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Immigration, Jurisdiction, and Exclusion

When states assert the right to exclude unwanted would-be immigrants, they are asserting a right to use coercive force. Those who attempt to cross the borders of the state will be met with violence; borders have guards, after all, and these guards have guns.[1] That these facts are rarely questioned in our world does not mean that they are not morally exceptional. Those who propose to use violence must justify to others, in a manner that respects the moral equality of all, why they have a right to do so.[2] If the state demands the right to use coercive force in repelling would-be immigrants, it has to justify its right to do so.

Some theorists have argued that the state cannot justify this right.[3] On this view, the purported right to exclude is unjustifiable; the just state cannot, consistent with its liberalism, exclude those who want to enter.

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1. For this phrasing I am indebted to Joseph Carens. See Joseph Carens, "Aliens and Citizens: The Case for Open Borders," *Review of Politics* 49 (1987): 251.

2. David Miller, in contrast, has asserted that the uses of force by the state amount to mere constraints on freedom rather than coercive force. I do not think this distinction is quite enough to allow us to release the state from the burden of justifying its uses of force. Those who propose to use the threat of violence are under a standing obligation to justify that threat, whether or not we regard all such threats as equivalent in scope to the ongoing coercion of a territorial state. David Miller, "Why Immigration Controls Are Not Coercive: A Reply to Arash Abizadeh," *Political Theory* 38 (2010): 111–20.

3. See Carens, "Aliens and Citizens"; Arash Abizadeh, "Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Border," *Political Theory* 36 (2008): 37–65; and Michael Huemer, "Is There a Right to Immigrate?" *Social Theory and Practice* 36 (2010): 429–61.

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I believe these arguments are mistaken, but I will not directly engage with them in the present context. In what follows, I want to present a novel argument in defense of the state's right to exclude unwanted would-be immigrants. On this argument, what is crucial in the right to exclude is the fact that the state is a territorial and a legal community, where that territory marks out a jurisdiction within which that state's laws are effective. This means that one who crosses into a jurisdiction places the inhabitants of that territory under an obligation to extend legal protection to that immigrant's basic rights. This obligation, however, limits the freedom of the current inhabitants of that jurisdiction, and as such these current inhabitants are licensed in using force in preventing the entry into that territory of unwanted migrants. This right to exclude, however, is not a trump against the rights of all would-be immigrants; these immigrants have rights to the circumstances under which their basic human rights are protected. As such, there will be many circumstances under which the liberal state is not permitted to exclude unwanted would-be immigrants, since liberalism obliges the inhabitants of that state to enter into a legal relationship with these prospective immigrants. The right to exclude, I suggest, exists, but cannot justify anything like the exclusionary practices undertaken by modern wealthy states.

I will try to make this argument in four steps. In the first, I will differentiate what I argue here from more common approaches to the right to exclude. In the second, I will attempt to develop a particular methodology to the right to exclude, in which this right is derivable from the structure of human rights protection under international law. In the third, I will seek to demonstrate how this methodology can defend a pro tanto right to exclude would-be immigrants and the right to use some forms of force in defense of this right. In the final section, I will examine two arguments against this right: the argument from federalism and the argument from oppression. These arguments, I will argue, are not sufficient to disprove the jurisdictional theory of immigration—but they are, I believe, sufficient to demonstrate that the jurisdictional theory will be unable to legitimate the sorts of exclusionary practices undertaken by states today.

We can start, therefore, with contemporary defenses of the right to exclude. Many of these defenses begin with the idea that a world in which states do not have the right to exclude would be a markedly worse world than one in which states did have this right. These defenses, then,

derive the right to exclude from the promotion of a particular good; we are right to exclude unwanted would-be immigrants, because we want to build a social world in which some goods are allowed to flourish. These goods, in turn, are described in terms of the relationships fostered by a state that asserts the right to exclude: we seek a social world that permits the cultural production of meaning, or the creation of social trust and solidarity, or cultural stability—and only the exclusion of nonmembers can allow the promotion of these goods.[4] The right to exclude, on this analysis, emerges from the right to promote the development of those goods important for human flourishing; if free movement of persons would interfere with the promotion of these goods, then humans have no right to free movement.

These defenses of the right to exclude have some common failings. They are, first, committed to the thesis that the relevant relationships conducive to these goods are all found inside the legal state. This is rarely, if ever, true; there is no cultural group that is found entirely within one state, and there is no state that has only one cultural group within its jurisdiction. The supposed right to exclude from the state, then, is poorly served by a justification that looks to cultural relationships within it.[5] More often, a cultural justification for the right to exclude amounts to little more than a political declaration that some cultures—or, indeed, some races—are more desirable, more worthy, than others. This declaration, in turn, is entirely antithetical to liberal egalitarianism; we cannot ground the right to exclude in a declaration that some people are worth more than others.[6]

These defenses, moreover, derive a right from a purported interest; and, even if that interest were genuine and morally defensible, it is never entirely clear how the equation between interests and rights is meant to work. From the fact that we have an interest in a particular set of policies, we cannot infer that we have a right to it—particularly if other people

4. These ideas are found in, respectively, Michael Walzer, *Spheres of Justice* (New York: Basic Books, 1983); David Miller, *On Nationality* (Oxford: Oxford University Press, 1997); and Will Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1995). For a related view, see Sarah Song, "The Boundary Problem in Democratic Theory: Why the Demos Should Be Bounded by the State," *International Theory* 4 (2012): 39–68.

5. See Carens, "Aliens and Citizens."

6. See, on this, Michael Blake, "Immigration and Political Equality," *San Diego Law Review* 45 (2008): 963–80.

may have interests, or even rights, in the absence of those policies. Phillip Cole has argued convincingly that we are wrong to think that we can simply declare that our interests in a particular form of life are sufficient to give us a right to that form of life. Other people, after all, have rights too, and we cannot take our interest in a particular sort of community as a sufficient reason to legitimate force against others.[7] Martin Chamorro, finally, has argued that even if we were genuinely interested in promoting a particular form of life, we would be unable to justify using violent means to do so, if there were other means by which this good might be promoted; as such, we may not have a right to use violence against would-be immigrants, if—as seems likely—there are means by which community might be created in even a fully open world.[8]

Comparatively fewer theorists have sought to defend the right to exclude on deontic grounds—grounds, that is, that begin with rights rather than interests. The most prominent recent thinker to develop a deontic account of the right to exclude is Christopher Heath Wellman, who has argued that the right to freedom of association demands that states have something like an unlimited right to exclude unwanted would-be immigrants. The argument, in brief, is that individuals have a right to avoid having to associate with those with whom they do not want to associate; this right is held by collectives, as well as by individuals; and, therefore, the inhabitants of a state may exclude those with whom they have no inclination to associate. The right on the part of the state is, here, derivable from a right on the part of the citizens. These citizens—and the state—may have extensive duties of international aid and assistance, but they are under no obligation to allow unwanted foreigners to become members, and may therefore use violent force against those who want to enter into the state's territory.[9]

Wellman's argument is a step forward, in that the right he defends begins with deontic considerations rather than mere interests; it is not, however, without its problems. In the first instance, it is not clear that the right to freedom of association is quite such a strong right as Wellman

7. Phillip Cole, *Philosophies of Exclusion* (Edinburgh: Edinburgh University Press, 2001).

8. See Martin Chamorro, "A Theory of Just Immigration Policy," PhD dissertation, University of Colorado, Boulder.

9. Christopher Heath Wellman, "Immigration and Freedom of Association," *Ethics* 119 (2008): 109–41; Christopher Heath Wellman and Phillip Cole, *Debating the Ethics of Immigration: Is There a Right to Exclude?* (Oxford: Oxford University Press, 2011).

takes it to be. We regularly weigh this right against the competing rights of others in domestic policy, as we do with antidiscrimination law; the right to freedom of association does not always outweigh such competing considerations domestically, and it is hard to see why it should therefore outweigh them in considerations of immigration.[10] The second issue is that Wellman takes the source of the right to be the relations of people in civil society; what matters is that people do not want to deal with one another in public life, to see one another in markets and in churches. This vision makes the fact that people are bound together by politics a merely incidental fact. Individuals have the right to develop a particular picture of what they want their civil society to look like, and then to employ politics to defend that picture. This, to my mind, ignores what is distinctive about a political community, namely, that it *is* a political community, bound together by ties of law and politics rather than simply by the shared understandings of its inhabitants. Wellman's vision might be more appropriate if we were excluding people from a social reality constituted by the mental states of its members—if, for example, we were excluding people from a society of people gathered together out of a shared love of knitting (for, presumably, not loving knitting with adequate fervor). What is striking about politics, though, is that it applies to the members of a given jurisdiction regardless of what happens to be in those members' heads. Wellman's analysis, while powerful, reduces politics to an accidental aspect of what is shared in a society; such a reduction, on my view, is a reason to regard Wellman's account as flawed.

We ought, instead, to examine shared liability to that legal and political society as the grounds of any purported right to exclude. I want, therefore, to begin with *legal* community as the grounds for any such right: with facts that are not in the head, so to speak, but on the ground—facts of shared legal liability and obligation. This idea has been comparatively underdeveloped in discussions of immigration.[11] It is, however, an

10. Michael Blake, "Immigration, Association, and Anti-Discrimination," *Ethics* 122 (2012).

11. One exception to this rule has been Ryan Pevnick, who has argued that the right to exclude emerges from the shared ownership of political institutions by the members of that political community. Pevnick's argument is an important one, and I agree with him about the need to take political institutions as central in justifying the right to exclude; I disagree with him, however, about the need to understand this right as grounded in historically

important fact about states, one we ought to remember in our analyses: the state is a political institution, with a limited jurisdiction. Whatever else a state may be—a site for a culture, a particular sort of self-understanding, a particular historical project—it is at its heart a *jurisdictional* project, in that it is defined with reference to a particular sort of power held over a particular sort of place. If the state has a right to exclude, and has it in virtue of being a state, it must have it in virtue of its jurisdictional aspect, the rights it has simply in virtue of existing as a state. If a state has this right, of course, it could always choose to exercise it in the defense of other goods, perhaps the promotion of a culture, say, or respect for the associative wishes of its member. The first question, though, is whether or not such a right exists.

What I want to do now is to see whether or not such a right might be derived simply in virtue of the state's jurisdictional nature. I want, that is, to start with states as they are, understood in their most foundational legal terms, and then to see what in this package of legal rights might be used to ground a right to exclude unwanted would-be immigrants. The idea here is to describe a state in its most basic terms, those without which we would not describe the thing in question as a state at all, and then to see what in this image could be used to develop the right to exclude. I understand this method as something akin to that developed by Robert Nozick to justify the state; on Nozick's account, we ought to develop the most favored account of a nonpolitical situation, and to see what in that situation would lead to the emergence of a legitimate political state. Nozick's idea is to justify the state through this process, by showing it as an emergent property of the most favored nonpolitical situation; if we had reason to leave the state of nature, on this account, then we have reason to be reconciled to at least some forms of political

based *property* rights. Pevnick's account argues that those who have in the past labored to create a political community have property rights over the institutions of that community, and can therefore exclude outsiders. I do not, however, think that we need to make such appeals to the past, nor do I believe that those who have engaged in such labor are more entitled to exclude than newcomers or those who have been unable to engage in the sorts of labor Pevnick imagines. On my view, we ought to focus on currently existing relationships of politics rather than on the historical story of how such relationships came to be. See Ryan Pevnick, *Immigration and the Constraints of Justice* (Oxford: Oxford University Press, 2011).

organization in the here and now.[12] My own argument is not so ambitious. I take for granted that states exist, and that they have certain characteristics without which we would not describe them as states—but *not*, of course, that they have any right to exclude. I want then to ask what, in these characteristics, might be invoked as the ground for a collective right to refuse would-be immigrants. If the right to exclude can be shown to emerge from the materials thus given, we may have some reason to think that a deontic right to exclude can be defended.

We have, in this, some advantages; international law, in particular, has given us some materials that can be used to define what it means to be a state. The Montevideo Convention of 1934 is most commonly cited, and describes a state as having four aspects: a permanent population, a defined territory, a government, and the capacity to enter into relations with other states.[13] The final test need not concern us at present; the first three, however, do. The idea is that a state cannot exist without the simultaneous existence of three things: a government capable of exerting its coercive control; a particular part of the world's surface over which that control is exerted; and a particular group of people over whom that control is exercised. This last is intended, of course, to eliminate from consideration the uninhabited or uninhabitable parts of the world's surface from consideration; Antarctica is not a state, and (barring rather extreme climate change) will never be one. For our purposes, what we ought to take seriously is the idea that a state is constituted by effective jurisdiction over a particular part of the world's territory. This jurisdictional principle seems to be foundational, even to the writers of the Montevideo Convention; this document specifies that all inhabitants within a territorial jurisdiction, foreigner and national alike, must be "under the same protection of the law."[14] A state, on this analysis, at its foundation comprises a set of institutions that are able to effectively rule over all individuals who happen to find themselves within a particular territorial jurisdiction.[15]

12. Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974).

13. Montevideo Convention on the Rights and Duties of States, <http://www.cfr.org/sovereignty/montevideo-convention-rights-duties-states/p15897>.

14. Montevideo Convention, Article IX.

15. States also claim jurisdiction over their own citizens as well when those individuals travel abroad; they claim the right to defend the rights of those citizens when those individuals are threatened. This complication, however important in practice, can be ignored

We can take this image as our starting point in our analysis of the right to exclude. On this analysis, states exist wherever there is an effective government able to exert political and legal control over a particular jurisdiction. This analysis does not include the right to exclude, since that is what we are trying to derive. It only includes the existence of the territorial state, and there seems to be nothing illegitimate about this assumption. Indeed, it seems to me that the very question of immigration itself makes sense only where this assumption holds true; if the world contained only one government, ruling over all habitable land, the concept of the immigrant would seem to be inapplicable.

So: we assume that states have the indicia that make them states. We can also assume that humans have the rights they do in virtue of being human. Here, I want to be very careful about what I am not saying; I do not think we have yet any particular final answer about what human rights ought to be legally defended. Scholars and practitioners will continue to disagree about which rights we have reason to regard as universal.[16] All this is perhaps acceptable to gloss over, though, because what I want to explore more than the substance of human rights is its structure. Although human rights are defined as those rights that are held by humans in virtue of being human, this does not entail that all human rights are equally pressed against all human institutions at all times. Human rights, in a world split into distinct jurisdictions, impose distinct obligations on distinct political communities. In particular, we may invoke the standard tripartite distinction of obligations under human rights, to *respect*, to *protect*, and to *fulfill*.[17] These three sorts of obligations call upon states to act in different ways toward different persons. States are under an obligation to *respect* human rights, to begin

in the present context. That there is more than one way of establishing jurisdictional authority does not diminish the fact that those who cross territorial borders impose new obligations on others in virtue of their crossing.

16. A few answers to these questions: William Talbott, *Which Rights Should Be Universal?* (Oxford: Oxford University Press, 2005); Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton, N.J.: Princeton University Press, 2003); Charles Beitz, *The Idea of Human Rights* (Princeton, N.J.: Princeton University Press, 2001).

17. For a historical introduction to the development of this trichotomy, see Ida Elisabeth Koch, "Dichotomies, Trichotomies, or Waves of Duties?" *Human Rights Law Review* 12 (2012): 81–103.

with, in a global sense; the legitimate state cannot act so as to violate the human rights of others, whether those others are within its territorial jurisdiction or not. States are under a further obligation, though, to *protect* the human rights of those persons who are within its territorial jurisdiction. This means that the individuals within that jurisdiction have the right, against that particular state, to have their human rights defended and protected. This project of protection, of course, demands the creation of novel forms of political institutions with the standing ability to offer concrete defenses of these rights and act to vindicate them when they are violated. This demand is understood as the obligation to *fulfill* the human rights of those persons present within the jurisdiction of the state.

What I want to emphasize, in this context, is that, while the first demand is universal, the second two are emphatically local. The state is under a universal demand to avoid violating human rights, that is, whether the violation occurs within its jurisdiction or not. But the state is under no correspondingly universal obligation to protect or fulfill the rights of humans qua humans. The state is instead obliged to protect and fulfill the rights of only some humans, namely, those who happen to be present within its territorial jurisdiction. This limitation does not seem by itself to run up against the liberal demand for the equality of persons; it is instead the means by which that equality is to be made operational in a world of territorial states. Thus, an assault in France upon a French citizen is undoubtedly a violation of human rights, and is undoubtedly to be regretted by all states, French or otherwise. But the United States is not obliged to devote its institutional capacity to the vindication of the rights of the French citizen to be free from assault. (Indeed, it would likely strike the French government as rather problematic if the Americans began to build institutions devoted to the punishment of French rights-violators.) The United States is able to devote its own institutional capacity to the protection and fulfillment of the rights of those present on American soil. It does this not because it values French lives less than American lives; after all, it would—if it were just—devote just as much time and effort to an assault upon a French tourist as to an assault upon an American citizen. It is able to devote its own institutional capacity in this way because of the jurisdictional limitation of the United States government, which is authorized and obligated to protect and fulfill human rights only within a particular part of the

world's surface.[18] Those who participate in the American system, further, are authorized and obligated to help support this system's ability to protect and fulfill human rights in this way. If we believe—as I do—that we have as individuals a general duty to uphold just institutions, then those who live and work within the jurisdiction of the United States have an obligation that is both legal and moral to protect and fulfill the human rights of their (jurisdictional) neighbors.[19]

With this in mind, we can now proceed to examine just what happens when someone crosses the borders of a state. Assume, for the moment, that an individual from France simply swims to the United States. She arrives within the country, and is now within its jurisdiction, as described above. If the United States would like to exclude her, I believe it will have to cite something relating to this jurisdictional picture. We might start by noting that the French citizen was, in France, possessed of institutions that are legally and morally bound to protect and fulfill her human rights, and of a population that is legally and morally obligated to use these institutions in defense of these rights. (I should note, up front, that what is true of France is unlikely to be true of a great many other countries; this will be important when we consider the limitations of the jurisdictional approach to the right to exclude.) In leaving the jurisdiction of France, she has to some degree abandoned the right to have French institutions act to protect and fulfill her human rights. The abandonment is not total, of course; she has every right to return to

18. It is true that some crimes are of sufficient gravity that they can be pursued anywhere; universal jurisdiction is a long-standing concept within international law, and recent scholars have urged an expanded view of this concept. The concept, however, exists as an exception to a general rule of territorial jurisdiction; no one, to my knowledge, has ever thought to extend this concept to cover crimes other than the most gross violations of human rights. See, on this, the Outcome Document of the 2005 United Nations World Summit, /RES/601/1, <http://www.un.org/en/preventgenocide/adviser/responsibility.shtml>.

19. It is worth noting, however, that all this assumes that the particularity of the relationship between the state and those within its jurisdiction is itself morally permissible. I have assumed that it is, but have not argued to that effect. A. John Simmon's analysis of the particularity problem might therefore be a necessary precursor to the discussion I provide here; Simmons questions whether or not the particular relationships defended between particular states and particular citizens can be adequately grounded in any general account of moral duties (such as, most centrally, a duty to uphold just institutions). I assume here that some solution can be found to this problem; if one cannot, then we may have reason to believe that what I say in this article is morally problematic as well. See A. John Simmons, *Moral Principles and Political Obligations* (Princeton, N.J.: Princeton University Press, 1979).

France, and she may have some recourse to French consular services if she is arrested in the United States. She is, however, no longer entitled to have French institutions act to directly protect and fulfill her basic human rights, so long as she is within the territorial jurisdiction of the United States.

She has, however, acquired other rights now in virtue of her presence within the United States. In particular, she is entitled to have her basic rights protected and fulfilled by the legal institutions of the United States; the mere fact of her presence within the jurisdiction is sufficient to place these institutions under an obligation to act in defense of these rights. The individuals within the United States, moreover, have a moral and legal obligation to act in defense of these rights, an obligation they did not have prior to her entry into the territory of the United States. They are obligated to act in particular ways, so that her rights are effectively protected and fulfilled: they are obligated to help pay for the police that will defend her physical security, they are obligated to serve on juries that will serve to convict those who attack her, and indeed, they are obligated to help create and sustain institutions sufficient to protect her basic human rights. This obligation, it should be noted, emerges from the simple fact of presence; no particular legal status within the jurisdiction is required. International law demands that states extend their institutional reach to protect and fulfill the rights of all those within their jurisdiction.[20] Domestic law has often echoed this jurisdictional concern; the United States, for instance, has held that the right to primary education is held by all those present within the jurisdiction of the United States, whether or not that presence is legal:

> [T]he protection of the Fourteenth Amendment extends to anyone, citizen or stranger, who *is* subject to the laws of a State, and reaches into every corner of a State's territory. That a person's initial entry into

20. The strongest statement of this principle is found in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, GA Res. 45/158 of 18 December 1990, which forbids discrimination against those present in a jurisdiction without legal documentation. Most Western countries have refused to sign the Convention. The rights of those present within a jurisdiction to be protected by that jurisdiction's institutions, however, is less controversial, finding a home both in the Montevideo Convention and in the International Covenant on Civil and Political Rights, Part II, Article 2.

> a State, or into the United States, was unlawful, and that he may for that reason be expelled, cannot negate the simple fact of his presence within the State's territorial perimeter. Given such presence, he is subject to the full range of obligations imposed by the State's civil and criminal laws. And until he leaves the jurisdiction—either voluntarily, or involuntarily in accordance with the Constitution and laws of the United States—he is entitled to the equal protection of the laws that a State may choose to establish.[21]

All of this entails, I think, a strong set of obligations on the part of current residents within a jurisdiction to protect and fulfill the rights of all and only residents within that jurisdiction. These residents are not obliged to protect and fulfill the rights of others resident abroad—or, more accurately, they are not obliged to do that when those rights are adequately protected by the territorial institutions currently in place. American citizens may have obligations to the citizens of Somalia to help create political institutions in that country, or to allow Somali citizens to enter into the jurisdiction of the United States and to be protected by its institutions. But the residents of the United States are under no obligation to extend this protection to French citizens resident in France, and when such a French citizen enters into the United States, she imposes upon the current residents of the United States a new set of obligations. If there is a right to exclude unwanted would-be immigrants, on my view, it will have to emerge from these facts.

So: how could a state, understood in these terms, argue that it has a right to exclude a would-be immigrant? The argument, I think, will have to begin with the fact that the one who enters into a jurisdiction imposes an obligation on those who are present within that jurisdiction: an obligation, most crucially, to create and support institutions capable of protecting and fulfilling the rights of the newcomer, and then to act within these institutions so as to ensure that they do in fact defend these rights. If we are legitimately able to exclude unwanted would-be immigrants, it will be because we have some right to refuse to take on this sort of new obligation. I should note, up front, that this argument is not one about *costs*, but about *obligations*; I am concerned with whether or not we have a right to be free from an obligation to act in particular ways toward

21. *Plyler v. Doe*, 457 U.S. 202 (1982), at 215.

particular persons, not whether or not they impose financial costs on us by their presence. (We can stipulate that the unwanted French emigrant would actually be a financial blessing to the United States, since she will pay taxes and be unlikely to rely upon many social programs.) Is there a right to exclude a particular person, simply because her presence would impose upon us an obligation to act in a particular way?

I think it is plausible that there is, if one takes the idea of liberty seriously. Someone who imposes an obligation upon me is, in a very limited way, impinging upon my freedom. If it is a legal obligation, then my freedom to do a certain thing while not suffering a negative consequence is eliminated; the very nature of coercive law, after all, depends upon the law's being able to oblige particular actions by eliminating certain options (such as the one in which I both steal your bicycle *and* do not have to go to jail). If it is a moral obligation, then my moral right to do a particular thing is limited by that obligation; if, for instance, I acquire an obligation to care for your puppy, then my moral right to spend my evening doing something other than walking your dog is eliminated. Philosophers who discuss obligations have tended to look at the morality of *being obliged*, that is, of how we ought to understand the structure of a duty to act, and how the various sorts of obligations might interact. I do not think many of us have looked at the morality of *acting to oblige others*.[22] This is, of course, natural; most of the time, what we care about most is how to understand and follow the various obligations that compose the normative backdrop to our lives. But we should care, also, about the morality of imposing duties on others. Indeed, I think the following principle might be defensible, although in the present context I cannot offer an adequate justification for it: we have a presumptive right to be free from others imposing obligations on us without our consent. This right is a presumptive one only, and it is possible that under many circumstances we have a standing obligation of sufficient force that we are duty-bound to acquire a new obligation. But the showing of that standing obligation must be made, or the new obligation is simply an unwarranted interference with freedom.

22. One interesting exception to this is Jeremy Waldron, who critiques John Locke's account of property in virtue of its ability to impose obligations on others without their consent. See Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1990). I am grateful to Wayne Sumner for discussion of this point.

To illustrate this, we might repurpose a well-loved example from Judith Jarvis Thomson. Imagine that Thomson's libertarian objections fail, and we are in fact subject to an obligation—legal and moral—to share our bloodstream with needy violinists when that support is required for the violinists to survive.[23] Violinists, further, can successfully place us under an obligation to offer them support simply by touching us with the tips of their fingers. (Assume that this touching is otherwise permissible; a mere touch of fingertips, in this world, is not a battery.) Imagine, finally, that a violinist is now attached to one individual, and is being offered adequate support by that individual; the violinist, however, would like to be attached to you, instead. Does the violinist have a right to touch you, and place you under an obligation to provide her with those goods to which she is morally entitled? I cannot see why; whatever it is to which she is entitled, she is by hypothesis already receiving it from the individual to which she is attached. You are under no obligation to become the individual charged with the defense of the violinist's entitlements; indeed, you would be licensed in using some degree of coercive force in keeping your person free from violinists' fingers. This is not, of course, a blank check: there are many things you could not do in the course of defending your liberty to be free from the obligation to support the violinist. But you would seem to have some right to defend your liberty to live your life free from the obligation to support any particular violinist, at least where that violinist's rights are already adequately protected by another. The violinist has a right to protection, but not to be protected by the individual of her choosing.

There are, of course, many distinctions to be drawn between the immigrant and the violinist. The violinist is burdensome. The immigrant may not be: the relationship she invokes is one that may or may not ever lead to a demand for a particular action from any particular individual. The immigrant's action is often done for good reasons, reasons of family, economic sufficiency, or mere survival; the violinist, in contrast, seems almost capricious in jumping from back to back. The violinist, further, offers no benefits to her host. The immigrant, in contrast, generally offers a very great deal to the countries in which she is situated: she offers, at the very least, her labor power and the attendant taxation revenue that such labor power engenders. The violinist, in sum, is more easily

23. Judith Jarvis Thomson, "A Defense of Abortion," *Philosophy & Public Affairs* 1 (1971).

condemned than the immigrant. Might we not, in view of this, simply abandon the metaphor?

I think, instead, we should treat these differences as going to the moral judgment of how we evaluate the *character* of the one who imposes obligations on others, rather than dispelling the idea that the imposition of obligation is itself morally problematic. The immigrant is often perfectly comprehensible to us; she does what she does for reasons we recognize. (Indeed, I think many of us have no particular wish to condemn those who cross the border without right as lacking in virtue; we may have the legal right to stop them, for reasons that may prove morally defensible, but we are not therefore entitled to regard them as morally monstrous.) The distinctions between the immigrant and the violinist, then, caution us to avoid transferring our moral condemnation of the violinist directly to the immigrant. Much of what bothers us about the violinist might be produced because of factors not shared with the immigrant.

We should therefore be careful before we condemn the immigrant with the same strength as in our condemnation of the violinist. The *source* of our moral disquiet, however, seems to be the same. Even if the violinist's act is more burdensome and capricious than the immigrant's, they are both wrong for the same reason: they impose an obligation on those who have no independent obligation to accept being so obliged. The immigrant's burden is less significant, and more reciprocal, than the violinist's; but neither has a right to impose that relationship without consent upon an unwilling moral agent. I cannot justify an imposed relationship of obligation with reference to the lightness of its burdens, any more than I can justify my breaking into your house with reference to the fact that I am likely to make things tidier for you once I am in there. The one who breaks and steals, or who breaks and destroys valuable heirlooms, is more harshly judged than one who breaks and cleans; none, however, does what is morally right, because none has the permission of the owner.[24] So, I think, with the violinist and the immigrant; we

24. Terry Pratchett introduced the concept of an anti-crime to cover cases such as these: they include such possibilities as breaking-and-decorating and whitemail (for instance, threatening to publicize a mobster's secret donations to charity). Pratchett insists that an anti-crime must include the desire to bother or embarrass the victim; my own use of this concept does not contain this restriction. See Terry Pratchett, *Reaper Man* (New York: Harper Torch, 2002).

may judge the former more harshly, but we are right to judge each as having done what is morally wrong, and the source of that judgment is in each case the same.

I want to pause here to recognize that this metaphor is disquieting; it seems to invoke the old idea of the immigrant as parasite, an idea rightly regarded as morally and empirically indefensible. I am emphatically not saying *that*. We are all, in this metaphor, violinists, whose rights are dependent upon the choices and labor of others. The point of the metaphor is not to say that immigrants are unique in imposing obligations on others. The point is, instead, to argue that those who choose to impose an obligation on us wrong us when there is not some particular reason in place to show that *we* should be so obligated. The one who acts to oblige others, on this account, has to be able to invoke a reason in defense of the proposition that those others are in fact under some obligation to become obligated. When the well-protected would-be immigrant crosses into a given jurisdiction, though, she imposes obligations upon the inhabitants of that jurisdiction, a fact that licenses those inhabitants in using coercive force to exclude that migrant. Nothing in this picture depends upon would-be immigrants being seen as morally inferior. All persons, migrants and nonmigrants, are equal on this view; they are all under a duty to refrain from imposing unjustified obligations upon others.

We might, at this juncture, defend the rights of the would-be immigrant with reference to the implausibility of the principle I defend here. It is, after all, true that we all impose obligations on one another all the time. When I walk down the street, those people who are near me in space are obligated to help me if I am assaulted, or if I simply keel over because of some medical condition.[25] They are morally obligated to help, and these moral obligations may even be legally backed. Those who are farther away, of course, do not have the same obligations. May we, in the name of keeping ourselves free from unwanted obligations, keep people from coming near to us in public? When my friends and colleagues have children, they place me under new obligations, certainly to defend the legal and moral rights of those children, but also to provide specific goods to them, including such demanding tasks as babysitting and the provision of appropriate gifts on

25. I am grateful to an anonymous referee for this journal for this example.

appropriate birthdays.[26] Does the principle identified here give us the right to slip birth control pills into our colleague's coffee to avoid such unwelcome burdens?

The answer, I think, is that the principle defends the right to avoid unwanted obligations, except when we have an existing obligation to acquire such new obligations; there can be, and likely are, many cases in which we are not morally free to refuse to become so obliged. Take the case of reproduction, for example; the rights of my friends and colleagues to control their own bodies is more central than my right to avoid unwanted obligations toward their children, and this means in practice that any attempt to prevent those children from coming into the world would be morally impermissible. I cannot, of course, defend my conclusion that the one right trumps the other; but I think all I must really do is point out the possibility that the right to avoid unwanted obligations is, in fact, capable of being trumped. What this means, in practice, is that we are often going to be limited in how free we actually are to avoid unwanted obligations. The demands of civil society, for example, might place limits on our ability to use physical force to keep people from coming near us. We might say that the rights of people to use what is commonly owned, or at least subject to collective rights of use, place limits on my ability to keep people from coming near me. I cannot push people away from me on the street, even if their proximity alters my moral obligations toward them; this is because, I think, their moral rights to use that street are rightly understood as so significant that I am obligated to accept the risk of having to help them when they need it. There are, indeed, limits on our ability to keep ourselves free from obligation. This is not, I think, fatal to the idea that the right to exclude is best grounded in some version of the right to be free from unwanted obligation; the right to exclude, on my account, is capable of being trumped by the rights of others: nothing I say here demands, or permits, the idea that the right to avoid being obliged to others is morally absolute.

So: can we now defend the right to exclude? I think we can, in at least some cases. The would-be immigrant who wants to cross into a given jurisdiction acts to impose a set of obligations upon that jurisdiction's

26. Versions of this worry have been pressed on me by Kok-Chor Tan, Wayne Sumner, and an anonymous referee for this journal.

current residents.[27] That obligation limits the freedom of those residents by placing them under standing obligations to act in particular ways in defense of that migrant's rights.[28] In response to this, legitimate states may refuse to allow immigrants to come in, because the residents of those states have the right to refuse to become obligated to those would-be immigrants. This general right imposes a duty on would-be immigrants to cite some particular reason why these residents have an obligation to become obligated to these immigrants. In the absence of such a reason, it appears that the state has the right to use coercion to prevent the would-be immigrant from entering into the jurisdiction of the state, since it is the simple fact of presence within that jurisdiction that invokes the obligation to protect the migrant's basic rights. The state in question can decide on the purposes for which this right is to be invoked; it may choose to use this right to defend cultural unity, or solidarity, or any other particular good. The right itself, though, is derived from the general right to avoid unwanted obligations where we have no obligation to become obliged. The right is therefore derivable from the rights of individuals; states that did not have this right could argue from these existing individual rights to the plausibility of a general right to exclude.

To illustrate this, I can discuss, once again, my own story: I moved from Canada to the United States at age twenty-two to pursue a graduate education in philosophy.[29] The United States became obliged to me in

27. Christopher Heath Wellman has suggested to me that we might be able to gain the right to cross into any particular jurisdiction simply by contracting away our right to be protected in our basic rights by the inhabitants of that jurisdiction. I am skeptical about whether or not this is a morally permissible bargain, though; I believe it would be morally impermissible to accept such terms, and even more impermissible to make the offer to a would-be immigrant. If I am wrong about this, though, then it is indeed true that the state would no longer have much of a right to exclude those who create no obligations at all on the part of the current residents.

28. We could, perhaps, rephrase the obligation to avoid this appearance: perhaps we might say that we have a standing obligation to defend the rights of all those who enter into our jurisdiction, an obligation not changed when a new migrant enters, since the content of our obligation preexists that migrant's entry. This redescription, though, does not account for the fact that the migrant's entry imposes particular duties upon the current residents that were not present before. Acting so as to impose these duties upon the residents seems to stand in need of some justification; as such, the burden of justification seems to exist for a particular migrant, and we might derive the right to exclude from the failure of such justification.

29. I discuss this case in Michael Blake, "Immigration," in *A Companion to Applied Ethics*, ed. R. G. Frey and Christopher Heath Wellman (Malden, Mass.: Blackwell, 2005).

particular ways once I entered onto American soil. The United States might have chosen to exclude me in virtue of these facts; they certainly had no obligation to become obliged to protect my rights, since these rights were already well protected in Canada. I am extremely glad that the United States chose policies that allowed me to enter. I do not think, though, that I had any particular *right* to enter the United States; their decision to allow me to study at an American university was a discretionary act, and no injustice would have been done to an alternative version of me who was excluded.[30]

All this, of course, is only the first step in an argument. Even if legitimate states have a right to exclude unwanted would-be immigrants, much work needs to be done to figure out the contours of that right. It is possible for us to have the right to exclude, after all, and still question whether or not that right is able to ground a particular exclusionary policy. We might ask, after all, whether the right to exclude allows the use of a particular program of enforcement; the militarization of the southern border of the United States, for example, might be morally problematic even if the United States is permitted to exclude migrants.[31] We might further ask whether all the goods cited in defense of a particular use of the right are, in fact, goods a liberal state is entitled to pursue.[32] We might, finally, ask whether or not a state, even if it had the right to exclude, would be likely to exercise this right fairly when it exercises it unilaterally.[33] For the moment, though, I want to ignore these issues and focus on two more basic objections to the idea I propose here. I want to consider these objections not only because they are plausible, but because I think they are at least partly correct, when they are interpreted

30. One possible response to this argument would be to say that my right to pursue my career was a sufficient reason for the United States to take itself as under an obligation to allow me entry. I do not think this is entirely adequate as a response; the right to occupational choice is not best construed as the right to the maximization of the occupational options open to me. There are, after all, excellent graduate programs in philosophy in Canada; a United States that insisted I choose from among those programs would not have interfered with the freedoms that compose my moral rights.

31. A good discussion of the limits that might emerge from such ideas is found in Jose Jorge Mendoza, "The Political Philosophy of Undocumented Immigration," *APA Newsletter on Hispanic/Latino Issues in Philosophy* 10 (2011).

32. I discuss some of these ideas in "Immigration and Political Equality."

33. This is a reinterpretation of Arash Abizadeh's argument in "Democratic Theory and Border Coercion."

as limits to how able we are to use the ideas I discuss here to justify current state practices of exclusion. The two arguments I want to consider can be called the argument from *federalism* and the argument from *oppression*.

We can deal with the first argument comparatively quickly. The argument notes that states are not the only entities defined jurisdictionally; federal subunits, including provinces, municipalities, and the like, all have a limited territorial space within which they are able to impose binding legal commands. The worry emerges when it appears that these subunits are, on the argument given here, as able to exclude unwanted outsiders as sovereign states. Such a conclusion, needless to say, would impugn the validity of the argument; a theory of exclusion that gives the same right to exclude to the city of Seattle, the state of Washington, and the United States of America is one that is unlikely to provide us with much insight.

The proper response to this objection, I think, is to note that the structure of a federal state necessarily involves some particular constitutional project, which dictates how power shall be shared between the federal subunits and the central government. Under these circumstances, the federal subunits may be unable to exclude unwanted outsiders, not because it is in principle forbidden for them to do so, but because the particular purposes of the legal union between those subunits make it impermissible for them to do so. This is, I think, the proper account of the United States' current understanding of the right to freedom of movement; this right is tied by the Supreme Court to the importance of the federal project of creating one political union:

> But this does not mean that there are no boundaries to the permissible area of State legislative activity. There are. And none is more certain than the prohibition against attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders. It is frequently the case that a State might gain a momentary respite from the pressure of events by the simple expedient of shutting its gates to the outside world. But, in the words of Mr. Justice Cardozo: "The constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several States must sink or swim

> together, and that, in the long run, prosperity and salvation are in union, not division."[34]

This analysis means that the rights of particular federal subunits to exclude must be made subservient to the project of creating one political community under constitutional rule. The proper response to the objection, then, is that federal subunits do not have the right to exclude when that right is anathema to the project of creating a single political community. There is nothing inherently wrong in imagining that the state of Washington, or even the city of Seattle, might have had the right to exclude outsiders under a different set of institutions. Under the institutions currently in place, however, these federal units have no right to exclude would-be residents journeying from elsewhere in the country, even when such residents might impose significant costs upon the current residents.[35] This is because the project of shared self-rule entered into at the federal level demands that only the federal government has the right to exclude. The federal subunits, in contrast, have no such right: in the terms I have used above, they are obliged to become obliged to those who want to enter.

This response, though, opens up one avenue by which we might criticize the jurisdictional theory, or, more accurately, criticize the ability of that theory to justify the sorts of exclusion states currently undertake. The response argues that some forms of political projects require the jurisdictional units gathered together under that project to give up their rights to exclude. It is now possible for the critic to argue that some such project does in fact exist. If this is right, though, then the supposed right to exclude would-be immigrants held by states might be as illusory as the same right when pressed by the city of Seattle.

There are two versions of this argument: a stronger version and a weaker one. The stronger one is global, and argues that some sort of political community now exists at the global level that makes exclusion impermissible. The weaker one is particular, and argues that some particular forms of political and legal integration between particular countries might make exclusion between those countries impermissible. The

34. *Edwards v. California*, 314 U.S. 160 (1941), at 173–74, citing *Baldwin v. Seelig*, 294 U.S. 511 (1935), at 522.

35. *Saenz v. Roe*, 526 U.S. 489 (1999).

stronger version of the argument strikes me as extremely difficult to establish; the institutions that currently exist at the global level are sufficiently weak, and sufficiently dependent upon sovereign states for their legitimacy and for enforcement, that it seems implausible to suggest that they are at a sufficient level to make exclusion by states impermissible. I have not, of course, given anything like a full account of what it would take for global institutions to be sufficiently robust to preclude exclusion by their member states; I have simply asserted that the United States is sufficiently robust, and the United Nations is not. It is therefore entirely possible for an argument to be developed that shows that my assertion is incorrect. I remain, of course, skeptical.

The weaker argument, however, seems more plausible. Again, without any more substantive theory of what sorts of political arrangements constrain the right to exclude, it is difficult to make any final conclusions. It seems plausible, though, to say that some forms of political integration create a political community of sufficient power and reach that the subunits of that community forfeit the right to exclude unwanted outsiders. The most advanced form of transnational community, on this vision, is probably the European Union, which has an array of political institutions that create something like a single community for the purposes of politics: a European parliament producing binding laws, a European Commission executing them, and so forth.[36] This sort of integration might mean that the states composing the European Union no longer have the right to exclude unwanted would-be migrants from other European Union states. If this is true, then the states of the European Union have created a set of political institutions whose needs include the creation of a common citizenship; the right to freedom of movement might emerge, as it did in the United States, from the needs of this conception of a common identity. It is possible, then, for states to lose the right to exclude in virtue of their voluntary creation of robust political institutions within which they serve as component parts. On my own view, this has occurred within Europe to such a degree that freedom of movement within the European Union is a moral imperative, and would be so even if the states of the European Union did not recognize it as such. I am less concerned with defending

36. See, generally, Desmond Dinan, *Ever Closer Union: An Introduction to European Integration* (Boulder, Colo.: Lynne Rienner, 2010).

this conclusion, though, than with acknowledging the force of the objection from which it emerges: it is true, I think, that we cannot entirely rest easy with the right to exclude in a world that contains robust transnational institutions. At the very least, we are right to ask whether such institutions are sufficient to impose limits on that right. An argumentative pattern is available to cosmopolitan critics of the right to exclude, on this view: the critic can argue that this right, even if defensible in the abstract, cannot be exercised in particular circumstances in the world we know. While I suspect the cosmopolitan critic and I would disagree about what would trigger this limitation, I am at least satisfied that we have now identified a common description of our argument: we are searching to discover whether or not the particular institutions we share are of the right character to make us obliged to become obliged to those migrants seeking entry into our jurisdiction.

The second objection is more simple, but also potentially more important. It notes, simply, that the structure of the argument is as follows: we can exclude unwanted would-be immigrants, because these immigrants already have adequate rights-protection within their countries of origin, and are seeking now to oblige us to act in defense of their rights. The argument only holds, that is, when there in fact *is* adequate rights-protection in the country from which the individual is seeking to emigrate. This was, of course, true for me in my emigration from Canada, and it is doubtless true of many would-be immigrants. It is unlikely to be true of most immigrants, however, many of whom are fleeing circumstances that could be described (rather bloodlessly) as insufficiently rights-protecting. This means, of course, that the justificatory story now fails to hold. We are unable to exclude the unwanted migrant, because the story we would have to tell—namely, that we have no obligation to become obligated to protect that migrant's rights—is inaccurate. The migrant would, upon entry into our territory, simply acquire that set of rights-protections to which she is entitled. If we propose to use force to prevent that individual from entering into our territory, we are simply using force to keep her in a morally indefensible situation. There is no possibility of that use of force being legitimate. As such, we might think that the story I tell here—despite its general defense of the right to exclude—is, in fact, considerably more radical than it would at first appear. It would mandate something like a radically revised account of refugee and asylum law, on which we cannot use force to exclude

outsiders from entry when those outsiders are coming from countries that are insufficiently attentive to basic human rights.

This is, again, an objection to the view if interpreted as a blanket defense of our current practices; it is not, however, an objection I want to reject in its entirety. I will suggest two means by which the objection's force is potentially subject to some limitations, but on the whole I believe the objection to be accurate. Indeed, if we focus on the justification for the use of force, I believe we are likely to arrive at an account of refugee and asylum law on which we are unable to refuse admission to a great many would-be migrants.[37] This view of immigration will be, I think, considerably more robust than a related view given by Christopher Heath Wellman, who allows the legitimate state to purchase the right to exclude by devoting an adequate share of its resources and efforts to development in foreign countries.[38] On my view, this is not even in principle permissible. We cannot justify the use of force against one party by citing benefits to others; the justification must be in terms that the coerced party can accept without requiring that party to unduly identify with the interests of others. This is, after all, the lesson John Rawls taught about the separateness of persons: it is wrong to demand that an individual who is treated badly by a coercive institution be mollified by the comparatively greater benefits received by others.[39] The idea that we can justify using force against someone whose rights are unprotected by citing the fact that we have helped other people elsewhere seems to fly in the face of this idea. We can only justify the coercive force of the border if we use it against people whose rights are adequately protected in their current homes. To use it elsewhere seems simply to use force to defend an illegitimate status quo; this is morally impermissible regardless of how just our foreign policy might otherwise be.

If we are going to limit the rights of immigrants from oppressed countries, then we will have to do so in a manner that defends their right to be

37. Strictly speaking, there is a distinction between asylum or refugee law on the one hand and the simple admission into jurisdiction on the other; I am, in the present context, ignoring a great many legal complexities. I do not think, however, that these complexities are relevant to the present argument. For a contrary view, however, see Matthew Lister, "Who Is a Refugee?" *Law and Philosophy*, forthcoming.

38. Wellman, *Debating the Ethics of Immigration*, pp. 123–32; see also Lister, "Who Is a Refugee?"

39. John Rawls, *A Theory of Justice* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1971).

treated as a moral equal. Is there any way of doing this? I believe there are, in principle, two ways of doing so, although neither will offer much consolation to those who want to defend the international status quo. The first way begins with the simple fact that the obligation to become obliged is held not simply by an individual state, but by all legitimate states collectively. To return to the modified violinist case: a dying violinist might have a right to have someone offer her the necessary support needed for a decent life, but she does not have the right to pick her favorite agent as provider. Nothing in the picture of basic rights we are imagining here mandates that we are allowed to insist that the *general* obligation to protect the rights of persons can be made into a *particular* obligation—that is, an obligation to be pressed against one particular agent—simply through the wishes of the one to whom we are obliged. This means, I think, that the story we can tell about exclusion might have to be more complex. We are not entitled to use force to exclude individuals who want to enter our jurisdiction when they come from jurisdictions that do not adequately protect their rights. But nothing in this says that we are obligated to be the jurisdiction in which those individuals ultimately make their lives. If the burden of refugee flows is one that ought to be borne by the wealthy states of the world collectively, then it is entirely open to a particular state to argue that some other state is refusing its share of the bill. This opens up the possibility that we can develop a secondary moral analysis of what fairness would demand in the allocation of the burdens of doing justice through immigration. It also opens up the possibility of legitimate international covenants excluding individuals when they have passed through rights-protecting countries on their way to their chosen country of refuge. The Dublin Regulation, for example, insists that an individual's asylum claim must be heard by the first European Union state into which that individual enters.[40] This regulation may be unfair toward border states, which tend to bear a higher proportional cost from refugee flows; but it cannot be said to be unfair toward refugees themselves.

The second sort of restriction we can imagine is more complex—and, potentially, more dangerous. It goes to the idea that we can, under some circumstances, demand that people pay some costs to maintain just

40. The Dublin II Regulation, <http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/l33153_en.htm>.

institutions. This is, of course, hardly a controversial idea, stated this generally; we accept that individuals have the duty to pay taxes to support just states, for example. But we might similarly think that individuals have the obligation to bear some of the costs involved in setting up just institutions, too. We might, for example, demand that individuals from a particular state bear some of the costs involved in transitioning that state toward democratic legitimacy. These costs, moreover, might include things other than financial burdens; we do, under some circumstances, insist that individuals bear some personal risk in the name of justice. (Most accounts of just war, after all, include the idea that justice is a sufficient ideal to warrant the imposition of a risk of violent death.) So: if individuals want to emigrate to a given country from a non-rights-respecting country, we might want to have the right to insist that those individuals remain where they are, and improve circumstances in their country of origin.[41] Is this a sufficient reason for us to think that we can insist that people fleeing from a non-rights-respecting country return to that country and improve it from within?

I do not want to reject these ideas entirely; I do believe, however, that they are insufficient to generate anything like a right to exclude would-be migrants from oppressed states. The reason is, I think, the fairly simple one that it is unfair to insist that someone fleeing an oppressive state has more duties to that state than someone outside of it.[42] The relationship between that state and the emigrant is hardly that of someone who is a party to an ongoing, valuable relationship, who thereby acquires some duties to the other parties in that relationship. If we did not accept this simply in virtue of the fact that the state is engaging in unjustified coercion, we might accept it in virtue of the fact that the emigrant is actively trying to sever that relationship. To insist that this relationship generates duties, then, is something very much like insisting that an ascriptive fact—a mere fact of birth—is sufficient to generate an obligation. This, however, seems to be morally impermissible. Why, the migrant might ask, should she be asked to bear a higher burden of the shared task of democratizing her country of origin? She was born there, but that hardly

41. Gillian Brock, for example, defends the legitimacy of states keeping their own high-talent individuals from leaving for other countries. See Gillian Brock, *Global Justice* (Oxford: Oxford University Press, 2009), pp. 190–212.

42. For a contrary view, see David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007).

seems sufficient to justify a greater obligation to help that place than there is for those lucky enough to be born in more wealthy jurisdictions. (She may have greater knowledge, and therefore ability, to help, but those seem to be separate issues; and, besides which, it seems unjust for us to insist that obligation increases with ability.) The only way, I think, in which we might use the idea of a burden to work for democratization is if the argument treats all parties—current residents and would-be immigrants—as moral equals, with each having an equivalent duty to build the democratic capacity of the state in question. This might legitimate asking the would-be immigrant to bear some costs in rebuilding the state from which they come; but it would equally ask those who currently reside within the rights-respecting jurisdiction to give of themselves to help the shared task of building a rights-protecting world. The idea of a special duty to one's home country, I said, was dangerous because it tempts us to see those who come from a place as specially obligated to sacrifice themselves to improve that place. The shared sacrifice, I think, must be actually shared, justly, among all the citizens of the world; it seems hard to imagine that we could actually use these ideas to exclude would-be immigrants, at least unless we ourselves are bearing costs equivalent to those we expect these migrants to pay. This is a test, of course, I do not think any current state is likely to meet.

The result of all this is that the right of a state to exclude people from underdeveloped and oppressive nations is likely to prove rather weak. I do not think this is a defect; it strikes me as true that a state that proposes to use force to keep people out of its jurisdiction has to account for the rights of the people against whom that force is directed. I have ignored, here, many relevant questions. We have reason to ask what human rights are those that ought to be defended by international law and by immigration law. We have reason to ask what sorts of considerations other than the protection of basic human rights ought to affect the right to exclude.[43] For the moment, I am content to leave these questions to one

43. I have not, for instance, examined the notion of family reunification. I believe the approach I give here is compatible with a right to something like family reunification; the right, however, would have to be derived from the illegitimacy of a domestic state using its political rights to undermine the familial interests of a current member of that state. That is, even if states have the right to exclude, they have to answer to their own members about how that right is exercised. I regret that I do not have space to consider these matters more fully in the present context.

side. What I have said here, I believe, might give us some reason to think that the right to exclude exists, and that this right is far from able to justify the sorts of policies all wealthy societies currently undertake. We have, collectively, the right to exclude some unwanted would-be immigrants. We should not, however, take any comfort from this fact; much of what we are doing now is profoundly unjust, and should be recognized as such. This defense of a right to exclude should therefore be taken as a plea for reform, not for quietism; we can indeed seek to exclude some unwanted immigrants, but we should not therefore conclude that we are allowed to exclude as we currently do. Justice, I suggest, demands more discussion both of the moral foundations of this right and of the relationship between that right and our own acts. I will, therefore, be quite satisfied if I have shown the need for such a discussion to take place.