege to those who [*973] have already gained benefits from an unjust social system - and to punish those who have already been treated unjustly. This problem is exacerbated when the injustice is one in which the society accepting immigrants has been complicit; if persistent underdevelopment is even partly the result of the unjust foreign policy and practices of our own state, then it seems rather unjust to refuse admission to prospective immigrants on the basis that they have not acquired an adequate level of skills.¹³

These facts, however, may not be sufficient to overcome the legitimacy of the preference for skilled immigrants. There are at least two things that might be noted in response. The first, and less important, is that the causal story here is subject to much dispute; it is not always clear exactly who is responsible for underdevelopment, so any

¹³ This worry has been impressed upon me by Lori Watson - whose commentary provides an excellent development of these ideas - and Rogers Smith. See Lori Watson, *Equal Justice: Comment on Michael Blake's Immigration and Political Equality*, [45 San Diego L. Rev. 981, 984-85 \(2008\)](#).

particular story about blame is likely to be contentious and subject to troublesome empirical counterexamples.¹⁴ The second, and more important point, is that it is not clear that recognizing these facts produces a duty to permit immigration, rather than a duty to alleviate international poverty and injustice more generally. After all, the morality of immigration does not exhaust international morality. Where injustice exists - and especially where our society has had a historical role in perpetuating it - we have a duty to effectuate institutional change so as to overcome that injustice. Nothing in this, however, requires us to think of entry into our society as the favored institutional response. The following analogy might be helpful: I contemplate hiring you as my surgeon but carelessly burn your hand with coffee as I walk into your office. It is clear that I owe you something - compensation for your unjustly burned hand, at least - but it is not clear that I have any obligation to let you continue acting as my surgeon. However unjust it may be, you simply do not have the skills required to do the job. If this is so - and if no particular surgeon has a right to act as my surgeon - then my moral duties do not include a general prohibition on taking skills into account in choosing a surgeon, a fact which remains true even when the skill sets are the result of injustice.¹⁵ Something similar must [*974] hold true internationally as well; the foreign poor have a great many moral rights that are currently being ignored, but it is not clear to me that a right to entry into a foreign society is one of them.

A second category, also much employed by current states, is that of "political integration." Given that democratic life requires not simply democratic institutions, but also individuals willing and able to engage in democratic political deliberation, it seems difficult to deny that states may have a legitimate preference for those who are more able to engage in the activities constituting political engagement. These abilities include skills such as language competence, political sophistication, and perhaps a demonstrated affinity for democratic practice. Again, it should be emphasized that nothing here would be legitimate as a way of defeating an independent claim made on behalf of a refugee or asylee. As applied within the pool of prospective discretionary immigrants, however, it seems entirely plausible to suggest that distinguishing based upon traits such as these does not betray moral contempt or inequality. For prospective immigrants to be politically equal to one another, we must only arrive at reasons that ought to motivate all members of the pool of prospective immigrants; it is difficult to deny that the continued functioning of the democratic community constitutes a reason of this character.

There are, of course, some significant questions about this pattern of reasoning. The most important is how far the notion of "continued functioning" can be pressed. We might imagine, for example, a society that takes itself as having a particular mission - the preservation of a certain kind of music, to pick an example less fraught with historical problems.¹⁶ If a given pattern of immigration would make the success of that mission less likely, can we legitimately use the reasoning discussed here to restrict such immigration? Could a society of individuals who love classical music seek to exclude all those who enjoy acid jazz?

The answer here is likely no - at least not without some additional arguments I think are likely to ultimately fail. The pattern of argument suggested above looks for a basis of adjudication that is uncontroversial in that it relies upon interests and desires all persons could be expected to recognize. The continued functioning of democratic society is clearly a case of this. Once we distinguish between the continued existence of a democratic society and the continuation of a particular character of that society, things become more controversial. What the classical music lovers want is not simply a democratic society but a society in which democratic institutions defend certain specific forms of music. Were immigration to increase from acid jazz loving nations, it seems likely [*975] that what would happen is not the collapse of democratic governance but rather the alteration of what specific forms of music are to be found within the society so governed. To defend a particular character of society is much more controversial; it borrows much from the idea that each state has a national or racial identity whose preservation is a legitimate ground for immigration policy. In this paper, I want to avoid grounding immigration decisions on this sort of consideration. Therefore, we must stick with a more restrictive vision of democratic life as a basis for immigrant policy. We must show that a given set of immigrants is not willing to play the game of democratic governance - and

¹⁴ See Mathias Risse, Do We Owe the Global Poor Assistance or Rectification?, 19 Ethics & Int'l Aff. 9, 13 (2005).

¹⁵ This analogy is due to Larry Alexander, who suggested this line of response to me.

¹⁶ This example is due to Steve Smith.

not simply that such immigrants are likely to alter the nature of the social goods such a democratic society might pursue.

The above two reasons seem to give us some tools with which to justify principles by which prospective immigrants might be excluded. It is beneficial, by contrast, to consider some reasons that would fail the tests discussed here. Chief among these is the simple denial of moral equality between members of the pool of prospective immigrants. A policy that begins with the premise that certain forms of individuals are simply better than others is a policy that could not even begin to pass the tests demanded by the concept of political equality. It is rare to find a policy that simply and boldly asserts the superiority of one category of person over another - although some historical examples have come quite close. Here, we may cite the White Australia policy,¹⁷ the pre-1990 policy in which homosexuality was a valid ground for exclusion from the United States,¹⁸ and Justice Brewer's implicit justification of an anti-immigrant statute as legitimately held against the "obnoxious Chinese."¹⁹ It is difficult to describe any of these policies without understanding them as a simple statement of the superiority of one form of person over another. As such, using these reasons to differentiate between prospective immigrants [*976] would be morally impermissible; to accept these reasons would require parts of the pool of prospective immigrants to accept their own subordinate moral status.

At this point, however, we arrive at a bit of a difficulty because there is no bright line between policies of exclusion that look like the acceptable ones described above, and policies that look more like a simple case of racial or ethnic hierarchy. In the first instance, the message of any particular form of policy is always subject to interpretation - and, in the context of immigration, frequently subject to interpretation by more than one cultural framework. It is difficult to get any agreement here on whether a given piece of policy unjustly privileges one group or justly differentiates based upon neutral reasons. More difficult is the fact that even the most racially hateful forms of differentiation can often be dressed up and justified with reference to apparently neutral principles.²⁰ Even the most gutter forms of racism can be given a veneer of legitimacy with the application of arguments to the effect that some group of prospective immigrants will necessarily be a drag on the public purse or cannot be relied upon to participate in democratic life.²¹

How then can we distinguish the legitimate from the illegitimate forms of the exclusionary principle? The most important thing to note here - and the aspect of my argument which will provide more comfort to the advocates of immigration than to their opponents - is that all the reasons given above must, in the end, be factually valid before they are morally valid. In order for a reason to function as sufficient to justify coercion to all parties, it has to have a sufficient empirical basis to ground the distinction's legitimacy. This is an underexplored aspect of contractarian methodology; the reasons we cannot reasonably reject have this character, in part, because of their empirical plausibility. In other words, factual truth has moral relevance in the process of reason-giving. If a given justification cannot be shown to have empirical validity, then those who are affected by that justification can reasonably reject its application. Here, a claim without sufficient factual justification - for example, that members of my group are inadequate democratic participants - is a claim that can be rejected in virtue of its falsity. As such, those who treat

¹⁷ For a discussion of this policy, see Carlos Scott Lopez, Australian Immigration Policy at the Centenary: The Quest for Control, [18 Geo. Immigr. L.J. 1, 17-21 \(2003\)](#).

¹⁸ The law was formally changed in 1990 but had been only rarely invoked prior to that. See Barbara Vobejda, Broad Immigration Changes Approved, Wash. Post, Oct. 28, 1990, at A1; Shannon Minter, Sodomy and Public Morality Offenses Under U.S. Immigration Law: Penalizing Lesbian and Gay Identity, [26 Cornell Int'l L.J. 771, 778-79 \(1993\)](#).

¹⁹ It is true this statute is directed only against the obnoxious Chinese; but if the power exists, who shall say it will not be exercised to-morrow against other classes and other people?" **Fong Yue Ting v. United States**, 149 U.S. 698, 743 (1893) (Brewer, J., dissenting).

²⁰ See Michael Dummett, On Immigration and Refugees 62-63 (2001), for a defense of this claim.

²¹ A much more vexing case - and one I cannot adequately explore here - is the possible existence of a form of justification that is simultaneously demeaning and true. I am grateful to Alan Patten for raising this possibility, even though I can here only acknowledge the possibility of such cases.

me as unequal to my fellow prospective immigrants based upon this reason do me an injustice. Here, I am being treated as less than morally equal, insofar as the reasons I face for my [*977] exclusion are not reasons I can be justifiably expected to endorse. I am, instead, subject to a simple case of illegitimate and invidious distinction; the fact that the distinction has been justified with reference to a (false) empirical generalization does not remove the taint of injustice.

What this means in the end is that political equality may constrain our ability as a state to exclude prospective immigrants. More precisely, we may have a limited ability to give principles justifying the different treatments we propose to give different parts of the pool of prospective immigrants. Even those prospective immigrants who have no independent claim to admission, and who are not by definition current citizens of the state in question, may make claims of justice against the application of certain principles. Their claim must be to treatment as equals in the political context of the pool of prospective applicants. This claim, in turn, means that the country to which they are applying has duties to justify its exclusionary acts in certain specific ways. It may differentiate between persons only when sufficient evidence exists to motivate the distinction; evidence, that is, that the reasonable agent could be expected to interpret as factually sufficient to justify a difference in political treatment. This result does not give prospective immigrants the right to open borders; policies might be imagined that can meet this test. It does mean, however, that prospective immigrants may make claims in justice against the state in virtue of the character of reasons they face for their exclusion. Prospective immigrants are neither politically nor morally nonentities. They do not have the same rights as current citizens, but they do have the right to complain when policies excluding them are not empirically valid. As such, states cannot distinguish between prospective immigrants as they see fit, even when such immigrants do not have independent claims to entry.

This leads to some rather surprising results. It seems that prospective immigrants may have stronger rights to have good evidence used in justification of laws than current members of society. In ordinary democratic life, after all, we are generally entitled to make our own mistakes, rely upon faulty evidence, and choose economically disastrous policy for ourselves; so long as we do not violate moral rights or procedural safeguards, we are generally permitted to be as foolish as we want. Why then do prospective immigrants have rights to factual showings greater than those held by democratic insiders?

The response goes to the very nature of the democratic project. In this case, we are entitled to make our own mistakes in large part because [*978] we - as a community - will be governed by the law created. So long as what we do is compatible with substantive and procedural justice, we are able to pursue foolish policies because we are the ones who choose such foolish policies for ourselves. I have suggested earlier that the goal of democratic life is the transformation of coercive law into something that is reciprocally justified through the ongoing process of consent and participation. This transformation gives us the moral right to rely upon faulty reasoning in political life. It is precisely because the prospective immigrant is not yet part of this community that he has a greater right to have accurate factual information given to him. Such an immigrant is not yet part of the group of people making laws together, but only seeks to become so. In the single decision that constitutes the acceptance or refusal of this desire, he has a right to a standard of evidence greater than that applicable to domestic adjudication. I do not claim that there could be any legal way of instantiating this moral requirement; we could imagine the creation of an instrument guaranteeing the legal right to such a showing of evidence, but such an instrument is both hypothetical and deeply unlikely to be forthcoming. I claim only that immigrants may be entitled to a greater showing of factual evidence than that applicable domestically. Their status as nonparticipants in the system excludes them from certain moral rights as regards government policy; if what I say here is correct, though, it may also create distinct political rights as well. ²²

²² Another possibility, of course, is to include such individuals within the democratic process by creating new forms of political institutions. We might imagine here that democratic decisions regarding immigration could be made jointly by those who are currently citizens and those who are prospective immigrants. I think, however, that such institutions are both unlikely to come into existence and would be theoretically unmotivated if it is possible for us to articulate moral standards that are sufficient to protect the interests and moral rights of prospective immigrants. Such moral standards might not be adequately protected by current political practices, but our task in the present context is the discussion of moral rights, prior to the discussion of

I would conclude only with an acknowledgment of how incomplete the answer given here really is. It is incomplete because, to apply it in practice, we would have to know what the standard is for empirical adequacy. Given that social science is rarely as precise or as unanimous as we would like, it seems unjust to demand that the state can only be justified if it has a perfect factual basis for its actions. I cannot defend the conclusion, but I suspect that something like the preponderance of the evidence might be usefully employed as a standard here for what factual showings the state must make. I would note, further, that the answer I have given here is incomplete also in that it does not address [*979] what forms of antecedent circumstances might give rise to a claim for immigration rights; as I have already mentioned, this form of inquiry may be the more important one, given the highly imperfect and unjust world in which we live. The answer is incomplete, finally, in that it does not engage with immigration as a phenomenon involving geography and nationalism - with, as I have said, the place and the people. A fuller account of immigration would involve making sense of all three of these alterations as well as their interrelationships.

Nonetheless, I hope what I have done here is a useful first step. What I hope to have shown is that immigration can be discussed from the standpoint of political justice without reducing immigration either to charity or to a human right. By paying closer attention to the distinct political status of prospective immigrants, we may have arrived at a conclusion in which such individuals are able to make claims of justice against the state - but in which such claims of justice are distinct from those that might be made by current citizens. This methodology, however rough, represents a potentially fruitful beginning for the analysis of the political ethics of immigration.

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institutional responses necessary for the efficient defense of such rights. I am grateful to Arash Abizadeh for discussion of these issues.