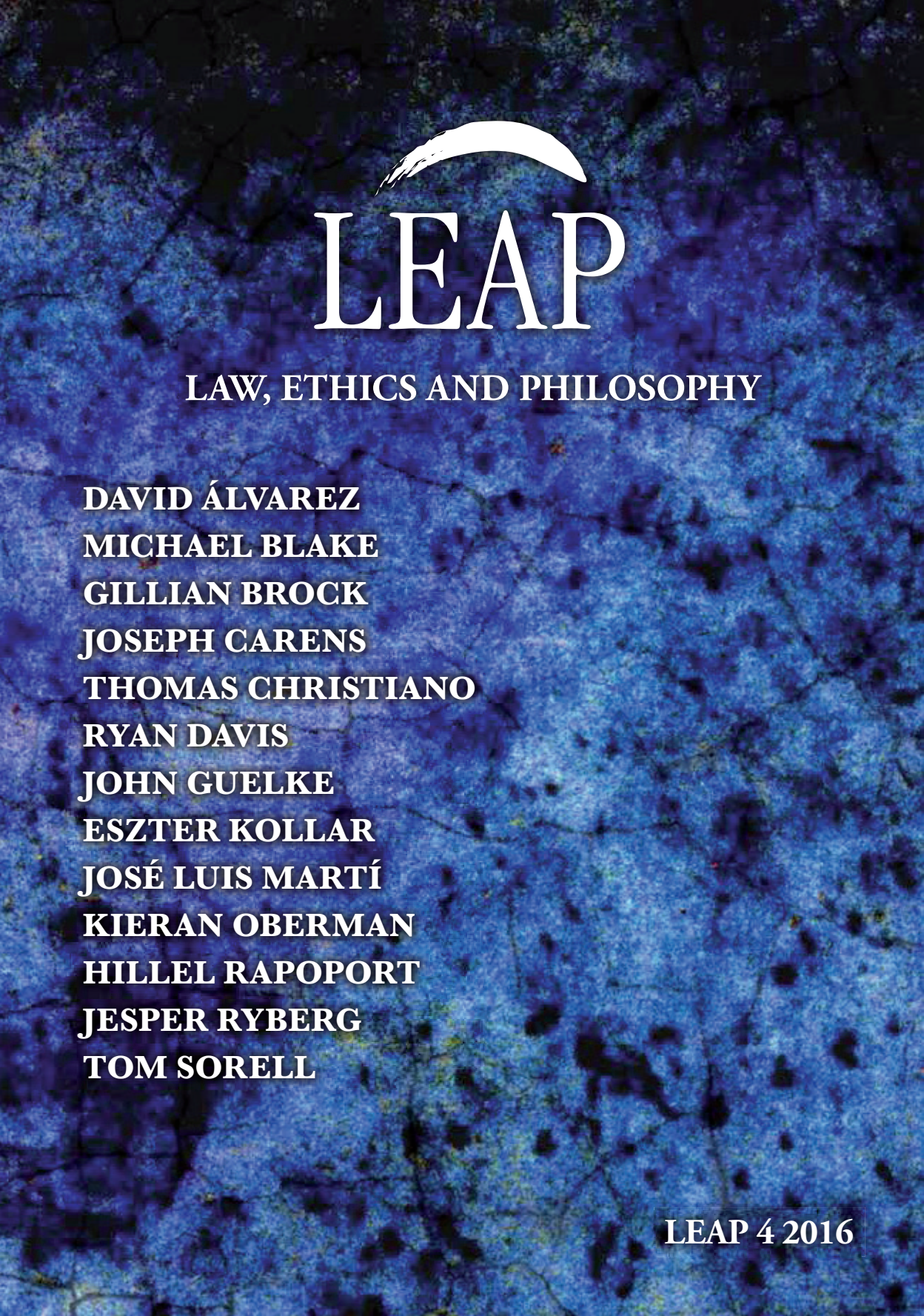
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# Which Moral Requirements Does Constitutivism Support?

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## ABSTRACT

Constitutivists about morality believe that necessary features of any action can also provide norms of moral assessment. This paper investigates what kind of moral requirements constitutivism might support. To narrow that question, I will consider one way of developing a constitutivist account of morality that purports to ground requirements to not interfere with others' exercises of rational capacities, and to help them possess these capacities. This paper will claim that not interfering with others' capacities is more important than helping them to possess those capacities. The weaker version of this thesis will be that in cases of conflict, we should have a presumption favoring non-interference. The stronger version is that not interfering is always required, but helping is only sometimes required. If I am right, constitutivism might not only explain the moral significance of not interfering and of helping. It may also help explain long-standing intuitive asymmetries between the two.

**Keywords**: constitutivism; autonomy; agency; obligation; Michael Smith

## INTRODUCTION

Constitutivists about some domain believe that elements in that domain have a feature (or features) that both constitute them as members of that domain, and also provide a standard of evaluation for them.[1] The idea is that a complete description of the domain will also contain implicitly some prescriptive component as well, or at least the resources for drawing out a prescriptive component. Constitutivism about morality is the view that an account of moral reasons or norms can be derived from facts about the nature of agency, or the status of being an agent.

1 Recent examples include Katsafanas (2011); Alm (2011); Walden (2012); Bertea (2013); Ferrero (2009); Korsgaard (2009). My definition here is most closely related to the one proposed by Katsafanas.

This paper will set aside arguments about the truth of constitutivism. It will instead ask: What moral requirements would constitutivism support? To narrow that question, I will consider one way of developing a constitutivist account of morality that purports to ground requirements to not interfere with others' exercises of rational capacities, and to help them possess these capacities. This two-fold requirement has been philosophically popular since at least Rawls (1996: 293; Cohen 2008; Shiffrin 2011).

This paper will claim, internal to the constitutivist account I will sketch, that not interfering with others' capacities is more important than helping them possess those capacities. The weaker version of this thesis will be that in cases of conflict, we should have a presumption favoring non-interference. The stronger version of my thesis is that not interfering is always required, but helping is only sometimes required. If I am right, constitutivism might not only explain the moral significance of not interfering and of helping. It may also help explain long-standing intuitive asymmetries between the two.

## 1. FROM AGENCY TO MORAL REQUIREMENT

Michael Smith has recently (2011; 2012; 2013; 2015) developed a version of constitutivism about morality (Cf. Smith 1996). Like other constitutivists, Smith's position is that moral requirements are included among constitutive standards of action. Smith derives two high-altitude constitutive moral requirements: one prohibiting interference with "any rational agent's exercise of his rational capacities", and a second requiring actions that "make sure that agents have rational capacities to exercise" (Smith 2011: 360). Following Smith, I will refer to these respectively as obligations to "not interfere" and to "help" (2013: 26).

Smith begins with the idea that there is some feature of action that also provides standards of assessment for actions. For Smith, the important concept is that of "agent", which picks out a "goodness-fixing kind" (2013: 17). A kind is "goodness-fixing" if grasping the concept involves also grasping standards for assessing instances of the concept as better or worse. Following Judith Jarvis Thomson (2008: 21-22), Smith gives "toaster", "burglar", and "tennis player" as examples (2013: 18). According to Smith, "a good agent is someone who has and exercises, to a high degree, the capacity to know the world in which he lives and to realize his final desires in it" (2013: 18). Smith inherits these criteria from what he calls the "standard story of action", according to which a movement counts as an action if it is produced by a belief and a desire that combine in the right

kind of way (Hume 1740; Davison 1963). Smith thinks the standard story is appealing in its parsimony and explanatory power, but I will not worry about the reasons for accepting it here. Instead, I will be interested only in the standard story's consequences for the content of moral requirements.

The standard story makes it obvious why constitutive standards of assessment apply for belief: an agent with false beliefs is failing to exercise the capacity to know the world. The standard story also makes it obvious that we can assess the rationality of action: an agent whose actions fail to realize the agent's final desires is also failing to exercise a constitutively agential capacity. What is not obvious on the standard story is how any constitutive feature of action could help to explain moral requirements. Instead, it might appear that accepting the standard story will undermine our confidence that any rational requirements are also moral requirements. The standard story allows for rational criticism of beliefs, and also of desires that depend for their existence on beliefs. For example, if I desire to walk to Central Square as a means of getting ice cream, my desire to go to Central Square depends for its existence on my belief that ice cream can be had there. (Following Smith, I will call these extrinsic desires.)[2] If, as the standard story seems to suggest, the only attitudes amenable to rational assessment are beliefs and extrinsic desires, then final desires cannot be assessed. If final desires cannot be rationally assessed, then no final desire could be irrational. And in fact, Smith points out that proponents of the standard story have long accepted that final desires could not be rationally criticized (Hume 1740; Williams 1981; 1995). However, if we also believe that some final desires can be contrary to morality, and that moral obligations give us reasons, then some final desires are contrary to reason. So, the standard story apparently conflicts with our other beliefs about morality.

Smith's revision is to suggest that the standard story provides tools for assessing not only beliefs and extrinsic desires, but final desires as well. The standards of assessment for final desires, it turns out, are also the basis for moral requirements. In this way, Smith is a constitutivist about moral requirements. Understanding how Smith's argument works will be important to thinking about its consequences for the content of moral requirements, so I will briefly outline its steps.

Call an agent "ideal" when that agent is the maximally good member of the kind of which it is an instance. If good agents exercise, to a high degree, capacities to know the world and realize their final desires within it, then the ideal agent will exercise these capacities fully and robustly. The

2 For other uses of "extrinsic", see Korsgaard (1996) and Langton (2007).

question is what to do about cases in which exercising one capacity undermines the exercise of the other. Smith imagines an agent who finally desires to believe <p>. If this agent is maximally ideal, then the agent must be able to exercise the capacity for desire realization robustly, across a variety of circumstances. But if the agent robustly realizes the desire to believe <p>, then the agent will realize this desire in circumstances that include those in which the available evidence tells against <p>. This case shows that exercising the capacity to realize one's final desires may conflict with exercising the capacity to know the world. As Smith points out, "An ideal agent thus turns out to be one whose psychology, by its very nature, displays lots of tension and disunity, as a higher score along one dimension comes at the cost of a lower score along another" (2013: 22).

What are the choices for a defender of the standard view? One might hold that an ideal agent would maximize either belief acquisition or desire realization, or that there is some composite in which the ideal agent would have the highest aggregate "score" possible—even if this meant having a very dis-unified and incoherent psychology. Smith finds all of these options unappealing, and concludes that we should take one of them only if there is no available way of adding mental states to the ideal agent so as to make that agent's psychology more coherent. Fortunately, it is very plausible that there are mental states that render the ideal agent's psychology more coherent. Suppose the agent had a final desire to not now interfere with the exercise of their belief-forming capacities. Provided this desire exceeded the desire to now believe <p> in strength, the agent would then not face a dilemma. Because the agent's psychology would be more coherent with this additional desire than without it, we can infer that the desire would be part of the ideal agent's psychology. What is interesting is that this suggests that the standard story can not only say something about what beliefs and extrinsic desires the ideal agent would have, but can also say something about what final desires the ideal agent would have. In particular, the ideal agent would have what Smith calls "coherence-inducing desires".

Although this shows that one apparent implication of the standard story was mistaken, it does not yet show how the standard story could ground constitutive moral requirements. Smith next considers an agent who finally desires to believe <p> in the future. This desire sets up the same incoherence in the agent's future psychology as the analogous desire creates in the agent's present psychology. Because this makes the agent's psychology less robustly coherent, Smith concludes that a desire to believe <p> in the future makes the agent's psychology less ideal in the present. So, coherence-inducing desires will also include desires to organize the agent's

psychology in the maximally coherent way in the future. Not only should the agent desire not to interfere with the future exercise of their rational capacities, they should also have desires (now and in the future) to bring it about that the agent possessed these capacities (Smith 2011: 356).

As with other constitutivist projects, grounding moral requirements must involve making the shift from a temporally extended concern with the self to a concern with other agents. Smith offers a couple of different considerations for how this move might be made. First, he suggests that if agents are to fully and robustly possess rational capacities now and in the future, they will have to count on other agents to not interfere with their use of these capacities, and also to help them possess these capacities. Part of having an ideal psychology—and recall this is using only the resources from the standard story—is to then have a concern for the rational capacities of others. Smith writes:

> "[I]f an agent is to robustly and fully exercise the capacity to believe for reasons, then he also has to be able to rely on the non-interference of other rational agents, assuming that there are such agents…[T]his too is grounded in the reasonableness of his supposing that all rational agents, if they are robustly to have and fully exercise their own capacities to believe for reasons, must desire not to interfere with other rational agents exercises of their capacities. For to suppose that rational agents do not extend their concern for non-interference to other rational agents in this way is to imagine that they make an arbitrary distinction between their reliance on themselves and their reliance on others—despite the fact that all of those on whom they must rely, insofar as they exercise their capacity to believe for reasons, have the very same interests in the non-interference of others as they have in themselves" (2011: 357).

Smith has another argument for the same generalizing move to other agents. The reasons to want to maintain the functioning of one's rational capacities remain in place even if the agent undergoes changes during the course of exercising a rational capacity, such that the changes do not preserve the agent's personal identity (Smith, 2012: 323-327).

The move from self to other agents has long been controversial for constitutivists. One potential concern with the account developed here is how it could capture the type of universality that we characteristically regard as characteristic of morality. Why, that is, would an ideal agent want to help and not interfere with all other rational agents, as opposed to merely that subset who happened to be around her, and could affect her capacities?[3]

3 I'm grateful to a referee for pressing me to think about this question.

The crucial idea in the account presented here is that, given the similarity between other agents and oneself, it would be arbitrary to hold the relevant desires with respect to oneself and not to others, and it would be similarly arbitrary to desire to help and not interfere with some other agents, but not with other agents.[4] Extending the relevant concern to all agents is a matter of being "fully consistent, treating like cases alike" (Smith, 2015: 192).[5]

In any case, once we grant that ideal agents finally desire to not interfere with and to help other agents, then we can quickly see that they have reasons to do the same. To rehearse: because the concept of an agent is "goodness-fixing", agents are evaluated as better or worse, depending in part on the extent to which they fulfill their final desires. The concept of a reason can then be analyzed in terms of what is desirable relative to the agent, which in turn is given by the desires of the idealized version of the agent (Smith 2015: 188-189; 2013). These reasons, for Smith, ground the fundamental moral requirements—not interfering and helping. Smith, again:

> "In virtue of the fact that every agent's fully rational counterpart has these desires, every agent has the same reasons for action, and these reasons for action, I hereby conjecture, are reasons to do what agents are morally obligated to do. Agents are morally obliged not to interfere with any rational agent's exercise of his rational capacities, and they are also morally obliged to do what they can to make sure agents have rational capacities to exercise" (2011: 359-360).

If Smith's account succeeds, it would show that moral obligations can be derived using only the resources of a descriptive explanation of agency. This would be a remarkable achievement. More, it would show that the constitutive moral requirements were extensionally very similar to our ordinary moral beliefs. Among other things, it would show that our moral obligations are non-welfarist, agent-relative, and deontological. Non-welfarist: because moral reasons concern the presence and exercise of rational capacities, not well-being. Agent-relative: because the desires of the ideal agents, which ground the relevant reasons, are to help and to not

4 Compare a set of agents who are concerned only with the rational capacities of others in their vicinity, and a set of agents who are concerned with all rational agents. Let us assume that it is, in principle, possible that one's rational capacities could come to depend on the actions of any other rational agent. If this is true, then the first class of agents will not possess their rational capacities as robustly as the second class of agents. Given that robustness is a feature of the ideal agent, those agents who are concerned with the rational capacities of all other agents are more ideal.

5 The issue deserves more attention than I can provide here, but further investigating this question would divert the essay from its intention of setting aside whether constitutivism is correct, and focusing on the content of its resulting requirements.

interfere, rather than to bring about the maximization of helping among all agents, or the minimization of interference. This also explains why the requirements are also deontological, in the sense that they cannot be reduced to agent-neutral values.[6] To borrow David Velleman's (2009) phrase, it would vindicate at least a "kinda Kantian" normative ethics.

## 2. CONFLICTING REQUIREMENTS

Suppose we accept the requirements to not interfere and to help. How would these requirements guide our action? Although many obligations we intuitively accept involve some combination of not interfering and helping, accepting these two general requirements recreates the possibility for conflict that the standard story created for rational requirements. Problem cases will be those in which acting to help counts as interfering, and refraining from interfering counts as failing to help. Individuals may use their rational capacities at a given time in a way that will undermine those capacities in the future. This possibility creates along with it the prospect of tension between the two fundamental moral requirements.

For example, consider an individual's decision to use potentially rational-capacity impairing drugs. If I withhold from interfering with the agent's exercise of their capacity to realize their desires, then I will be failing to help secure the conditions under which their capacities to realize their desires or to know the world will be effective in the future. Moreover, this tension between a moral concern for the exercise of the capacities, and the capacities themselves, is likely to arise often.[7] If the moral requirement to not interfere with people could be compromised anytime they act in ways that undermine their future use of their rational capacities, then Smith's constitutivism might not deliver a morality as consonant with our intuitions as he might have hoped. As Jessica Flanigan writes:

> "Sleeping aids, roller coasters, alcohol, standing on one's head during yoga class, falling in love, and falling out of love can all be seriously incapacitating in their own way, but no one would ever say that

6 They are not deontological in a much stronger sense, in which the deontic facts could not be reduced to any evaluative facts. Cf. Smith (2009).

7 As a referee points out, an ideal agent would have a dominant desire to not impair their rational capacities, and so would not make this choice. I acknowledge as much; it is important that the case I describe here could not arise among ideal agents. Below, I will address this issue by considering conflicts of this sort that could arise among ideal agents, and then extending the concern to non-ideal agents. For now, my aim is just to motivate the case for actual agents who try to live by the helping and non-interfering requirements.

interference on behalf of the would-be incapacitated is justified" (Flanigan unpublished: 3; cf. Flanigan 2012).

Although all of the above cases involve taking some action that undermines one's rational capacities, we can also imagine conflict cases in which an agent has a desire to not act in a way that would develop rational capacities. I am told that my capacity to know the world would be much improved if only I would learn some econometrics. However, I have a very strong desire to not spend any summers studying econometrics. Thus I remain at my middling state of being able to know the world, because I privilege my exercise of my capacity to achieve my desires. Again, helping my development of my rational capacity could only come at the price of interfering with its exercise.[8]

There is no problem with thinking that we have conflicting reasons for action, because the presence of a reason does not imply that there are no countervailing reasons. Whether agents can be subject to conflicting obligations is more controversial. The presence of an obligation typically indicates that the obligated agent might be blamed if they fail to act on the obligation, and they have no excuse (Cf. Darwall forthcoming). Perhaps incompatible obligations merely indicate that an agent could be blamed no matter which action is chosen, but this might sit in tension with our ordinary practice of blaming—which supposes that the blamed agent could have acted so as to avoid being blamed.[9] Nevertheless, many philosophers have developed strategies for allowing inconsistent obligations (Horty 2003; Goble 2009; Nair 2014). It is beyond the scope of this essay to address this general matter, so I will set it aside in order to focus on whether there is a special problem with conflicting obligations for Smith's constitutivist account.

To proceed, compare the psychology of an ideal agent who was subject to conflicting obligations with an ideal agent who was not subject to conflicting obligations. Would one psychology be more coherent than the other? I suspect there are several ways in which an ideal agent's psychology would be rendered less coherent by conflicting obligations. Suppose the agent intended to comply with all of their obligations. Then the agent would have intentions that were not jointly realizable. Allowing that intention must involve at least the belief that one *may* do as one intends, the presence of incompatible intentions would imply that the agent had conflicting beliefs,

8 Smith emphasizes that possible ideal agents may know a wide variety of different things, and have a wide variety of different final desires.

9 Bart Streumer (2007) defends the claim that "it cannot be the case that a person ought to perform an action if this person cannot perform the action." Even if this is not true for "oughts" generally, it may still be true for all-things-considered moral obligations. Cf. Graham (2011: 367-378).

and was therefore incoherent.[10] Alternatively, the agent might intend to comply with only some of their obligations. Partial compliance threatens other kinds of incoherence. In one case, the agent might decide arbitrarily which obligations to fulfill. Of course, choosing purely arbitrarily which obligations to fulfill will likely produce diachronically sub-optimal results. Let us grant the possibility of deontic inconsistency. An agent who chooses arbitrarily which obligations to fulfill may well end up satisfying fewer obligations overall, relative to an agent who chooses current actions with an eye toward being able to better fulfill obligations in the future. So an arbitrary selection strategy will not be used by an ideal agent.[11]

Next consider an agent who determines which obligations to fulfill so as to maximize the total number of satisfied obligations. This strategy looks roughly analogous to the "highest aggregate score" strategy mentioned earlier to describe a more basic level of agential functioning. Again, this is intuitively incorrect. Philosophers who accept deontic inconsistency still allow that some obligations are more important than others, a fact obscured by simple aggregation. The constitutivist picture can support this intuition. The highest aggregate score model was previously rejected, since it accepts a bundle of incompatible desires as constituting the ideal psychology. A more ideal psychology would not take such "dysfunction" to be a feature of the ideal (Smith 2012: 314). As we have seen, a more ideal psychology would include dominant, coherence-inducing desires. Likewise, compare the psychology of an agent who simply maximized obligation satisfaction with an agent whose psychology included elements that provided reasons to prioritize some obligations and not others. For considerations analogous to the earlier case, the latter psychology would be more coherent, and so also more ideal.

The last option would suggest that an ideal agent would choose which obligations to fulfill on the basis of reasons. Yet, how could there be reasons on the basis of which to make such a choice? To say that I am obligated to do something suggests that I have decisive reason to do it, or at least that I have sufficient reason to do it. If I have sufficient reason to perform either of two incompatible obligations, then on what could I deliberate between them? If there are reasons to deliberate on, then it seems that I may not have sufficient reason to do one of the things I am obligated to do after all. That would deny what I am taking as a conceptual truth about obligation. One possibility here is to think that there are "enticing reasons" to

10 Cf. Bratman (2009). Also on the irrationality of incompatible intentions, see Liberman and Schroeder (2016: 110).

11 This conclusion is consistent with Smith's rejection of arbitrary discrimination, in other areas—for example, among other agents. Cf. Smith (2011: 357).

discriminate among obligations, where an enticing reason to perform some action does not undermine the sufficiency of the reasons supporting an alternative.[12] Another possibility is to distinguish between an agent's being obligated, simpliciter, and an agent's being obligated, all-things-considered.[13] In either case, there will be a further question about how an ideal agent would prioritize obligations.

To sum up, the obligations to help and to not interfere can come into conflict. On the constitutivist picture, such conflicts can be characterized in terms of incoherence in the psychology of ideal agent. One way of managing this incoherence is to deny one of the obligations in question; a second is to allow conflicting obligations, but locate some further considerations to establish priority; a third is to locate some further considerations to establish what the ideal agent is all-things-considered obligated to do. For any of the three, further attention to the ideal agent's psychology is demanded.

It is tempting to think that we might appeal to the agent-relativity of the requirements to help and to not interfere in order to explain away any conflict in obligations (Smith 2011: 361; 2015: 192; 2003). The ideal agent is concerned about that agent's own compliance with the two requirements, not with maximizing compliance generally. In some well-known cases, an apparent dilemma between competing obligations can be dissolved by appealing to agent-relativity. For example, if an agent is concerned only with her own non-killing of other agents, and not the reduction of killing overall, she might refrain from killing an innocent, even it will bring about that some other killing of an innocent occurs. Agent-relativity can thereby support a distinction between "doing" and "allowing", which might be thought to bear on dilemmas between helping and not interfering. Although I will not explore this matter in detail, I do not regard this direction as promising. No such solution is likely to be in the offing, because agents have agent-relative reason both to not interfere and to help. The agent has a reason to avoid interfering, but the agent also has an agent-relative reason to bring it about that helping is produced through their own efforts. Agent-relativity cannot offer any traction in choosing between apparently conflicting obligations.

Another strategy might be to think about cases of resolving conflict within a single agent, and then try to generalize this to the case of moral obligations toward another agent. And in fact, it is plausible that the tension

12 A referee provided this suggestion, which I had not previously considered. See, for example, Dancy (2004).

13 Thus allowing for different obligations to have different weights, as favored by Liberman and Schroeder (2016).

between helping and not interfering would arise within a single agent. Consider again the dangerous drug case. An ideal agent might have any first-order desire, and so might desire to take capacity-damaging drugs. However, the ideal agent would also have a coherence-inducing desire to avoid interfering with the agent's future use of belief-forming and desire-realizing capacities. To achieve coherence, the latter desire would have to be dominant, and so the ideal agent would never have a dominant desire to take the drugs in the first place. This shows that in interactions between ideal agents, one agent will never have to consider whether to help or not interfere with another agent in this kind of case, since the ideal organization of the patient's psychology will prevent the conflict from arising.

Notice, however, that this conclusion does nothing to help the ideal agent who has to interact with non-ideal agents. There is no assurance that a non-ideal agent will have the relevant coherence inducing dominant desires, and so there is no assurance that non-ideal agents will not act in ways that threaten their rational capacities. Thus, if an ideal agent is interacting with a non-ideal patient, the patient may well decide to take a capacity-impairing drug. In this case, the ideal agent will be forced to prioritize either helping or not interfering. If the ideal agent helps (by interfering so as to stop the non-ideal agent from taking the drug), the ideal agent will be failing to comply with the obligation to not interfere. Likewise, helping can only be achieved through interference. Although the tension might not happen to arise for residents of the Kingdom of Ends, the actual world seldom affords such morally propitious conditions (Cf. Korsgaard 1996; Schapiro 2003). There is no reason this kind of case could not arise within Smith's constitutivist system. Although Smith formulates the view initially within a community of ideal agents interacting with each other, he explicitly allows that ideal agents have reason to abide the moral requirements with respect to non-ideal as well as ideal fellow agents (Smith 2015: 191; 2012: 329).

For simplicity it may help to begin with a conflict case that could arise within even ideal agents. Smith poses a helpful case: an ideal agent is suffering from an incurable, degenerative disease, but it so happens that forming the false belief that one is getting better actually does delay the progress of the disease, thereby preserving the patient's deliberative capacities in the future. The patient has a drug that, if taken, will cause the formation of the helpful false belief. Because the agent is ideal, there is a coherence-inducing desire to not interfere with one's rational capacities in the present, which provides a reason against taking the drug. Likewise, there is another coherence-inducing desire to help one's rational capacities in the future, which counts in favor of taking the drug. Because the conflict is between two coherence-inducing desires, it won't do to say that the

coherence-inducing desire is dominant. Smith recommends resolving this conflict "in a principled way, specifically by reference to the relative strengths that these desires have to have vis-à-vis each other simply in virtue of being the desires of an ideal agent" (Smith 2012: 319).

As I understand it, the relative strengths that the desires "have to have" are fixed by facts about what would maximize the agent's satisfaction of final desires, and knowing the world, given the agent's circumstances in the present and in the future.[14] In other words, the agent would have a relatively stronger desire to take the drug if doing so would overall promote the agent's final desires' satisfaction and knowledge of the world better than not taking the drug. This way of resolving the case is principled in that it appeals to the agent's success *qua* agent across time, rather than to our own intuitions about whether or not taking the drug is rational. What remains to be shown, I suggest, is how to carry out analogous reasoning between two different ideal agents, and then between an ideal agent and a non-ideal agent. Both the aspirations of Smith's constitutivism, as well as our everyday moral situation, call for extending the theory to cases like these.

## 3. PRIORITIZING REQUIREMENTS

Recall that so far, the constitutivist strategy has given us the following principles.

> *Non-interference*: It is impermissible to interfere with any rational agent's exercise of his capacities.
>
> *Help*: It is morally required to do what one can to make sure that agents have rational capacities to exercise.

The last section canvassed the constitutivist view to look for additional resources for resolving conflicts among these principles. The following are relevant. First, agents with more coherent psychologies are, *ceteris paribus*, more ideal than those with less coherent psychologies. Second, if an ideal agent must decide between either not helping or interfering with their future self, the agent will act so as to maintain the ideality of her future self's psychology. Third, ideal agents will act to maximize their knowledge of the world and satisfaction of final desires.

Now we can deploy a similar strategy in the two-person case. If one

14 I am persuaded of this interpretation by a referee. I am not confident that the ideal agent would be one who maximally achieves intrinsic desire satisfaction and knowledge of the world, since this standard sounds similar to the (rejected) "highest aggregate score" criterion, discussed above. All the same, it is a better interpretation than denying there are any facts fixing the desires' relative strengths.

ideal agent must choose between helping and not interfering with another ideal agent, the agent should act so as to maximize the patient's knowing the world, and fulfilling final desires. Further, the acting agent should act to bring about that the patient's psychology is as ideal as possible, and so, as coherent as possible. So we can add a further principle:

> *Coherence*: If one must either not help or interfere with another agent, one should do whichever would be supported by the most coherent rendering of that agent's psychology.

Imagine one ideal agent must choose between helping or not interfering with a second ideal agent. Suppose an agent [A] is deciding whether to take a helpful drug that would cause A to form a false belief. Some other agent [B] must choose between interfering with A's choice and not interfering. If A is an ideal agent, it is—according to the last section—possible that A will choose either option. Let us suppose, given the facts about A's circumstances, that A chooses not to take the drug. In this case, it would not make sense for A to also want B to interfere with A's choice. The reasons for A's wanting B to interfere with A's choice would also, by hypothesis, count in favor of A's not making the choice that A made in the first place. So if A were to then prefer that B interfere with A's choice, A's psychology would not be ideally coherent. So, A has most reason to want B to not interfere with A's choice in the case of conflict.

Next, suppose that B were committed already to some combination of helping and not interfering with A. If B had these commitments, it would not be coherent for B to then make decisions about whether to help or not interfere that disregarded what A had most reason to want. If B were to do that, then B would be both committed to acting in ways that were sensitive to A's reasons to want A's rational capacities to be helped and not interfered with, but insensitive to A's reasons about how helping and not interfering should be prioritized. This combination of responsiveness and non-responsiveness would, I think, impose a tension within B's psychology. So in the case of two ideal agents, we can infer how one would prioritize helping and not interfering with respect to the other. The acting agent would honor the priorities of the agent in the role of patient, whatever those priorities might be.

This inference can be further refined. Given variation in the circumstances, A may decide to take the drug that will interfere with A's capacities in the present, but will do so in a way that helps A's future capacities. Or, given other circumstances, A may decide against taking the drug. So A may prioritize either helping or not interfering with respect to future A. However, given A has an ideal psychology, B's response will be to

not interfere with A. If A interferes with A's future self, or if A decides to help A's future self, B will not interfere in either case.

A question arises when we consider the case of an ideal agent confronting a choice of whether to prioritize helping or not interfering with respect to a non-ideal agent. Recall from above that ideal agents may well encounter other agents who are non-ideal in a variety of ways. If A is a non-ideal agent, then A may opt to not take the helpful drug, notwithstanding that under the circumstances, A would do better as an agent if A did take the drug. A's psychology is not coherent. But if it were coherent, then A would want to take the drug. In this case, it seems that B, an ideal agent, should interfere with A to bring about that A takes the drug.

Although this may be correct about the case of the helpful drug, cases more enriched with realistic detail may reveal relevant, complicating considerations. Consider again the case of my refusal to study econometrics. An onlooker, persuaded by my social scientifically inclined friends, decides that it would be good for my rational capacities to enroll me in a remedial summer economics class without my consent. Although enrolling me would—by hypothesis—help cultivate my capacity to form correct beliefs about the world, it would also interfere with my autonomy. Which should the observer privilege? According to *Coherence*, my friend should investigate the relative strengths of my desires as part of an investigation of which value would better (that is, more coherently) resolve the internal tensions within my psychology. By hypothesis, if I cannot be persuaded to the take the class by non-interfering methods, then it is probably unlikely that the class will improve my capacities enough to justify the trade-offs with my end-setting and desire-satisfying capacities. I will just resent the infringement on my liberty, lack interest to study effectively, and so on. In other words, the same features of my psychology that make it non-ideal may render the helpful action ineffectual. An ideal agent would also be responsive to this non-ideality, and so would have reason to defer to my refusal, non-ideal though it might be.

Maybe this case seems too easy. Recall the would-be recreational drug user. This person has an end of using drugs that might damage their rational capacities in the future. Should an onlooker interfere in the drug user's life for the good of their future rational capacities? This case may seem more challenging—and indeed, a number of philosophers side with the preservation of rational capacities, even by way of state coercion if necessary (Freeman 1999; de Marneffe 2003; but compare Koppelman 2006). While I allow that this outcome cannot be ruled out according to *Coherence*, there is some reason to privilege non-interference. To see why, imagine the best scenario for the would-be paternalist: the drug user

judges that he should use the drug, but this judgment is—in coherentist terms—mistaken. We can add detail for the convenience of seeing the case at higher resolution. Suppose the drug user wants to go to school and study a technical subject, he admires people who resist temptation, he wants to set an example of "clean" living for his younger siblings, and he wants to preserve his cherished memories of his youth. A dominant desire to take the drug does not cohere with these other attitudes.

My suggestion is that even if the drug user is in this sense mistaken, it does not follow that the would-be paternalist should interfere. This is because the drug user's own judgment must now be included as a member of the elements of his psychology, and that judgment tells in favor of taking the drug. Even if the drug user's original judgment was mistaken, its mental genealogy does not make it any less a part of the drug user's psychology. Further, the drug user is likely to make additional plans based on that judgment, forming intentions and policies that cohere with it. After adopting these plans, the drug user's other attitudes may naturally shift in ways that cohere better with the judgment in favor of taking the drug (Cf. Velleman 2006; 2008). The preceding claim is about human psychology, but in principle my suggestion does not rely on any psychological conjecture. It only requires that an ideal agent's judgments about what to do will affect the content of their subsequent attitudes such that those attitudes will tend to cohere with the judgment. This alone, I think, is enough to at least tip the scales in the direction of deference to the agent's choice. If this is right, then *Coherence* supports another principle for deciding how to reconcile the original two.

> *Deference*: One should not, *ceteris paribus*, interfere with an agent for the sake of promoting their rational capacities.

Again, the *ceteris paribus* clause makes *Deference* defeasible. Here it will help to distinguish between the agent's *local* and *global* coherence.[15] The drug user's judgment may create a series of attitudes that cohere with that judgment, but these attitudes will likely include only a part of the total set of his desires and beliefs. However, the drug user's taking the drug may contribute to thwarting the agent's completely unrelated desires, and may undermine the correctness of unrelated beliefs. Thus, the drug user's judgment in favor of taking the drug may be locally coherent, but—with respect to the total set of the agent's attitudes—globally incoherent. The extent to which *Deference* is generalizable depends on how significantly considerations of local coherence impinge on an agent's global coherence. In the case of the drug user, local coherence of attitudes that fit with the drug user's plan are outweighed by its global incoherence. In other cases,

15 I'm grateful to an anonymous referee for this suggestion.

the opposite may be true. Imagine an agent who irrationally decides to embark on a career to which he is not well suited. This decision is non-ideal; it will, in expectation, realize the agent's *ex ante* desires less well than other career options. However, the agent not only strongly desires to embark on this career, but thereby adopts a whole series of related desires, beliefs, and plans. The agent might form other final desires to develop the skills necessary for the career, may form plans to receive training for the career, and might intend to move to different parts of the country to facilitate the career. As the set of relevantly connected attitudes expands, it becomes more likely that the local coherence with the agent's initial judgment will affect what is globally coherent for that agent.

If this line of reasoning is correct, we should expect that *Deference* will apply more often in cases in which an agent has formed many desires and beliefs around a given judgment, and less often in cases where a judgment is at odds with an agent's other desires and plans. To a considerable extent, this fits with our intuitions about when we ought to respect a person's sub-optimal choices. Choices that are more central to a person's beliefs, which reflect "deep commitments" or "personal integrity", are plausible candidates for respect, whereas choices less connected to other attitudes are correspondingly more plausible candidates for paternalism (Williams 1973). In fact (although I cannot pursue this conjecture here), the constitutivist program followed here might provide one way of explaining the normative significance of such locutions. On this view, a choice would be "deeper" or more associated with an agent's "integrity" if it impinges to a greater degree than other choices on an agent's global coherence.

## 4. THE PRIORITY OF NON-INTERFERENCE

So far I have tried to show that constitutivism, at least in the form presented here, tips the scales of moral obligation slightly in favor of deference to individual choice. It tends toward what Rawls called the "priority of liberty" (Rawls 1999: 214-220). I regard shoring up this presumption as sufficient to satisfy the original aim of this paper. Nevertheless, in this section I hope to find support for a stronger version of the thesis.

Recall that Smith's argument moves from the premise that agents must desire to not interfere and to help to the conclusion that they are morally required to not interfere and to help. The argument is something like this:

1. Ideal agents have dominant desires to help and to not interfere.
2. If ideal agents have dominant desires to Φ, then their real-world counterparts have decisive reason to Φ.

3. Obligations are grounded in decisive reasons.
4. So, agents are obligated to help and to not interfere.

There are several questions we could ask about how the desires to help and to not interfere could ground moral obligations. First, one might ask how morality got into the story at all. For none of the previous desires that Smith considered, including coherence-inducing dominant desires, did he infer that their corresponding reasons were moral reasons. I take it that Smith simply infers the moral character of the reasons to not interfere and to help from their extensional similarity to our ordinary judgments about the content of moral reasons. He writes:

> "The striking similarity of these acts to those that we ordinarily take to be morally required is, the Constitutivist insists, manifest. The only reasonable conclusion to draw is that every agent isn't just rationally required to help and not interfere, but that, at the most fundamental level, every agent is morally required to help and not interfere as well" (Smith 2013: 26).

Smith may not have much at stake in whether this inference to moral requirements holds. In a passage cited earlier he describes it as his "conjecture", and here he recommends it as a kind of obviously reasonable conclusion.

Granting that we have moral reasons to not interfere and to help, I am less sure that it follows that these are requirements. I am also less sure that this inference follows from Smith's constitutivist account. To begin with the former, we ordinarily accept that we have many moral reasons that we are not required to act on, even in the absence of strong opposing reasons. If we take for granted a basic moral category of supererogation (or even something like imperfect duties), then there are likely many moral reasons that do not yield a requirement to perform any particular action (Driver 1992; Darwall 2006; Wolf 2009; Harman 2016). Moreover, it would be strange if we were morally required to act in ways that promoted the development or acquisition of others' rational capacities. It does not fit with our intuitions that we have obligations to ensure that other people (at least, other adults) go to class, or refrain from taking drugs, or avoid falling in love—notwithstanding that these all correspond to ways of ensuring various capacities for knowing the world.

These concerns form part of a larger worry, which is that a set of moral requirements to "help" would ask more from us than a commonsense morality supposes. There are—to put it mildly—many people in the world whose rational capacities are not fully and robustly realized (Caplan 2007). Doing what we could to help them would likely require living very

differently than we now live, but this is at odds with our current practice of moral praise and blame. We do not resent people who fail to dedicate themselves to helping in the same way that we resent those who stand us up for lunch. This echoes the standard "overdemandingness" worry prevalent in the moral philosophical literature (Railton 2003; Herman 2001; Sin 2010; Noggle 2009; Igneski 2006; Jamieson 2005). But within the constitutivist framework underwriting this discussion, we can more precisely frame why the worry poses a theoretical problem. The issue is not merely that the demands are intuitively too demanding. Rather, the issue is that such demands would predictably disorder an agent's psychology. If we were to dedicate ourselves to helping (in Smith's technical sense), it would likely take so much time as to compromise our pursuit of our other final desires and cultivation of rational capacities. Perhaps if we had significantly restricted sets of final desires, or final desires that happened to cohere with a rigorous program of helping, then they would not conflict with an obligation to help. Recall, however, that an ideal agent can have a great variety of final desires. It is not plausible to assume that such incoherence-creating conflicts could be avoided. Nor will it help to insist that the ideal agent's final desire to help will be a dominant (coherence-inducing) desire. As noted above, there will likely be many candidates for helping, requiring a kind of triage in deciding where to help. Choices must also be made about how much to trade off helping others with other dominant-desire supported ends, including not interfering with one's future self, and helping one's future self.

In short, treating the moral reasons to help as requirement-grounding creates much possible incoherence in an agent's psychology. But was there a good theoretical basis for treating reasons in this way to begin with? Consider again the single agent whose idealized psychology happens to finally desire to believe <p>. That desire conflicted with another desire that the ideal agent turned out to have—a desire to not interfere with their capacity for belief. Imagine leaving it an open question, for any given case of such conflict, which desire happened to be stronger. If that question had been left unsettled, there might have been cases in which the desire to believe <p> prevailed, such as when the importance of believing on the evidence seemed relatively low. That state of affairs would have flouted a rational requirement on belief, which is that beliefs must still be apportioned to the evidence even when the content of the belief is unimportant (Kelly 2002).

Revisiting this case shows how to locate the emergence of the rational requirement. Here, the requirement on belief is not given by any comparison of the strength of the desires that bear on how to believe. Instead, the

theory produced a model that extensionally resembled the rational norms on belief by positing an additional mental state—a coherence-inducing desire—and then ensuring that this desire would always be dominant. In the remainder of this section, I will briefly sketch how conflicts among dominant desires might be managed within the ideal psychology.

To be ideal, an agent must satisfy as many of their dominant desires as possible. However not all dominant desires can ground requirements. Note that incoherence only arises with respect to helping, but not with respect to not interfering. Any agent may maximally satisfy the requirement to not interfere with other agents' exercises of their rational capacities. All you need to do is nothing at all. Some philosophers have tried to deny that it is possible to avoid interfering with other agents (Pogge 2002). I will not argue against this view here, but I do not agree (Cf. Risse 2005). While I will not try to specify what counts as non-interference here, I am sympathetic to the hypothesis that a great many human endeavors can succeed at not interfering in the relevant sense.[16]

If not interfering is uniformly possible in a way that helping is not, then not interfering can always be required, while helping cannot. With that distinction in hand, we can say something about the traditional asymmetry between negative and positive duties. Very generally, negative duties (which forbid actions) seem morally more stringent than positive duties (which require actions) (for example, Foot 1977; Thomson 2008). The constitutivist account helps to explain the difference. Because helping requires action while not interfering does not require action, the asymmetry between the moral status of helping (sometimes required) and the moral status of not interfering (always required) fits the asymmetry between negative and positive duties.

Now the question is: How can we add a mental state to the psychology of an ideal agent in order to fix the terms of when helping is a moral requirement? We could try to say that the ideal agent would maximize helping overall, or maximize instances of that agent's own helping actions. These would also threaten incoherence, given that they would predictably interfere with the agent's dominant desires to develop rational capacities and not interfere with the agent's own exercises of those capacities. But this fact may give a clue to discerning when helping others *could* be required. Perhaps if an act of helping would not conflict with any of the agent's dominant desires with respect to the agent's future self or with respect to other agents, then it could also be promoted to the status of a requirement (Ebels-Duggan 2009). The ideal agent might have some

16 See Ripstein (2009) on the difference between interfering with a person, and changing the circumstances of their choice.

additional mental state that facilitates this coherence. For example, an ideal agent might be required to perform those helping actions that he had promised or otherwise committed to perform. Beyond this, the ideal agent would intend to act on some combination of desires to help others, and desires to help and exercise the agent's own capacities.

How could we ensure that a requirement to help some given agent would not conflict with any of an ideal agent's other dominant desire supported ends? There may be a variety of ways to achieve this result, but one suggestion is to expect that dominant desires to not interfere will be especially weighty, relative to dominant desires to help. Although the details of how such a weighting might be developed will have to be left aside for now, the general contour of this idea fits with many first order intuitions, as well as widely accepted theoretical commitments. For example, it conforms with an intuition mentioned earlier: the fact that another could be helped by our action is generally not sufficient to require our action. It also fits with the diversely motivated theoretical commitment that there is "a clear sense in which [morality's] fundamental prohibitions (its 'thou shalt nots') are more strict than its fundamental exhortations (its 'thou shalts.')" (Graham 2011: 377). For now, all I want to suggest is that "helping" and "not interfering" can both be correct principles, provided that we see the limits of the requirements they together create.

## 5. CONCLUSION

This essay takes constitutivism about morality for granted. Suppose that moral requirements are grounded in what is constitutive of agency. What would that tell us about the content of moral requirements?

Michael Smith answers that it would reveal that helping ensure that other agents have rational capacities, and not interfering with the exercise of those capacities, are the fundamental moral requirements. The problem is that these requirements can conflict. That news is not too bad, though, because Smith's entire constitutivist project is worked out in terms of resolving conflicts in an agent's psychology. Using similar strategies, this paper has argued that the potential for conflict can be solved. The weaker thesis of this paper is that there is reason to defer to the agent's choice in deciding between helping and not-interfering, and so we should have what Rawls called a "presumption of liberty." The stronger thesis is that not-interfering is always required, but helping is only required sometimes. One interesting upshot of these claims is that, if correct, they can contribute to explaining other aspects of our moral practice, such as the asymmetry between doing and allowing. Another interesting upshot is that it will turn

out that Immanuel Kant—at least on one reading—was right about how we are obligated to other persons.[17]

Put in a mundane way, my essay has tried to make one modification to one existing version of constitutivism. But put in a more dramatic way, the proposal of this essay shares the aspiration of constitutivist theories since their start—to vindicate the truth of Enlightenment liberalism. If the amendment offered here is right (along with, I suppose, all of the foregoing theory as well), then we are rationally required to treat the liberty of persons as sacred.[18]

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17 On Karen Stohr's (2010) reading of imperfect duties, "it appears that it is up to me to choose the occasions on which I will be beneficent." If Kant thought interference was always wrong; that helping was sometimes required; but that no arbitrary case of helping was sometimes required; and that what determined whether a given case of helping was required was up to the helping agent—then Kant was right about everything.

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# Violations of Privacy and Law: The Case of Stalking[1]

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## ABSTRACT

This paper seeks to identify the distinctive moral wrong of stalking and argues that this wrong is serious enough to criminalize. We draw on psychological literature about stalking, distinguishing types of stalkers, their pathologies, and victims. The victimology is the basis for claims about what is wrong with stalking. Close attention to the experiences of victims often reveals an obsessive preoccupation with the stalker and what he will do next. The kind of harm this does is best understood in relation to the value of privacy and conventionally protected zones of privacy. We compare anti-stalking laws in different jurisdictions, claiming that they all fail in some way to capture the distinctive privacy violation that stalking involves. Further reflection on the seriousness of the invasion of privacy it represents suggests that it is a deeply *personal* wrong. Indeed, it is usually more serious than obtrusive surveillance by states, precisely because it is more personal. Where state surveillance genuinely is as intrusive as stalking, it tends to adopt the tactics of the stalker, imposing its presence on the activist victim at every turn. Power dynamics —whether rooted in the power of the state or the violence of a stalker —may exacerbate violations of privacy, but the wrong is distinct from violence, threats of violence and other aggression. Nor is stalking a simple expression of a difference in power between stalker and victim, such as a difference due to gender.

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**Keywords**: Stalking; privacy; ethics; criminalization; psychology; law

## 1. INTRODUCTION

*Stalking* consists of one person's keeping track of, and trying to make frequent contact with, another person, who is the subject of the first person's obsessive thoughts. The contact can take place in physical space or on the Internet. Although there are cases in which the object of obsessive thoughts is unaware of the attentions of the stalker, these are unusual and will be ignored in what follows. Some stalkers target high-profile political figures and think of their own behavior in patriotic or party political terms: these cases, too, will be disregarded. Also to be set aside are cases in which the context for the stalking is some pedagogical or clinical relationship which takes on sexual or romantic significance even if it involves no actual sex. We shall focus instead on what the psychological literature identifies as standard: cases where the basis of the stalking is some temporarily disrupted, defunct, or even imaginary romantic relationship between stalker and target.

Two questions will be considered in what follows. (1) What, if anything, makes stalking wrong? and (2) If stalking *is* wrong, is it so seriously wrong that it should be criminalized? Our answer to (2) is 'Yes', and the serious wrong involved can be summarized by saying that prolonged stalking often results in a sort of psychological take-over of its target.[2] The obsessive character of the stalker's pursuit can end up being reflected in an obsessive, anxious preoccupation with the "presence" of the stalker on the part of the victim, whether or not that presence is physical. This anxious preoccupation often pervades the stalking target's waking life, and undermines her capacity to deliberate, choose, and plan. This undermining is the harm that a properly formulated law against stalking should address.

The stalker imposes his presence typically by following the victim, by penetrating her home, and by disrupting her normal work and social relations. This presence is not always eliminated when the stalker is made the subject of a restraining order or put in prison. Victims of stalking suffer from anxiety, insomnia, greatly disrupted work lives, and loss of confidence. The effects of common or garden harassment can be similar, but they are often tied to a context —a workspace or a shared communal housing space —which does not pervade the victim's life, and which can be escaped or left. In stalking at its worst, the anxiety resulting from it is relatively *in*escapable and debilitating. It breaches most of a person's private space,

2 See Meloy (1998: ch.9), Mullen and Pathé (2002: 273-318, esp. 296ff)

including a person's inner sanctum: the space in which she deliberates and makes choices without external influences.

Because conventions governing private space, including the space to choose and deliberate without interference, are intimately connected with autonomy, it is hard to separate violations of privacy from attacks on autonomy. We emphasize violations of privacy, because, as it will emerge, we identify the psychological space for deliberation and choice as the most basic of three zones of privacy created by familiar informal conventions governing privacy. Moreover, we argue that in law, policy, and public discussion, the violation of privacy involved in stalking is incorrectly minimized, especially when compared to the intrusiveness of state surveillance. According to us, many forms of state surveillance are *less* invasive than stalking.

The rest of this paper is divided into five sections. In section 2, we draw on some of the psychological literature about stalking, distinguishing types of stalkers and their pathologies. We also discuss victims. It is the victimology of stalking that is the basis for claims about what is wrong with stalking and why it ought to be criminalized. Even when stalker and stalking victim are prior acquaintances who are not trying to revive or kindle romance, there is a thread running through the experiences of victims, and that is the obsessive preoccupation with the stalker and what he will do next. The kind of harm this does is best understood in relation to the value of privacy and conventionally protected zones of privacy (section 3). In section 4 we distinguish stalking from harassment in general and consider laws which fail to reflect the distinction between the two offenses. We compare anti-stalking laws in different jurisdictions, claiming that they all fail in some way to capture the distinctive privacy violation it involves. Section 5 considers the role of broader power dynamics and a feminist skepticism about the value of private spaces. Section 6 contrasts the invasiveness of stalking with the invasiveness of state surveillance.

## 2. STALKERS AND THEIR VICTIMS

It is rare to be stalked by a stranger.[3] Most stalkers are men who are known to their typically female victims.[4] Stalkers are often former sexual partners with whom the victim no longer wants a relationship, or else rejected

3 Though the UK government recently proposed new legislation in part addressing this kind of stalking http://www.bbc.co.uk/news/uk-35010544.

4 For an overview of typical offenders also see Baum (2009); and for an overview of both typical offenders and victims see Mullen (2009). The strongly gendered character of the typical stalking case is discussed in section 5 below.

suitors with whom at most non-sexual intimacy was achieved. These two kinds of stalkers, together with work-related colleagues, people met through professional relationships, and neighbors form the category commonly referred to as 'prior acquaintance' stalkers. In virtually all studies, whatever the recruitment method or sample size, 'prior acquaintance' stalkers account for the majority, sometimes close to 80 percent, of cases (Pathe and Mullen 2002: 289ff.).

Prior acquaintance stalkers can include ex-spouses who when living with the stalking victim were highly controlling and suspicious, and for whom stalking is a way of resuming that controlling role.[5] These men might have been batterers of the women they once lived with and later stalked.[6] Other stalkers are the non-battering former partners of stalking targets from whom they have been divorced.[7] Still other stalkers are socially incompetent or isolated people who make frequent contact with the stalking victim as a form of communication of romantic feelings. Stalkers of this kind deludedly hope that frequent contact will make the stalking victim reciprocate these feelings. These stalkers do not necessarily strike the victim as frightening or a likely source of violence. Much more rare is the classic erotomanic type, usually a woman, who suffers from the delusion that a higher-status man whom she has never met is in love with her.

Many stalkers —at least in the samples that have been associated with empirical studies in several countries —have criminal records and psychiatric histories, including histories of addiction to drugs and alcohol, but have better than average education (Hall 2007: 124-31). To the extent that they have been assessed psychologically, a significant number have experienced unwanted separation from parental figures or other adult providers of care or love in their early childhood (Meloy 2007: ch. 3). There is also a weak association between stalking and being a foreigner or cultural outsider.[8]

5 Indeed, Kurt (1995: 221) claims that "some stalking behavior represents a form of domestic violence".

6 See, for example, Logan and Walker (2009) for an argument that stalking by partners is particularly likely to be particularly harmful and often begins while the relationship is still intact. It is also worth noting a study by Weller et al. (2012) indicating that both the public and police were less likely to regard scenarios involving stalking behavior by someone previously known to the victim as a case of stalking than they were when the same behavior was carried out by a stranger.

7 For an overview of sexual abuse —a category in which the authors include stalking —directed by women against men, see Cook and Hodo (2013)..

8 In one of the formative legal cases that inspired stalking legislation in the USA — Tarasoff v. Regents of the University of California (1976) —Prosenjit Poddar, a Bengali graduate student at Berkeley in the late 1960s, developed an obsessive attachment to a fellow student, Tania Tarasoff, who was probably the only American woman to befriend him while he pursued his studies in the USA. He misinterpreted some of her behavior as a sign of

The most severe stalking behavior —the most persistent, the most likely to involve violence, obtrusive following, surveillance at home, and frequent telephone contact —is associated with highly controlling ex-partners. Such stalkers sometimes seek to re-establish a cohabiting relationship, but they can also try to prevent the formation of new relationships by ex-partners. Where children are involved and they have visitation rights, stalkers of this kind often have a range of pretexts for maintaining contact with an unwilling ex-partner, and it is particularly difficult for the victim to extricate herself. Stalkers in this category often exhibit the symptoms of anti-social personality disorders (ASPD).[9]

Related personality disorders —borderline[10] personality disorder, histrionic[11] and narcissistic[12] personality disorders —are also associated with violent stalking and may co-exist with or be confused with ASPD.[13] In borderline personality disorder there are frequent changes of mood and threats of suicide as well as signs of paranoia. Again, "individuals create a sense of the importance or depth of the relationship that is not consistent with their partner's attachment" (Meloy 2007: 74). This same delusion of depth is associated with histrionic personality disorder. "Individuals become uncomfortable if they are not the center of attention" and "often use their physical appearance, usually eroticized, to create attention" (ibid). As for narcissistic disorder, this is associated with a pathological need for admiration and is sometimes thought to run through the whole

romantic interest, and appeared not to be able to bear her eventual emphatic rejection of him. Although his obsession with Tarasoff was known not only to his friends but to clinical psychologists treating him, an attempt to talk to her alone at home ended in his stabbing her to death when she ran away. The claim that his relationship with Tarasoff was partly clouded by cultural misunderstanding and by the stresses of coping with American graduate studies is highly plausible (Meyers 1998).

9 See for example Meloy (2007: 73) who writes that these may include "failure to conform to social norms regarding behaviors, deceitfulness, lying, use of aliases, impulsivity, history of physical violence, reckless disregard for safety, irresponsibility and lack of remorse. ...Perpetrators present a false image of themselves regarding their life history, experiences and interest in the stalking victim. They have a unique sense of which women are vulnerable and prey on their weaknesses. Such female victims many times have a history of involvement with ASPD men. Domestic violence is a prominent theme during the relationship. When a break-up occurs, the stalker may attempt to intimidate the victim through telephonic and written threats, stalking and physical confrontation of their victims. Many times these individuals are violent toward their victims".

10 "a pattern of instability in personal relationships, self-image, and affects, and marked impulsivity" (American Psychiatric Association 2013: 645,663-666)

11 "a pattern of excessive emotionality and attention seeking" (ibid 645, 667-669).

12 "a pattern of grandiosity, need for admiration, and lack of empathy" (ibid 645, 669-672).

13 "a pattern of disregard for, and violation of, the rights of others" (ibid 645, 659-663).

variety of stalker profiles (ibid).

Unlike some of the more serious psychiatric conditions,[14] personality disorders do not necessarily rise to the threshold required for legal incompetence, and so stalkers suffering from them can be held responsible for what they do by courts and the police. Their behavior is also subject to moral assessment, since in many cases stalkers can form coherent (if malicious) intentions, reason about the consequences of their actions, be sensitive to the presence of witnesses, and can steer clear of legal borderlines they must not cross if they are to escape prosecution and imprisonment.

At the core of the moral wrong in prior acquaintance stalking is not assault or intimidation, serious as those wrongs are. It is the presumption of intimacy or the coercion of intimacy, if that latter notion is not self-contradictory. Intimate relations between two people involve willing companionship, including self-exposure on quite a large scale. This exposure proceeds on the assumption of more than trust: it usually involves mutual love. A false presumption of intimacy is a kind of pre-emption of the other person's exercise of will in self-exposure or in willing participation in intimate behavior, such as sex or sharing confidences that would be damaging if made public. The invasion is not necessarily greater when intimacy has never been entered into than when it has been entered into and then been withdrawn. For it may be a requirement of morally defensible romantic intimacy of any kind that, once it has been offered and reciprocated, either party can withdraw it at will. Such withdrawals are sometimes unreasonable, but they are always permitted; otherwise intimacy is forced and therefore defective. In ASPD cases the withdrawal of intimacy is very often *entirely* reasonable, prompted as it is by physical violence or psychological oppression. But even if it were not; even if one party suddenly found the other physically repulsive for no good reason; that would not make continued intimacy morally compulsory: intimacy is *never* morally compulsory.[15] Care-giving might be; or continued co-operation in joint projects. But this might co-exist with a significant degree of withdrawal, sufficient for ending intimacy.

14 See for example American Psychiatric Association (2013).

15 See for example the argument of Andrei Marmor: "intimacy involves considerable costs, such as responsibilities and the need to care for the other. When those responsibilities and willingness to care are voluntarily undertaken, they foster good relationships. But when they are imposed involuntarily, especially on a large scale, the results might be quite oppressive. We can only operate in the complex societies we live in if we are allowed to deal with others at arm's length, keeping some distance. The need to keep some distance is partly physical—we often feel very uncomfortable being too close to strangers—but it is also, perhaps primarily, social; closeness to another typically involves expectations and responsibilities that one should, by and large, only undertake voluntarily" (Marmor 2015: 9).

For at least some, stalking is the attempt to regain lost intimacy, or an attempt to win a so far withheld intimacy, by a show of emotional intensity and persistence. In the eyes of the stalker this persistence and intensity *deserve* a positive, intimate response —*deserve* a declaration of love, say, or an invitation to cohabit, or a marriage proposal. When the persistence or intensity is met instead with a clear rejection, or with fear or confusion, the stalking can begin to be motivated by anger and start to aim at revenge for the pain of rejection. It is at this point that the prior acquaintance stalker often invades personal space —either physical, such as the subject's home, or psychological. Some stalkers invade this space in order to acquire the sort of proximity to the victim that real intimacy would have afforded, and that is mostly likely to help the stalker impress himself on the victim's consciousness. The stalker wishes to be the central object of the victim's romantic preoccupations but engineers, as a second best, a kind of top billing in her *anxious* preoccupations.

In a culture such as ours in which behavior that is traditionally expressive of deep intimacy, such as sex, can be part of very short-lived, casual relationships, the scope for confusion about what is serious or deep or genuine intimacy, or what can lead to genuine intimacy, is probably considerable. Presumably the 'intimacy' of the one-night stand is at some distance from fully-fledged intimacy, yet in some cases it may hold the promise of fully-fledged intimacy, or be interpreted that way, possibly incorrectly. By contrast, 'prior intimates' who have been married and started a family are in a morally different case from one-night stands. Although marriages involving parenthood are not *bound* to involve genuine intimacy, they can and usually do, even when they end in divorce or separation. And again, both marriage and one-time sexual involvement are different from prior acquaintance in its sexually unconsummated forms, where one of the parties has, or formerly had, romantic aspirations.

The moral distinctions between these cases track the genuineness and depth of intimacy, where a criterion of genuineness is whether the intimacy is willing and mutual and relatively sustained. The deeper the genuine intimacy once achieved, the less presumptuous, other things being equal, is the attempt to *regain* it non-violently or non-oppressively. The divorced person who does nothing more than send an annual love letter to his ex-partner for more than 30 years does not count as a stalker, but his behavior probably belongs on a spectrum that includes stalking.[16]

16 Curiously, a deep invasion of physical and psychological space can occur in cases of stalking that are not obviously romantically inspired. Here the wrongness can seem as great or greater, violence apart, than in cases so far considered, since romantic intimacy is never offered, and so never withdrawn, by the victim. The stalking victim starts out by being professionally related to the stalker, and the supposed departure from that relationship by

## 3. STALKING AS A VIOLATION OF PRIVACY

Is there anything that ties together the invasiveness of the whole range of stalking behavior? The short answer is that all stalking involves persistent invasions of privacy. The successful stalker goes beyond simple invasions of privacy to mount a kind of *occupation* of the mind. This kind of intrusion is more significant than any other kind of incursion into this or any other zone of privacy, whether by perfunctory or even moderately prolonged uninvited observation.[17]

We now enlarge briefly on zones of privacy and the relations between them. We think there are at least three such zones. The first two include the naked human body and the home space, that is, the physical space —often a room or set of rooms or a building —which provides a customary default location for a given agent, and where others are permitted only at the agent's invitation. The home space in our sense —in the sense of default location of an agent to which he or she controls access —is more austerely conceived than home space in the sense of the site of traditional marital or family relations.[18]

Familiar and very widely observed conventions restrict public displays —displays outside the home space —of the nude human body, or of sex. Further conventions restrict the observation or surveillance by outsiders of activities in the home space. Surveillance that violates the home space can be motivated by the wish to exploit the connection between the privacy

the stalking victim is often largely or wholly a figment of the stalker's imagination. Two well-documented cases start in student-teacher relationships. The first involves an academic, Robert Fine, who was physically stalked by an ex-student (see Fine 1997). The other is a much more recent, possibly still on-going, case of cyberstalking, also involving an ex-student and the poet and novelist James Lasdun (see Lasdun 2013). Both cases depart from the standard pattern of a woman stalked by a man previously known to them, but they reproduce the severe psychological disturbance that stalking seems to bring with it.

17 While privacy may be invaded without constituting an act of stalking, all stalking behavior involves an invasion of privacy. Historically the privacy literature can be divided between that concerned with physical intrusions, informational privacy, and that concerned with the conditions of autonomous life. For example Allen (1998) distinguishes privacy in the sense of "restricted access" —something like our zonal account —and decisional privacy; Tavani (2007) argues for a "restricted access/limited control" position, latching together a "restricted access" account and a limited control component for the specific case of informational privacy. The literature most directly relevant to our purposes here is that on physical intrusion. However, we think the case of stalking helps to demonstrate the relevance of physical intrusion to understanding wider considerations, especially that of autonomy.

18 The austere conception of the home is supposed to be distinct from the problematized domestic space —outside the reach of law in classical liberal formulations —that is supposed to be one of the loci for the exertion of male or patriarchal power. To exclude issues that are not relevant to our account of the field of application of the right to privacy, we can imagine the home space having only a single occupant at a time.

zones of body and home. In the home, the normal conventions prohibiting the display of the body are relaxed. This means that surveillance of home space can give an outsider intimate access to the body of the person or persons whose home it is. Surveillance can produce a facsimile of physical presence. But since the conventions governing the home space require presence to be by invitation, the 'presence' afforded by surveillance, especially covert surveillance, is a significant violation of privacy.

The normative protections afforded to home spaces can travel with the individual to temporary homes like hotel rooms, or, more weakly, when travelling around particular kinds of public space. Consider a couple eating dinner together in a restaurant. It is understood that they may be seen by others there or spotted through a window, but any kind of prolonged watching will be invasive. Contact here might require some sort of negotiation —even a friend who spotted them might engage in at least non verbal communication to make sure their contact was not unwanted before approaching their table. We might call a table in a restaurant a 'semi public space'. Again, consider the norms governing watching or contacting an individual sitting in a parked car, relaxing in a public park, or reading in their seat on an airplane. Even in the most undeniably public of spaces — the concourse of a railway station or a public square —there might still be normative presumptions against prolonged watching or uninvited contact, albeit ones more easily trumped by other considerations. In this way, repeated uninvited contact or hovering could amount to intrusion even if it occurred in what was otherwise a public —non-home —space.[19]

Mere presence or observation in someone else's zone of privacy does not necessarily mean that that person has been wronged. After all, we often voluntarily *grant* access to others. Nevertheless, one may experience a loss of privacy even in these cases. The loss may be outweighed, e.g., by the benefits of (genuine, uncoerced) intimacy, or for more mundane reasons. The homeowner who asks a repairman to come round and fix their fridge gives up some privacy for a while. In a range of other cases potentially deep costs to privacy are mitigated by the fact that someone is acting in a professional role and has no personal interest in the information they gain access to. I may be less embarrassed by a repairman seeing how messy my kitchen is than by my neighbor's seeing the same thing: I will probably never see the repairman again. Our contact is at the outer fringes

19 Normative protections of the naked body and of mental privacy arguably also 'travel' with the individual. If someone's body is unwillingly exposed as the result of an accident it will be common to look away, to respect their privacy. Except in specific circumstances it will be regarded as (mildly) invasive to check what someone is reading over their shoulder even if they are in a public space.

of personal.[20] With the neighbor it is different.

We have been speaking of conventional restrictions on exposure of the body and outsider presence in the home space. A third, less obvious, zone of normative privacy is the mind. In a way this is the most sensitive of private zones, normatively speaking, since it is the space from which one chooses what the limits of willing self-exposure will be in relation to the body and also who else can be present in the home and how. More generally, the mind is the space from which everyday activity is considered and planned. It is also the space in which at times one *discovers* what one thinks, sometimes by 'trying on' opinions experimentally and attempting to defend them in conversation. In other words, mental space may be the staging area for the expression and controlled exposure to criticism of one's opinions —in a space that is only open to others by invitation. Here the home and mental spaces work together.[21]

Incursions into mental space can take the form of unwanted indoctrination or overbearing parenting, but they can also take the form of harassment and stalking. Incursions can be sporadic or sustained. When they are sustained and debilitating, in the sense of reducing the capacity of an agent for deliberation and choice, they are particularly serious, because of the way that deliberation and choice control exposure in the other privacy zones.

Prior-acquaintance stalkers have often had unrestricted access to all three of the privacy-sensitive zones on our list: they have been romantically involved with their stalking victims and have sometimes lived together and started a family with them. They have also gained information about what they think and what matters to them. This access is often what they are trying to regain by stalking. The same access is what stalkers exploit when they are trying to increase the anxiety of their victims. But the prime

20 Two intermediate cases are contact with doctors involving physical examination and (less common) being subject to the attentions of a private investigator, and becoming aware of it. In the doctor case, we grant (typically brief) access to a private zone for diagnostic or curative purposes, which purposes limit the degree to which it is personal. This is quite different from stalking. In the investigator case there is usually access to publicly available information about someone, rather than to the body or home. Where a private investigator carries out the investigation obtrusively and persistently over a long period of time, and stoops to wire-tapping or housebreaking, the distance from stalking shrinks. We thank anonymous Referee 2 for getting us to think about these cases and the case at N21.

21 If a fellow traveller's conversation on the bus is so racy and provocative that I cannot tune it out, has my mental privacy been invaded? In most circumstances no: the bus is understood as a shared space where overhearing conversations is to be expected. Furthermore, the conversers are unlikely to have any intention of imposing their conversation on others. However, in unusual circumstances an inappropriate conversation could be an invasive action: consider a stalker who deliberately sits near their victim and deliberately begins a conversation that they know the victim will be unable to tune out.

and overarching effect of stalking —often the intended effect —is to unsettle and preoccupy the mental space of the stalking victim, to such a degree that the stalker is always present to the stalking victim's mind. In this way they have often therefore also penetrated the normative protections of the home space as well.

The psychological harm produced by stalking brings out the importance of privacy in general, and the priority of protections for the mental zone among the range of zones of privacy. The reason why privacy matters in general is that it facilitates the autonomous pursuit of life-plans. Someone with no privacy is likely to be subject to interference from others, sometimes through the excessive influence of close associates, whether friends, family, or employers.

Privacy can counteract excessive influence. It obstructs coercion by removing people from the coercers, enabling unobstructed choice and activity to proceed. It allows an agent to think, plan and act away from even well-meaning friends and family. Again, privacy makes possible safe inactivity or rest. Differently, it makes possible safe engagement in otherwise risky social activity. It makes possible willing disclosure to a very limited audience, or even all-out concealment of things from everyone else. It provides opportunities not only for non-exposure, but also, when the private space is under the agent's control, for safely exposing oneself to, and thinking about, new ideas and influences, and for undergoing new experiences.

Through the opportunities it affords, privacy can enlarge the range of options an agent chooses between. It can also make available information about the experiences of those who have already made choices that one is considering. Not that the opportunities provided by privacy have to lead to uncharacteristic behavior: they can instead lead to reflections that confirm one in past choices. But by making available new grounds for endorsement of even characteristic choices, privacy makes characteristic choices more autonomous, at least in principle.

Against the background of the value of privacy, it is possible to understand the pre-eminence of the mental zone within the range of zones conventionally protected from unlimited observation and from intrusion. The mental zone is the locus for reasoning, critical reflection, and deliberation leading to decision. It probably contains the determinants of the continuity and identity of the self and possibly the person.[22] For this reason it might be considered an inner sanctum. If this zone is violated by the forced introduction of preoccupations, then the value of the privacy of the home is also diminished, since the home space acts to create a barrier

22 See for example Locke (1975) and Williams (1973).

of protection for the mind in addition to an agent's power of non-disclosure and concealment. If the mental space is anxiously preoccupied, its value as the locus for reasoning, critical reflection, and deliberation is diminished. In its diminished condition it can become a source of vulnerability which insulation within the home may even increase. If mental vulnerability is prolonged in time, as often occurs in stalking cases, the harm caused is proportionally greater. Mental vulnerability can in turn increase bodily vulnerability and the vulnerability of the home space. In other words, violations of the mental zone can rob the other privacy-sensitive zones of value, but not necessarily conversely.

## 4. STALKING , HARASSMENT AND LAW

What is the difference between the psychological invasiveness of stalking and the psychological invasiveness of harassment? There are similarities and overlaps between harassment and stalking, but distinguishing them helps to explain why stalking is usually a more severe violation of privacy and, with that, a more severe violation of autonomy, than harassment.

Typically, harassment is repeated, one-sided *aggressive* contact. As defined in English law,[23] the contact must cause distress or fear of violence to constitute an offense. It regularly occurs between a victim and *more* than one perpetrator, unlike typical stalking, or is directed by one or more people or by several perpetrators acting together.[24] Harassment may be a *hate* crime in which the perpetrators take out their racism or sexism on strangers who are representative of hated groups, but who are not known personally, or it may take place in the context of an employment relationship or between different residents in a neighborhood. Compared to the kind of stalking that appears to be central —namely one-on-one prior-acquaintance stalking with romantic associations —harassment seems to be more intended to frighten or exclude, and more open to collective rather than individual responsibility. Admittedly, some harassment can be sexual and can take some of the forms that stalking does. But harassers are often keen to drive their victims away, or to remind them through frequent contact of an imbalance of power in their favor in a neighborhood or workplace. There is often in the background a threat of violence if the victim does not behave in a certain way.

What is missing in many cases of harassment but present in nearly all cases of stalking is the wish on the part of the harassers to be permanently

23 http://www.cps.gov.uk/legal/s_to_u/stalking_and_harassment/#a02a

24 Sometimes in stalking cases additional people will assist the stalker —see for example Fine (1997) —but this is exceptional.

present to their victims. The neighborhood harassers make themselves felt when the victim is in the neighborhood; the workplace harasser when the victim comes to work, and so on. They are not omnipresent, and often they do not want to be. By the same token, ordinary harassment can often be escaped, at least temporarily, by distracting the mind or by retreat into the home. A person who is regularly subjected to verbal abuse can sometimes escape it by restricting their hearing of the abuse, say by drowning it out with music heard through headphones. The victim of harassment can sometimes change location, or in the extreme case, their address. Stalking, by contrast leaves the victim nowhere to retreat to, even if the perpetrator can be reported.[25]

The more *in*escapable the harassment, the more it is obsessively before the victim's mind, the more it has in common in its effects with stalking. But the former intimacy of many stalkers with their victims, and their quite common lack of aggression, create bigger and better opportunities for psychological take-over than are open to common or garden harassers. Perhaps the victim's home space was once shared with the stalker, and is associated psychologically by the victim with the stalker, so that it is not quite the retreat that it might be from ordinary harassment. Perhaps the stalker's relatively comprehensive knowledge of the victim's habits and movements, and the victim's awareness of that comprehensive knowledge, combine to produce the impression that the stalker is always close at hand. In short the relative inescapability of the stalker's presence, explained by former intimacy, distinguishes stalking from even quite similar forms of harassment.

In framing what are now the oldest and most influential stalking laws, legislators have misidentified the core wrong of stalking by linking it to the threat of violence.[26] This may fit many forms of harassment as we are characterizing it, but not the central forms of stalking. The first legislation to criminalize stalking was passed in California in response to a series of high profile murders committed by stalkers. The current legislation in the Californian Penal Code 646.9 runs as follows:

> (a) Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking.

25 Indeed, one line of criticism of stalking criminal justice is that it has offered too many opportunities for perpetrators to revictimize the stalked. See for example Pathe et al. (2004).

26 See for example Meloy (2002: 105): "the crime was codified to prevent acts of violence that were, in retrospect, sadly predictable".

The focus on physical safety in the originally drafted legislation, which required "a credible threat of death or great bodily injury" (Meloy 2007: ch. 2, 28), has subsequently been weakened, but it still treats the offense as one of threatening physical safety.[27] California law has remained a model for other American state jurisdictions, and up to now legislation in a number of other US states requires a credible threat to safety for an act of stalking to have taken place (Royakkers 2000: 8-9). Furthermore, in 1992, the National Institute for Justice, under the direction of the Congress, issued a 'model stalking code': this code specifies that it is conduct causing 'reasonable fear of bodily harm' that counts as stalking.[28]

We acknowledge that stalking cases involving the threat of violence are in some way more urgent morally than cases where victims suffer only incessant but non-violent contact. Does it follow that the actions of non-violent stalkers should not be criminalized? In our view, the answer is 'No': It is invasion of psychological space and psychological takeover that ought to be treated as the core wrong. The threat of violence aggravates rather than constitutes the core wrong. To address the core wrong we need a new category of non-violent harm, or a widening of the scope of violence to include something like psychological violence, where psychological takeover is sufficient for psychological violence.

These alternative approaches are up to a point reflected in UK legislation and case law. To come first to legislation, the UK's first attempt at criminalization was the 1997 Protection from Harassment Act.[29] It does not define harassment,[30] instead relying on an understanding of 'what a

27 See for example Guy (1993: 1010) or Zimmerman (2000: 233): "the ultimate harm that legislatures are trying to protect victims from is not the stalking conduct itself, but is instead the murder, rape or battery that the stalking conduct could ultimately produce". Both Guy and Zimmerman identify dangers to constitutional liberties in the criminalization of stalking (see also Purcell et al. 2004). Identifying the wrong involved with stalking conduct itself as opposed to violence helps to mitigate though not eliminate some of these worries. Such worries are also mitigated by our assessment of the severity of stalking, independent of any relation to violence. From an early stage advocates of stalking laws have argued that the liberties curtailed by anti-stalking laws are outweighed by the harm considerations: "Overall, the government's interest in protecting its citizens from harm outweighs the defendant's right to notice and extensive procedures in the short term. Therefore these procedures for ex parte restraining orders should not raise constitutional concerns" (Walker (1993: 301). We differ only in widening the harms relevant to this argument.

28 See for example Tjaden (2009).

29 We criticize the Protection from Harassment Act for misidentifying the criminalizable core of the act of stalking, but for criticism of its effectiveness and implementation see Petch (2002).

30 The Director of Public Prosecutions' latest guidance explains it "can include repeated attempts to impose unwanted communications and contact upon a victim in a manner that could be expected to cause distress or fear in any reasonable person" —see

reasonable person would consider harassment', and it further requires that the offender know that what they are doing would be so considered. 'Harassment' refers to a much wider category of activities than stalking some of which —like journalistic persistence —might not merit criminalization at all.[31] Although we agree that harassment is often a criminalizable wrong, it seems a lesser wrong than stalking.

The second alternative to the American approach —widening the scope of the harm of violence —can be seen in interpretations of the categories of assault and battery in UK law. 'Assault' refers to the apprehension of violence, while battery refers to the actual infliction or causation of harm. Both assault and battery may inflict either actual bodily harm (ABH) or grievous bodily harm (GBH). Actual bodily harm is an injury that is more than 'transient' or 'trifling', while to count as grievous bodily harm an injury must be one a jury would consider 'really serious'. Courts have concluded that both ABH and GBH can include entirely mental harms (Herring 2009: 62-64), but these have to amount to medically recognized psychological conditions. For example, in the case of the more serious category of GBH, Herring offers the example of post-traumatic stress disorder (Herring 2009: 62-64). This may raise the bar too high for cases of stalking where there is no one identifiable traumatic event.[32]

Legislation introduced in the Scottish Parliament in 2010 was the first in the UK to name and specify the offense of stalking. The relevant part of the legislation reads as follows:

(1)A person ("A") commits an offence, to be known as the offence of stalking, where A stalks another person ("B").

(2)For the purposes of subsection (1), A stalks B where

(a) A engages in a course of conduct,

(b)subsection (3) or (4) applies, and

http://www.cps.gov.uk/legal/s_to_u/stalking_and_harassment/#a02a. One important case in shaping legal understanding was Plavelil v Director of Public Prosecutions [2014] EWHC 736 in which the defendant had brought a series of distressing accusations through the courts which he knew to be untrue — the court found that this could amount to harassment.

31 A point made by Robert Fine, whose case formed an important basis for the Protection from Harassment Act (Fine 1997: 158-9).

32 "The difficulties associated with establishing the existence and extent of psychological harm may prove to be an impediment to conviction. The need to establish a causal link between the defendant's conduct and the psychological harm suffered by the victim may prove to be a particular barrier to conviction in the absence of a guilty plea. Moreover, the quantification of the extent of psychological harm is insufficiently precise to enable subsequent prosecutions to be brought in cases where the stalker is undeterred by his conviction" (Finch 2002b).

(c) A's course of conduct causes B to suffer fear or alarm.

(3)This subsection applies where A engages in the course of conduct with the intention of causing B to suffer fear or alarm.

(4)This subsection applies where A knows, or ought in all the circumstances to have known, that engaging in the course of conduct would be likely to cause B to suffer fear or alarm.

This improves on the 1997 Protection from Harassment Act by recognizing stalking as a distinctive offense, rather than stalking-as-harassment. But it locates the wrong of stalking in causing 'fear and alarm', and this seems not to capture the wrong in cases of prior acquaintance stalking where no violence is threatened or feared.[33]

In England and Wales, the 2012 Protection of Freedoms Act was introduced to update the 1997 Protection from Harassment Act. Like the Scottish legislation, this names stalking as an offense and gives a (non exhaustive) list of behaviors that could count. On the other hand, it retains some of the focus on violence of the 1997 Act. Offenses where the threat of violence is absent can be given prison sentences of no more than 6 months. The alternative of recognizing non-violent harms can again be seen in the new Section 4(A) offense of stalking involving violence or serious alarm or distress, carrying a maximum sentence of up to 5 years in prison. While this retains something of the idea of stalking as most serious when it is a violent offense, in the spirit of the current paper it recognizes 'serious alarm or distress' as a kind of serious harm. Below we shall consider whether serious alarm or distress ought to be built in to the definition of stalking itself. Here it suffices to point out that such an approach coheres with our view of what stalking is.

Legislation in the Netherlands and Germany distinguishes the wrong of stalking from harassment. However, Dutch and German legislators misidentify the core wrong involved. They frame stalking not only as an offense involving mental harms but also as one that involves manipulation or coercion of the victim. The Dutch legislation describes the offense as "the willful, unlawful, systematical violation of a person's private life with the intention of forcing someone to do, not to do, or to tolerate something or to frighten him or her".[34] Relatedly, German legislation identifies stalking offenses by listing a series of stalking (and cyberstalking) behaviors

33 As in the Fine and Lasdun cases discussed at N16.

34 (Royakkers 2000: 12). Furthermore, the mental nature of the offense is further underlined in a "companion explanatory memorandum [which] makes it clear that stalking is viewed as psychical assault with malice aforethought against the physical and psychical integrity of the victim" (Royakkers 2000: 12).

directed against a victim "thereby seriously infringing their lifestyle".[35] We think 'lifestyle' misnames what is infringed. 'Private life', the term used in the Dutch legislation, is more suggestive and is open to amplification along the lines of this paper. Nevertheless, both the Dutch and German approaches seem to go wrong in requiring stalking to belong to a manipulative or coercive agenda whereas some stalkers may be more concerned with imposing their presence than with getting the victims to do or omit something.

We argue that stalking laws ought to be reformed to reflect better the core wrong of stalking, which is a certain deep violation of privacy. But this claim immediately meets an objection: namely, that while stalking surely ought to be and has been criminalized, there is no need for the criminalization to be geared too precisely to the *core* wrong that stalking involves.[36] Here there is a useful parallel with the case of rape. Jurisprudents have disagreed over the core wrong of rape, but legislation or prosecutorial activity has not had to take sides in the controversy. Imagine a case where a woman who is unconscious is penetrated without consent and never finds out what has happened. In such a case sex occurs without consent but does not register with the victim at all, and therefore is not associated with experienced pain or distress. Could this count as a case of 'harmless rape', as some writers put it (Gardner and Shute 2000)? It is plausible that there is an interest in sexual integrity that is widely or universally distributed among human beings: this is clearly set back —which constitutes harm —even in the supposedly harmless rape case (see for example Archard 2007). On this account, the wrong of rape consists of the fact that unconsented-to sex — even where it is not experienced —sets back an interest in sexual integrity.

35 Whosoever unlawfully stalks a person by

1. seeking his proximity,

2. trying to establish contact with him by means of telecommunications or other means of communication or through third persons,

3. abusing his personal data for the purpose of ordering goods or services for him or causing third persons to make contact with him,

4. threatening him or a person close to him with loss of life or limb, damage to health or deprivation of freedom, or

5. committing similar acts and thereby seriously infringes his lifestyle shall be liable to imprisonment not exceeding three years or a fine.

(2) The penalty shall be three months to five years if the offender places the victim, a relative of or another person close to the victim in danger of death or serious injury.

(3) If the offender causes the death of the victim, a relative of or another person close to the victim the penalty shall be imprisonment from one to ten years.

(4) Cases under subsection (1) above may only be prosecuted upon request unless the prosecuting authority considers propio motu that prosecution is required because of special public interest.

http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1935

36 Victor Tadros called our attention to this point.

Analogously, one can say that an interest is set back where someone goes through all the motions of obsessive following but the person followed never notices —say because they are very preoccupied themselves with something else. In such a case there might still be an interest that is set back —e.g., an interest in having mental space for forming plans free of attempts at encroachment. If making repeated efforts to colonize this space is the core wrong of stalking, however, the law may have to confine itself in practice to cases where the efforts to colonize *do* take effect. This would correspond to the fact that unnoticed rape is bound to lie below the prosecutorial radar.[37]

Our view suggests that the *actus reus* of stalking consists in persistent attempts of unwanted following or contact, where this causes distress that we categorize as psychological take-over. This stands in contradiction to stalking legislation that specifies threats or fear of violence. On our account the *mens rea* of stalking could be characterized as seeking persistent contact where a reasonable person would know it was likely to cause distress.

Although the core *wrong* involved in stalking is, according to us, a privacy violation, our account of privacy connects the value of privacy to autonomy. Stalking characteristically produces impaired autonomy by means of psychological take-over. But our account is consistent with saying that the harm that justifies the criminalization of stalking is the impaired autonomy it produces, rather than core wrong of encroaching on a fundamental zone of privacy.

Stalking is a serious crime because it involves a *debilitating* invasion of

37 Furthermore, one can imagine cases where it would be difficult to determine whether stalking had taken place without knowing how the contact had affected the victim. Contact —even persistent contact —isn't inevitably psychologically harmful, or even distressing. Some will be able to shrug off persistent contact and some won't. The intention of an individual engaged in persistent pursuit provides another reason to stop short of pressing the analogy with rape too closely. Pursuing contact with an individual isn't inherently wrong —it's a basic part of everyday social interaction. The boundary between legitimate pursuit of contact and stalking will depend (among other things) on how the victim responds. Psychological harm may set the bar too high, though distress, broadly enough conceived, seems more reasonable. Unaware targets of stalking have been discussed specifically in relation to efforts to capture cyberstalking, with critics of existing legislation pointing out that important categories of cyberstalking behavior —interfering with the victim's computer, and carrying out 'surveillance' —are not covered by the law because these behaviors often are carried out without the intention that the target will be aware of them —see for example MacEwan (2012) for this criticism, though he goes on to note: "there is other law available in such circumstances. Where, for example, the stalker hacks into the victim's email this would be an offence under Computer Misuse Act 1990 (CMA) s.1.108 It would also be an illegal interception of a message under Regulation of Investigatory Powers Act 2000 (RIPA) s.1. Crucially though, neither the CMA nor RIPA enables the imposition of restraining orders".

private space, an invasion that goes deep into private space because of the pre-eminence of the mind —as seat of deliberation and choice —among the zones of privacy.[38] Debilitation through occupation is the more characteristic attack on autonomy carried out by stalkers. This form of wrongdoing seems integral to stalking, regardless of any external, coercive force —personal, physical violence —that might also be inflicted. It is natural to regard the invasion as a privacy violation in the deep sense that it penetrates the space of emotion, attention, choice, deliberation, confidence, and self-image tied to a minimal form of self-respect. Stalking is more than a violation of the precincts of the home, and the threat posed to it by stalking is crucial to understanding what is distinctively wrong with stalking.

## 5. GENDER AND POWER

Stalking is deeply personal and, according to us, what is wrong with it cannot satisfyingly be understood merely as the assertion of power against the relatively powerless. Very often stalking seems to arise from a will to connect rather than, or in addition to, a will to dominate,[39] and this will seems to belong to a person rather than a power structure —e.g., a patriarchal power structure —personified. Though stalking wears down and often permanently disables its victims psychologically, it is not always the behavior of stereotypically powerful people and institutions, and it is not always conducted with the goal of damaging or attacking the victim.

On the contrary, stalkers can be isolated social incompetents who want to establish a romantic relationship with someone, and go about it in a particularly clumsy or deranged way. Even forms of stalking that grow out of highly controlling domestic abuse can be described by the stalkers themselves as a means of regaining a life of affection with a family or a partner. This description detaches stalking from broader power dynamics which may also be at work. According to us, stalking does not only have a politics, concerned with the imbalances of power between men and women discussed in feminist writing, but also an ethics, connected with the value of having a personal space and personal plans outside the control

38 For a recent study of some of the typical psychological harms suffered by women see Diette et al. (2013).

39 See for example Spitzberg and Cupach (2001: 350): "The stalker is engaged in a campaign of messages to persuade an object of affection to cast a vote in the pursuer's direction. Even clinical approaches have defined stalking as a process of communication (e.g. Mullen et al., 2000). The stalk becomes a chess game of move and countermove, all directed toward establishing or re-establishing a relationship to suit the stalker's conception, even if at times that relationship is one of enemyship rather than friendship or romance".

or access of others. Our account is not in the least a denial of patriarchy or of its relevance to stalking. It is the suggestion that there is something further to be said. In this section we consider two possible feminist objections to our approach.

The first objection arises from a critique of the value of privacy. There is a strong tradition of feminist skepticism about privacy (see for example DeCew 1997: ch 5). For example, feminist skeptics point out that the commonly recognized privacy of the home has often served to obscure violence and other abusive treatment of women in domestic settings. Take this classic statement from Catharine MacKinnon:

> "It is probably not coincidence that the very things feminism regards as central to the subjection of women —the very place, the body; the very relations, heterosexual; the very activities, intercourse and reproduction; and the very feelings, intimate —form the core of what is covered by privacy doctrine. From this perspective, the legal concept of privacy can and has shielded the place of battery, marital rape and women's exploited labor; has preserved the central institutions whereby women are *deprived* of identity, autonomy, control and self-definition; and has protected the primary activity through which male supremacy is expressed and enforced" (MacKinnon 1987: 101).[40]

But the moral defensibility of norms of privacy is at least as much debated within feminist thought as it is between feminists and others. We think our approach coheres well with the approaches of (primarily liberal) feminists, such as Anita Allen (1988 and 2011), Annabelle Lever (2011), and Judith DeCew (1997 and 2015), who take norms of privacy to be deeply important to gender equality.

The many reasons a feminist might value privacy would surely include protection against unwanted contact from men —and not only protection from violence. Privacy normatively excludes unwanted presence. We think our account explains why this is so. Furthermore, our account of privacy allows that norms of privacy are criticizable. We don't defend all norms of privacy —only those that on balance are justifiable. The feminist critique has its greatest force against a set of safeguards different from the ones we wish to prioritize, that is, those protecting a set of practices —within marriage, child-rearing, and the maintenance of a household. We agree with Annabelle Lever when she says that

40 For another classic statement of this argument see MacKinnon (1983).

> "…while MacKinnon is right that legal protections of privacy have often had these effects, it is less clear that this makes privacy inherently, and irremediably, sexist, as she implies. On the contrary, many feminists have been moved by Virginia Woolf's claim, in *A Room of One's Own*, that women's lack of privacy has been a major obstacle to their development and self-expression and a potent sign of their second-class status. So, one could think that MacKinnon is largely right about way that established philosophical and legal views of privacy have disadvantaged women compared to men —in part, by denying them privacy within their marital and sexual relationships —without supposing that this is unalterable or an escapable feature of claims to privacy" (Lever 2012: 22-3).

The zones recognized by our discussion of privacy are both more abstract and less connected with a traditional public/private distinction than those of marriage, family, and household, which we think correspond closer to the target of the feminist anti-privacy critique. The body, the home, and the mind, as we have characterized them, are not essentially seats of patriarchal power. Indeed, DeCew (2015) distinguishes an alternative feminist position that redraws rather than collapses the public/private distinction:

> "On this alternative interpretation, rejecting the public/private divide by collapsing the private side onto the public is neither the feminist point nor an implication of the feminist position…the boundaries between public and private need to be redrawn. [Adherents of this alternative] would not jettison privacy but recognize that what happens in the family is not beyond scrutiny. An alternative understanding of the feminist critique of privacy, therefore, is that feminists merely want to reject the public/private distinction *as it has been understood in the past*, from Aristotle on. These feminists are emphasizing that the state must stop ignoring the unbelievable abuses that have been protected in the name of privacy; this is, they believe, a position that is not captured by the public/private position as it has been known and used in pre-feminist times and theories" (DeCew 2015: 92-93).

There is a second potential feminist objection to our approach which does not lean on a denial of the value of privacy. Feminists might object to the attempt to detach the core wrong of stalking from violence, as it obscures the fact that stalking is usually a crime carried out by men against

women, and that there is something violent about patriarchal power. We reply that distinguishing the different wrongs involved in stalking —partly by violations of different zones of privacy —produces a clearer and more accurate picture of what stalking is. It also clarifies how power dynamics —including those rooted in gender —play a role. It is not to deny that some of the power dynamics are strongly gendered.

There is indeed clear consensus that most perpetrators of stalking are male and most victims female, though no consensus on what best explains the disparity (Lyndon et al 2012; Davis et al. 2012; Langhinrichsen-Rohling 2012). In the most violent kinds of stalking behavior (including those involving physical threats) it is overwhelmingly men who are the perpetrators and women who are the victims. One explanation offered is the background power dynamics enabling men and disadvantaging women in day-to-day life. The argument is that this facilitates men's stalking behavior and simultaneously makes such behavior less likely on the part of women:

> "When one takes account of the differentials in resources typically available to men, such as greater physical strength, socially sanctioned power, and control of wealth, it becomes clearer why women will more often be victims of coercive control while in relationships, and persistent pursuit when attempting to leave abusive relationships" (Davis et al. 2012: 337).

It is probably correct to say that entrenched male power facilitates some abusive behaviors connected with stalking, however maladroit and socially ineffective many male stalkers may be. However, if stalking does not necessarily involve violence, the gender difference between stalkers and stalked may be less marked. Davis et al. (2012) restrict stalking to

> "the willful, malicious, and repeated following and harassing of another person that threatens his or her safety" (Davis et al. 2012: 329) —in other words defining stalking as involving some possibility of violence. 'Persistent pursuit' is used to refer to "'ongoing and unwanted pursuit of romantic relationships between individuals [who are either] not currently involved with each other' or who have broken up with each other" (Davis et al. 2012: 329).

We take a wider conception of stalking that would include persistent pursuit, denying the claim that behavior has to threaten safety, or even cause fear to qualify.

Davis et al. (2012) conclude that if one focuses on the wider set of stalking behaviors, the profiles of perpetrators and victims are less distinct

in gender terms. Furthermore, they argue that studies may fail to include methods of pursuit more likely to be carried out by women, suggesting that the picture may be more equal still. Women, they maintain, are as likely as men to engage in the least serious forms of persistent pursuit such as "following, showing up uninvited, and persistent telephoning, texting, and emailing: The difference is that when women persistently pursue, they don't have the backing of a broad, well-established cultural system that supports the cultural norm of a woman persistently and aggressively seeking a relationship" (Davis et al. 2012: 332).

We have argued that a description of the core wrong of stalking does not need to refer to power dynamics. However, the core wrong of stalking can of course be exacerbated by power differentials to which gender may well be pertinent. Laws criminalize behaviors, not people. Stalking cannot be regarded as a lesser offense just because it is carried out by a woman rather than a man. However, our view allows that following behavior could be much more threatening when carried out by a man against a woman. The law can widen its narrow focus on violence while distinguishing pursuit that is merely unwanted or annoying from pursuit that is debilitating.

## 6. STATE SURVEILLANCE

The ethics of respecting and protecting privacy is most often discussed in relation to state surveillance, not stalking. We previously claimed that the privacy violation of stalking could be worse than violations of the human right to privacy associated with state surveillance. We shall now substantiate this claim.

As articulated by the International covenant on Civil and Political Rights (ICCPR), Article 17,[41] and the associated Human Rights Committee General Comment 16,[42] the human right to privacy is a protection against surveillance of one's home, monitoring of correspondence, and attacks on one's reputation. Civil and political rights anticipate the whole range or arbitrary and excessive uses of power by states against their own citizens, especially politically active citizens. The right to privacy fits into that scheme: it affords a protected setting not only for conjugal and family life, but for thought and discussion, including thought and discussion that is critical of government and other powerful organizations. The home can also be a site for meeting a wide group of friends who may have, among

41 http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx
42 http://www1.umn.edu/humanrts/gencomm/hrcom16.htm

other things in common, a shared political or religious outlook. The home is thus a key site for the exercise of freedom of thought and association.

Human rights theory and practice focus primarily on abuses of state power or failures of states to channel resources where there is most need. They tend not to take account of disputes between individuals or small-scale abuses of power where they fall short of assault. It is true that Article 17 recognizes violations of privacy by natural persons; still, nosey neighbors, voyeurs, or spouses concerned with infidelity probably lie well outside its main ambit. Its focus is on arbitrary *official* intrusion and disruption, disproportionate police surveillance, disproportionate data retention, and defamation. Encroachments on parental rights to determine the education and religion of their children and even the size of their families are also included. In all of these cases it is against the state that privacy needs defending.

Since a large proportion of the literature on the ethics of privacy and the wrongness of intrusion has been focused on state surveillance, it is natural to question our claim that stalking attacks privacy and autonomy more directly than paradigm cases of state surveillance. We readily concede that, in extreme cases, state surveillance *can* threaten the psychological preconditions of autonomy. Sufficiently extreme cases —we outline some below —can be conceived, and some real world cases can be pointed to as well. Nevertheless, there are good reasons to consider such cases unrepresentative of state surveillance in practice.

In considering what the state does, it is routine to distinguish between mass and targeted surveillance. Examples of mass surveillance include CCTV and the Internet monitoring system revealed in *the Guardian* in 2013 and commonly referred to as PRISM. Mass systems attempt to capture information on anyone within a particular area, or carrying out a particular activity. The actual scrutiny involved in mass surveillance tends to be slight, however, because attention must be divided between many different targets. The limits to the degree of individual scrutiny in mass surveillance also restrict how intrusive one can consider the surveillance in question.[43]

Targeted surveillance is a different matter. By definition it involves intense scrutiny of individuals. Again, targeted surveillance may involve

43 Intrusiveness is of course also a function of the kind of information involved — most would consider the NSA Internet monitoring system more intrusive than CCTV in a public place, even though the likelihood that any particular person's communications are monitored is low. From our point of view it is not the intrusiveness but the undiscriminatingness and the disproportionate scale of the surveillance that is objectionable.

penetration of spaces like the target's home or car, which are far more protected by law from surveillance than public parks or squares. Furthermore, targeted surveillance involves concentrated attention and scrutiny from a number of people. The targeted monitoring of an individual's movements throughout public space, by the deployment of a surveillance team, say, will be much more intrusive than a CCTV viewer who notices the same individual as one of many people in the area.

Surveillance techniques can and have been used for repression, for example by the Stasi in East Germany after 1960.[44] Some of the techniques of the Stasi are similar to techniques used in contemporary serious crime investigations in liberal jurisdictions. They involve placement of bugs or human intelligence to gain access to the target in private places or tracking the movement and behavior of the target throughout their daily lives. The reach of the Stasi was enormous, with intelligence files on close to a third of the population by the time the Berlin Wall came down. These files were compiled with the willing help of many thousands of informers engaging in surveillance of their neighbors and acquaintances. Stasi targets were not restricted to credible suspects of serious crime; they included anybody who disagreed with the regime, or who was even merely suspected of doing so. The system of surveillance was also sometimes used as a tool to settle private scores that had nothing to do with politics. The Stasi was interested not simply in gathering intelligence but also in intimidating dissidents, smearing their character, and organizing 'professional failures'. Invasions of privacy, then, were used directly for repression, by making it clear to the target that they were being watched, or that they were targets of smears or coercion. For example, the activist with 'Women for Peace', Ulrike Poppe, was not only watched often and subjected to ongoing state scrutiny and detention: she was arrested 14 times between 1974 and 1989; and she was subjected to *obvious* surveillance, surveillance she could not help but notice, such as men following her as she walked down the street, driving six feet behind her.[45] In a case like this, it might be apt to talk about Stasi agents successfully achieving psychological takeover of the target; dominating their thoughts to the point that a normal autonomous life is impossible.

44 For histories of the Stasi state see for example Childs and Popplewell (1996) and Koehler (2008).

45 See for example Willis (2013). Furthermore, after reunification, when it became possible to read the file the Stasi were maintaining on her, she was to discover not only further surveillance she was not aware of (such as the camera installed across the road to record everyone coming to or from her home) but also the existence of plans to 'destroy' her by discrediting her reputation

—http://www.dw.dgermans-remember-20-years-access-to-stasi-archives/a-15640053

Stasi tactics provide the closest analogy between the intrusiveness of state surveillance and stalking. But reflection on this analogy exposes its limitations. First, the extremism of Stasi tactics is untypical of state surveillance in general. Most surveillance —even in illiberal states —is impersonal and much less pervasive, so that a person has something of a life behind closed doors and can have a full and unpreoccupied mind quite a lot of the time. Stasi surveillance is even untypical of surveillance in authoritarian regimes, as much successful repression can be achieved by the more modest means of simply disincentivizing political activity — raising the costs so high that very few will engage in it. This 'chilling effect' is often mentioned among the politically important costs of state surveillance policy, often in the course of a more general argument to the effect that modern surveillance unacceptably erodes the private sphere. However, 'chill', as distinct from psychological takeover, cannot erode the private sphere completely. For the disincentivization of political activity to be successful there must be a relatively roomy private life that the discouraged activist can retreat into. This means that it can be counterproductive for surveillance in the most repressive states to amount to autonomy-undermining psychological takeover. This can do more than discourage political activity: it can take away *sanity* when nothing so extreme is required for rendering people apolitical. Stalking does more than disable activist inclinations; it undercuts the conditions for even the apolitical, personal autonomy that activist and non-activist lives alike presuppose.

So while there ought to be a greater focus on violation of privacy in analyses of stalking, privacy is over-emphasized in much public debate about state surveillance. This is not to dismiss moral objections to the rise in surveillance of the last 15 years, largely a consequence of the September the 11th attacks. To judge much contemporary surveillance to be less invasive than stalking is not to endorse it. Much stalking flows from abusive relationships in which men are the abusers or from a refusal, overwhelmingly on the part of males, to accept rejected romantic overtures. It could be that a will to dominate that pervades many unreformed male-female interactions partly explains stalking, and is irreducibly political.[46] But this would not fully explain the personal harm involved in stalking, nor hence why stalking should be criminalized. The abusive husband does not just represent his gender and arguably gender-based will to dominate through stalking. Nor does his target merely represent 'womankind'. He acts in his own right —as a person —and his stalking is a serious crime committed against a unique individual.

46 We thank Anonymous referee No. 2 for this point.

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# Compulsory Medication, Trial Competence, and Penal Theory

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## ABSTRACT

Due process requires that a criminal defendant must satisfy a number of minimal conditions with regard to his/her cognitive abilities, i.e. that the defendant possesses trial competence. But what if a defendant —for instance, as a result of a mental disorder —does not possess the requisite competence? Would it be morally acceptable for the state to forcibly subject a defendant to psychotropic medication in order to restore his/her competence to stand trial? In this article it is argued that the reason that has constituted the main argument in favor of forcible medication of defendants —namely, that the state has an essential interest in convicting and sentencing defendants who are guilty of crime —is not as strong as has been assumed and may even, under certain conditions, speak against the use of forcible medication of trial incompetent defendants.

**Keywords**: Forcible medication; mental disorder; punishment; retributivism; trial competence; utilitarianism.

## INTRODUCTION

Due process requires that a criminal defendant is fit to stand trial. To be fit, a defendant must satisfy a number of minimal conditions with regard to his cognitive abilities. For instance, he must be able to participate and assist in his own defense, to observe the judge, jury, witnesses and other courtroom participants, and —not least —to understand the course of the proceedings against him. In short, a defendant must possess *trial competence*.[1]

1 For a review of the modern discussion of the legal definitions of competence to stand trial, see Fogel et al. (2013). Competence to stand trial is usually regarded as intrinsic to the fairness of a trial process. The main argument to this effect is that the lack of competence may imply that the defendant fails to communicate exculpatory information. See, for instance, Mossman et al. (2007).

But what if a defendant —for instance, as a result of a mental disorder —does not possess the requisite competence? What measures is the state justified in taking to ensure that a person, who may have committed a crime, is brought to trial? For instance, would it be acceptable for the state to forcibly subject a defendant to psychotropic medication in order to restore his/her competence to stand trial?

In contrast to other issues that are sometimes presented and discussed in legal philosophy, the question posed here is clearly not a purely hypothetical one dreamed up by imaginative legal philosophers. On the contrary, a number of criminal cases have in various ways directed attention to this question. The most significant case is undoubtedly that of *Sell v. United States,* in which a former dentist, Charles Sell, was indicted for Medicaid fraud and other offences. Sell had a long history of mental illness, and mental evaluations showed that he suffered from a delusional disorder (persecutory type). He was consequently held incompetent to stand trial. The case eventually found its way to the Supreme Court, which addressed the constitutional question as to whether the government was permitted to forcibly administer psychotropic medication solely to render a mentally ill defendant competent to stand trial for serious (but nonviolent) crimes. The court held that —under a set of strict conditions —the government was permitted to impose involuntary psychotropic (anti-psychotic) medication in order to bring a mentally ill defendant to trial.

Unsurprisingly, the case itself and the Supreme Court ruling have prompted numerous reactions and comprehensive legal discussions (see for instance, Baker 2003; Hilgers and Ramer 2004; Page 2005; Siegel 2008; Perlin 2009). The purpose here, however, is not to elaborate on the details of *Sell*, nor to contribute with considerations on the constitutionality of involuntary medication, but rather to address the overall question as to whether this method for establishing a defendant's trial competence should be seen as morally acceptable. That this question poses an ethical dilemma seems obvious. On the one hand, it is usually regarded as crucial that the state upholds justice, and the bringing of defendants to court is an important step in this process. On the other, the forcible imposition of medication on someone is standardly regarded as highly problematic. In fact, what makes this side of the dilemma particularly problematic is the contextual nature of the concept of competence (see Annas 2004). Being competent is task-specific, in the sense that a person may be competent to do one thing but not another. However, this means that, insofar as the standards of competence differ (are lower) when it comes to the acceptance or refusal of medication than when it comes to proper trial participation, there can be cases in which an attempt to medically deal with the trial

incompetence of a defendant not only involves involuntary medication but medication of someone who may be fully competent to refuse medical treatment. Thus, the question of the acceptability of the use of forcible medication as a means of restoring trial competence comprises cases which —at least from the perspective of standard heath-care ethics — would be regarded as morally highly dubious.

The purpose in the following, it should be underlined, is not to make a case against forcible medication by definitively rejecting this method for the restoring of the trial competence of defendants. However, what I intend do is to direct attention to an aspect of the problem that has so far been ignored in the discussion and which has implications with regard to the ethical assessment of the matter. More precisely, it will be argued that the problem, which has usually been analyzed as a conflict between state interests, on the one hand, and the interests of the individual defendant, on the other, may on closer ethical scrutiny —involving both utilitarian and retributivist penal theoretical considerations —no longer constitute a genuine conflict; that is, that the reasons that have been presented as the main argument in favor of forcible medication of defendants are not as strong as has been assumed and may even, under certain conditions, speak against the use of forcible treatment of trial incompetent defendants.[2]

In order to reach this conclusion, the paper proceeds as follows. In section 1, the interests that are at stake in the apparent conflict between the state and the individual defendant will be outlined. Subsequently —in section 2 —it is argued that what is usually regarded as the main interests of the state, namely, that the competence of mentally ill defendants is restored so that they can be brought to trial, may not —when analyzed from a penal theoretical perspective —be morally desirable after all. In section 3, a few objections to this argument are rejected. Finally, section 4 summarizes and concludes.

Before embarking upon the discussion, a few conditions should be mentioned concerning the scope of the considerations. Firstly, I shall not discuss whether the use of psychotropic medication is acceptable or unacceptable. Critics have sometimes held that this kind of treatment in *itself* is problematic. However, in the following it will be assumed that the use of psychotropic medication as a treatment of disorders, such as those that may imply a loss of abilities required for trial competence, is not in

2 It is a fact that the state sometimes uses other compulsory methods in the way it deals with criminal defendants (e.g. pre-trial detention). Even though it would be interesting to consider what the arguments presented below imply with regard to other types of compulsory methods, this question clearly reaches far beyond what can possibly by discussed within the framework of this article. Thus, as mentioned, the focus here is place exclusively on forcible medication of incompetent defendants.

itself unacceptable. I believe that, given the widespread use of this type of medication for mentally ill patients and the fact that few (I guess) would object to this treatment if a defendant were to ask for it himself in order to achieve trial competence, this is not a strong assumption.

Secondly, the imposition of involuntary medication for the purpose of restoring trial competence has in legal contexts been held to implicate that important individual and state interests have to be weighed against each other in order to determine whether this practice is constitutionally acceptable. For instance, in *Sell* the Supreme Court recognized the individual's basic liberty interest in avoiding unwanted medical treatment, but also held that his interests were insufficient to outweigh the state's interests in bringing someone to trial. In the following it will, as indicated, be argued that "state interests" do not provide as strong reasons in favor of forcible medication as is often assumed if seen from an ethical perspective. Thus, from the outset I shall assume that it is relevant to include what is usually regarded as the state-interests perspective in an adequate ethical evaluation. Clearly, not everyone will accept this. For instance, some might hold that forcible medication in itself violates a moral constraint and that such treatment, therefore, is morally wrong regardless of state interests, that is, independently of whatever moral reasons may point in the opposite direction. Since the point in the following is to show that there may be stronger reasons against forcible medication of trial incompetent defendants *even* if one accepts that the most plausible moral answer must be based on some sort of weighing of *pros* and *cons*, the constraint-based position will not itself be considered any further.[3]

Thirdly, given the context-dependent nature of the concept of competence, participation in the different processes of the work of the criminal justice system may require different sorts of competence. Thus, questions of competence have been raised not only in relation to fitness for trial participation —which itself has opened up a discussion of the distinction between being competent to stand trial and being competent enough to conduct trial proceedings oneself —but also in relation to both pre-trial settings (e.g. competence to make confessions or participate in line-ups) and post-trial settings (e.g. competence to motion new trials, parole, and —perhaps more bizarrely —to be executed).[4] However, even

3 More precisely, what I am arguendo assuming is that an absolutist interpretation of a constraint against forcible medication is not plausible. A threshold interpretation of such a constraint would still make it necessary to consider the weight of the reasons in favor of forcible medication in order to reach a conclusion on whether this practice is morally acceptable.

4 For a discussion of the use of medication as an instrument to render people competent for execution, see e.g., Daugherty (2001) or Latzer (2003).

though the argument that will be advanced here may have implications with regard to several of these aspects of criminal justice competence, the ensuing discussion will be limited strictly to the question of competence to stand trial.

## 1. THE *PROS* AND *CONS* OF FORCIBLE MEDICATION

Whether it is acceptable to impose psychotropic medication for the purpose of restoring competence to stand trial is a question which, as indicated, has typically been analyzed in terms of a conflict between the interests of the individual and the interests of the state. Strictly speaking, this way of phrasing the conflict may not be adequate in an ethical analysis: There may be moral reasons that cannot be reduced to interests and there may be interests that are not morally relevant. Be that as it may, let us now start take a closer view on the arguments that have been advanced for and against forcible medication of trial incompetent defendants.

The arguments *against* the use of forcible medication of defendants fall into two categories: Either they concern the impact on the defendant or the possibility of obtaining a fair criminal process. Starting with the first class of arguments, the most obvious objection to forcible medication of incompetents is that this treatment constitutes an imposition of something against the will of the defendant. The appeal of this objection is probably most obvious in cases in which there is the above-mentioned combination of a defendant who, while trial incompetent, is still competent to refuse medical treatment. The shift in modern health-care ethics, from an earlier period dominated by a paternalist view on medical treatment to the view that favors competent individuals' right to self-determination, is often emphasized as one of the most significant changes in the ethical approach to treatment. Today, it is widely accepted that patients have a right to refuse medication, even if it would be in their own best overall interest, or in the interest of others, that they be medicated. As a recent medical theorist has pointed out that "… anyone who wishes to ague for forced or mandated treatment on the grounds that society will greatly benefit is working up a very steep ethical hill" (Caplan 2008). Whether the problem of imposing something on someone against his or her will is best described as a problem concerning lack of respect for autonomy (which constitutes the standard phrasing in medical ethics) or in other ways is not crucial here. It is sufficient to note that the imposition of medication against a defendant's will constitutes a first reason against this sort of practice.

Another reason that has frequently been presented in the debate concerns the undesirable effects of medication. Psychotropic medication,

for instance antipsychotic drugs, is known to have a number of side effects. In the *Amicus Curiae* Brief in relation to *Sell*, the American Psychological Association highlighted a number of both common and rare serious side effects (e.g. including "extrapyramidal" reactions —a family of disorders such as tardive dyskinesia, Parkinsonism, and dystonia —blurred vision, sedation, orthostatic hypotension, dizziness, etc.).[5] However, it should also be underlined that more recent antipsychotics have a more favorable side-effect profile than older classes of drugs and that attempts to restore trial competence may involve only temporary medication.

Leaving aside the possible medical side effects, there is another potentially very serious effect that forcible medication may have on a defendant: If the medication is successful and trial competence is restored this may imply that the defendant is convicted and ends up being punished perhaps serving a long prison sentence, depending of course on the nature of the crime. According to some commentators, it is reasonable to believe that this prospect contributed to Sell's refusal of medication. Now, whether the risk of conviction and subsequent punishment should be regarded as an objection against forcible medication is controversial. It might be held that, since the whole point of initiating forcible medication is to make it possible to determine the guilt of a defendant and to punish him if he is convicted, the suffering of the punishment cannot plausibly constitute an objection against medication. However, the answer ultimately depends on penal theoretical considerations and, as we shall return to shortly, there may be reasons to regard the risk of punishment as a drawback in the evaluation of forcible medication.

So much for the set of reasons referring to the direct effects on the defendant who is made the subject of compulsory medical treatment. The other class of reasons that has been advanced against the use of forcible medication concerns the possibility of receiving a fair trial. The whole purpose of such medication is to make it possible for the defendant to stand trial. But, as several commentators have pointed out, the fact that trial competence is in this way restored does not imply that the trial will be fair. On the contrary, the side effects of medically induced trial competence may themselves turn out to compromise fairness. This could happen in various ways. First, depending upon how precisely the formal criteria for trial competence is put, it may be possible that a defendant's abilities are restored to a level which satisfy the competence criteria, even though the medication itself implies that the defendant is still to some extent cognitively impaired (e.g. if his memory is affected). Second, and more

5 Counsel for Amicus Curiae, American Psychological Association (2002: 20-25). See also Baker (2003).

importantly, several of the above-mentioned side effects (e.g. Parkinsonian tremors) may adversely affect a judge's or a jury's opinion of the defendant. In the same vein, a flattened emotional reaction of a defendant who, as a result of medication, appears bored, cold, or devoid of compassion and remorse, may prejudice jurors and thereby threaten basic fair-trial rights.[6] Finally, it has been underlined that medication may diminish a defendant's possibility of pleading insane at the moment of the crime. In a case in which a defendant appears too normal in the court this may affect, and in the worst case, undermine the persuasiveness of an insanity defense (see e.g. Graber 1979: 8ff). That this constitutes a genuine risk has been demonstrated in empirical studies which have found that jurors were more likely to hold a defendant not responsible on account of mental disorder if the defendant was psychotic *at the time of the trial* than if he or she appeared normal (see Whittemore and Ogloff 1995).

The above-outlined reasons concerning the direct impact of forcible medication on the defendant, and on the defendant's possibility of receiving a fair trial, roughly summarizes the main arguments that have been presented against this way of dealing with impaired trial competence. Let us now move on by turning to the argument that has typically been advanced in the opposite direction. What reasons could there possibly be in favor of subjecting defendants with impaired trial competence to compulsory medical treatment? As already indicated, the answer is simpler than the objections against this practice. The argument, unsurprisingly, amounts to the state's basic interest in bringing people who may have committed crimes to trial. That this interest is significant seems *prima facie* hard to dispute. A number of court decisions have addressed the state's interest in adjudicating guilt and innocence and have characterized this interest as "essential" (see Morse 2003: 320). Moreover, few would object to the fact that a comprehensive and costly system has been designed with the purpose of bringing people who may have committed a crime to trial. And several other ways in which this system works clearly indicate the significance usually attributed to the possibility of having a trial. For instance, as Morse has pointed out, the state may also take rather drastic initiatives —such as incarceration and perhaps even involuntary medication —of a material witness if the obtaining of a testimony of this witness constitutes the only effective means by which the state could try a defendant (Morse 2003: 321). If this treatment of a purely innocent witness is acceptable then the interest in bringing a defendant to trial must be significant.

6 See Counsel for Amicus Curiae. American Psychological Association (2002: note 7: 25); or Morse (2003: 319).

But where does this presentation of the reasons that have been presented for and against the use of forcible medication on trial incompetent defendants lead us? Given the initial and generally accepted assumption that the moral legitimacy of the use of forcible medication cannot be settled merely by focusing on the reasons on the one side of the scale, the complicated question one is left with is how the outlined reasons should be weighed against each other. How should we balance the protection of the individual against the interest in bringing defendants to trial? On this point theorists have been split. However, the point is not to engage in considerations on the weighing of the *pros* and *cons* but rather to adopt a more cautious attitude by asking whether the depicted picture of the outlined reasons is apposite. More precisely, what we shall now see is that on closer scrutiny it is not so obvious that the *pro*-side of the scale carries the weight with which, as we have just seen, it is usually attributed.

## 2. THE MORAL SIGNIFICANCE OF A TRIAL

Why is it so important for the state to be able to bring a defendant to trial? Why does this constitute an essential interest? The obvious answer is that there are strong moral reasons in favor of punishing people who have violated the law and that the criminal trial constitutes a vital step in the process of identifying those who fall into this category, that is, those who are in fact guilty of a crime. Unsurprisingly, this is also the answer that has been given in several Supreme Court decisions. For instance, in *United States v. Weston* it was specifically underlined that part of the state interest consisted in "demonstrating that transgressions of society's prohibition will be met with an appropriate response by punishing offenders".[7] Correspondingly, both "retributive" and "deterrent" functions were enunciated as ultimate goals of the state's trial interests.[8] However, further steps with regard to justificatory arguments are not usually taken. But this means that we are left with the basic question: How important is it that the state succeeds in punishing those individuals who have committed crimes but who belong to the group of defendants who are incompetent to stand trial? The answer to this question depends upon what constitutes the basic rationale behind state-inflicted punishment and, at this point, it is well known that there exists no theoretical consensus. Thus, let us now consider the question more thoroughly from the perspective of the two rival theories that have dominated penal theoretical thinking, that is, respectively from a utilitarian and a retributivist point of view.

7 U.S. v. Weston, 255 F. 3d 873 (D.C. Cir. 2001), cert. denied, 122 S. Ct. 670 (mem.) 2001: 880.

8 Ibid. p. 881.

According to the utilitarian approach to punishment, the infliction of punishment on perpetrators is justified on the ground of future desirable consequences that will follow from this practice.[9] Though there may be different types of desirable consequences, the cardinal implication of punishment is usually held to be crime prevention. Thus, seen from the perspective of crime prevention is it important to ensure that those defendants who have committed crimes, but who are trial incompetent, are brought to trial and subsequently punished?

First, if the question is considered in terms of *general* prevention, then it is far from clear that the answer is in the affirmative. It is generally believed that the existence of a punishment system has a general crime-preventive effect (see e.g. Nagin 1998). That is, the possibility of being punished deters potential criminals from engaging in criminal activity. However, when it comes to the question as to how the severity and likelihood of punishment affect general prevention, the picture becomes more complicated.[10] The only way in which the punishment of more individuals —that is, those who are found guilty after being forcibly medicated to stand trial —can affect general crime prevention apparently is if this will have an impact on the perceived likelihood of potential criminals being caught and punished if they break the law. But is it reasonable to believe that there will be such an effect? There are several reasons to doubt this.

First, the number of people who do not satisfy standards for trial competence is obviously small compared to the total number of people who end up in a criminal trial.[11] Second, out of the group of defendants who are found trial incompetent, certainly not all would end up in court if forcible medication were accepted. Some may not be medicated because it is estimated that this would not have the desired effect, for instance, because from the outset they are simply too ill. In other cases defendants may be involuntarily medicated but may nevertheless not reach the level of cognitive ability required to make them trial competent. Third, even if mentally ill defendants become trial competent as a result of medication,

9 In the following, I consider the utilitarian approach rather than a more general consequentialist approach. As is well known, the utilitarian approach to punishment constitutes the traditional rival to retributivism (very few non-utilitarian consequentialist approaches have been developed in modern penal theory). Moreover, there is no reason to believe that a non-utilitarian consequentialist theory (e.g. favoring the existence to several intrinsic values) will significantly change the main argument advanced below.

10 For an overview and discussion of research findings, see Durlauf and Nagin (2011).

11 Though some figures suggest that around 50.000 defendants are evaluation each year in the US it is reasonable to believe that many are referred inappropriately (e.g. they may be referred for strategic reasons). The vast majority of those defendants who are evaluated for competence each year are found competent (in some jurisdictions the majority is as high as 96 percent); see e.g. Winick (2002).

this obviously does not imply that they end up being punished; some will be found not guilty.[12] Thus, in sum, there are reasons to believe that the use of forcible medication on trial incompetent defendants will only have a *relatively* very small impact on the total number of those who are punished in the criminal justice system. Furthermore, it should be noted that the perceived risk one faces if one engages in criminal activity is not only a result of one's view on the probability of punishment but also (perhaps even more so) on the expectation one has on the likelihood of being caught. But it should be kept in mind that what we are here considering is the medication of people who are in fact defendants, that is, who have been caught (or turned themselves in) and this is so irrespective of the fact that they, as a result of a mental disorder, may not in the end be punished. Thus, all in all, that the relatively insignificant increase in the number of people who will be punished, if forcible medication is implemented, should manifest itself in the general perception of potential criminals of the probability of being punished in such a way as to affect crime rates seems highly unlikely.

However, even if there is no general crime preventive effect following from the use of forcible medication, such a scheme may nevertheless have desirable effects from a utilitarian point of view. The desired effects might consist in *particular* prevention; that is, the punitive treatment of the criminal may influence him to desist from future engagement in criminal activity. Though the idea of particular prevention as caused by deterrence or reform of the criminal has (in relation to imprisonment) been heavily criticized by criminologists and, despite the fact that the reference to general prevention has constituted the traditional justification in the utilitarian approach to punishment, it might be held that there is another way of reaching a particular preventive effect which is relevant in the present context, namely, incapacitation. A defendant who has committed a crime but who is too mentally ill to be trial competent may commit new crimes that could have been prevented had he or she been medicated, convicted, and placed behind bars. However, once again there is reason to doubt the empirical soundness of this argument.[13] Given the fact that imprisonment may have a criminogenic effect, this would have to be weighed against whatever is gained in terms of crime prevention caused by temporary incapacitation.[14] Moreover, in the present context, that is, when we are considering the value of forcible medication of mentally ill

12 For instance, by reason of insanity.

13 For a general review of research showing that the crime preventive benefits of incapacitation are highly uncertain, see e.g. Nagin (1998).

14 For studies on the criminogenic effect of imprisonment, see e.g. Vieraitis (2007); or Camp and Gaes (2005).

defendants, there is a further reason that should be kept in mind with regard to the possibility of a particular crime preventive effect, namely, that the alternative to a conviction and punishment for a trial incompetent criminal who is not compulsorily medicated may well not be freedom. Insofar as the defendant is regarded as dangerous he may be civilly committed. And even if the defendant is not dangerous —such as in the case of Charles Sell—the alternative may be long periods of hospitalization (according to some commentators Sell ended up spending more time being hospitalized than he would have spent in prison had he been involuntarily medicated, convicted, and punished). When this is taken into account, it becomes even less obvious that there would be a particular crime-preventive effect supporting the use of forcible medication to stand trial.

Considering the utilitarian approach to punishment there is, however, another side to the discussion that should be emphasized. In the previous outline of the reasons against forcible medication, the suffering the defendant would experience if he, after having been involuntarily medicated, were to be punished, was presented as a reason against this sort of forcible treatment. However, as also mentioned, this contention has been viewed with skepticism. It could be held that the fact that a criminal ends up suffering from a punishment cannot constitute a counterargument against forcible medication. However, as underlined, the answer to this ultimately depends upon the penal theoretical view one holds. In the perspective of the utilitarian theory of punishment, there is no doubt that the suffering of the person who is being punished counts as a reason against punishment. It is only if this disvalue of the suffering is outweighed by the greater amount of suffering that is prevented, that the punishment is morally justified. In Bentham's original wording, the punishment, when considered in isolation, is "adding one evil to another" (Bentham 1962: 306). To this it might perhaps be objected that, if the alternative is that a mentally ill person is forcibly hospitalized instead, then there is no real major difference when it comes to the drawbacks of forcible medication. However, this is not correct. Numerous studies have shown that prison conditions are clearly detrimental to persons suffering from a mental disorder. For instance, as has been summarized in WHO's considerations on the consequences of imprisonment: "The impact on someone in good mental health would be negative; for people who arrive in a vulnerable state of mind, the damage can be irreparable".[15] Thus, that a person may end up by being punished —for instance, imprisoned for years or even

15 WHO seminar on mental health in prisons, "Prison Can Seriously Damage Your Mental Health":http://www.prisonreformtrust.org.uk/uploads/documents/Mentalhealthsmall.pdf (at p. 6).

decades —does provide a strong reason against the use of forcible medication of defendants.

In sum, what we have seen is that, from a utilitarian penal theoretical perspective, it is far from obvious that the clearing of the ground for the punishment of trial incompetent defendants by the use of involuntary medication is as morally important as has hitherto been assumed. There is reason to doubt whether punishment of this small group of people will have any effect in terms of general crime prevention or with regard to particular prevention.[16] But it is clear that there is a reason for not punishing this group *qua* the suffering that is inflicted on them. So much for the utilitarian view of punishment.

Let us now consider the question from the perspective of the retributivist view of punishment. As is often described, retributivism has dominated penal theoretical thinking for the last three or four decades and has been developing in various ways (see e.g. Duff and Garland 1994 or Ryberg 2004). However, in the present context it is not necessary to engage in considerations of the many different explanations that have been given as to why a perpetrator deserves punishment and of what precisely it is that the perpetrator deserves. Rather, what matters here are the penal distributional implications of retributivism. Thus, from a desert-theoretical perspective, how should we assess the moral significance of the fact that incompetent defendants who have committed crimes are brought to trial and subsequently punished?

In contrast to the utilitarian approach to punishment, which has often been accused of holding only a contingent relation between guilt and punishment —precisely what has led to a number of traditional objections against this approach —this is not the case with regard to retributivism. However, if it is crucial, from a retributivist perspective, that those who have committed crimes are in fact appropriately punished then there seems to be a strong reason in favor of initiating procedures to ensure the adjudication of guilt or innocence of those who, from the outset, are not competent to stand trial. However, as we shall now see, on closer inspection the answer is not so simple.

16 As mentioned, there could also be other effects that ought to figure in the utilitarian calculus. For instance, it would be necessary to consider how it affects crime victims if some defendants are, as a result of mental disorders, held incompetent to stand trial. Though it is difficult to make general estimates on this effect (it probably varies significantly between different types of crime) it should be noted that a least some studies have indicated that the imposition of suffering on the criminal does not constitute the main interest of crime victims; see, for instance, Strang (2002: chapter 1). Moreover, even if a victim is affected, this is only one of the many consequences that should be taken into account by the utilitarian. Thus, it is far from clear that this would tip the scale in favor of compulsory medication.

The contention that retributivism provides a strong justice-based reason in favor of identifying those who are guilty of crime and, therefore, also in favor an imposition of involuntary medication on trial incompetent defendants, is based on one crucial presupposition, namely, that the punishments imposed on those who are guilty are in fact just. If criminals are punished in a way that violates the prescriptions of retributive penal distribution, the reason in favor of forcible treatment may well be undermined. Thus, the question is whether, in real life penal practice, there is reason to believe that criminals are punished in accordance with a retributivist view of punishment for different crimes. Obviously, for the simple reason that punishment levels vary between different jurisdictions, there is no universal answer to this question. However, interestingly, many theorists in the modern area of retributivism believe the answer to be in the negative. Two reasons have been presented in support of this.

The first reason follows from a view to which many recent theorists subscribe, namely, that there is, most markedly in the US but also in several other Western countries, a general problem of overcriminalization. A theorist in the retributivist camp such as Douglas Husak, who has comprehensively considered this issue, has even described overcriminalization as "the most pressing problem with the criminal law today" (Husak 2008: 3). What this simply means is that there are currently too many criminal laws on the books. But if this is correct, then it follows that there are cases in which the criminal sanction is being overused, that is, where people are being punished even when they do not deserve to be punished. In other words, one of the problems of overcriminalization is that it produces overpunishment.

The other reason is not concerned with the scope of legal prohibitions but with the penal levels themselves. Several retributivists have underlined that many criminals of today are being punished in ways out of proportion with the gravity of the crime committed. For instance, Richard Singer has underlined that it is a misconception to think of the desert model as a derivative of a "throw away the key" approach to punishment; he has suggested that, in contrast to what is current practice in many jurisdictions, confinement should be reserved only for the most serious crimes and, even then, the duration of this should be relatively short (Singer 1979: 44). In the same vein, another influential retributivist, Jeffrie Murphy, holds that if the desert theory were to be followed consistently one would punish less and in more decent ways than one actually does (Murphy 1979: 230). And Andrew von Hirsch, who has extensively elaborated the penal distributional implications of retributivism, regards the proportionality principle as a means to restricting punishment, suggesting more precisely that terms of imprisonment even for the most serious crimes should seldom exceed five years (see e.g. von Hirsch 1993: chapter 10).

Suppose all this to be correct, that is, that there exists, as a result of overpunishment and excessive penal levels, a discrepancy between actual penal practice and what ideally constitutes the deserved punishments for different crimes, what does this imply with regard to the desirability of taking compulsory steps to ensure that criminal incompetent defendants are brought to trial and punished? The answer is not straightforward, depending upon the view the retributivist more precisely holds on penal distribution.

Suppose, firstly, that one subscribes to a so-called *negative* retributivist view, according to which desert is a necessary condition for justified punishment in the sense that the proportionate punishment for different crimes is interpreted as setting upper limits for punishment.[17] In this view, it is morally prohibited to punish in a way that is excessive, that is, which is disproportionately severe given the gravity of the crime. However, it is not wrong, in terms of desert, to punish a criminal less severely. Thus, while this position restrains the imposition of punishment, it does not itself dictate how precisely a criminal should be punished. An answer to this question could be given by supplying the theory with further considerations; for instance, as has been suggested, by holding that below the proportionality levels the more precise severity of a punishment should be determined on utilitarian grounds. However, given this position, the answer concerning the desirability of ensuring that criminal defendants are medicated, brought to trial, and punished, becomes obvious. If there is a constraint against disproportionately severe punishing then, in a state of overpunishment, it will be wrong to punish these criminals. And since there is no constraint against disproportionately lenient punishing, it is all in all clear that, following a negative retributivist account, the punishment of the criminal defendants whose competence has been restored would not be desirable (in fact, it would be wrong).[18]

Suppose, alternatively, that one favors a traditional *positive* account of retributivism according to which justice implies that the proportionate levels of punishment for different crimes do not only set upper limits for acceptable punishment, but also set lower levels. That is, on this account the criminal should be punitively responded to with a punishment that is proportionate to the seriousness of the crime; both upward and downward deviations from this punishment would constitute violations of justice. Given this position, the picture becomes more complicated.

17 The distinction between positive and negative retributivism was originally introduced by Mackie (1985: 207-8). See also Ryberg (2004).

18 A negative retributivist might of course hold that there are consequentialist reasons in favor of punishment. However, what is important is that such consequentialist reasons do not justify a violation of the constraint against transgressing the upper level of proportionate punishment.

On the one hand, the moral significance of bringing incompetent defendants to trial cannot be justified in terms of the moral importance of imposing punishment on them, because —in a state of overpunishment —such punishment would, as we have just seen, be violating the proportionality constraint and would be morally wrong. On the other, if those defendants who are criminal are not convicted and punished, this will also violate the proportionality requirement. By being treated in a disproportionately lenient manner —that is, by not being punished —they will not get what they deserve. Confronted with these contradictory prescriptions, what should be regarded as retributively preferable: to punish too much or to abstain from punishing? In order to avoid being theoretically locked, that is, in order to be able to provide theoretical guidance with regard to what is preferable under these non-ideal conditions, one will have to engage in some sort of comparison of these two types of injustice. But it is fair to say that at this point retributivists have had very little to say. The modern retributivist discussion of penal distribution has been focused on clarifying what constitutes the proportionate punishments for different crimes —for instance, how should crimes be ranked in seriousness, how should punishments be scaled in severity, and how should these scales be anchored —not on the comparison and measurement of degrees of disproportionate punishments. However, it seems reasonable to hold that, if we wish to compare the two outlined states, then there are at least two aspects that must be taken into consideration.

The first aspect concerns the extent to which a punishment of someone who is respectively overpunished or underpunished (*in casu* not being punished) deviates from what constitutes the proportionate punishment. For instance, punishing a person who deserves five years in prison for one extra day may be considered a very slight deviation compared to not punishing this person at all. Correspondingly, punishing this person one day less than five years may constitute a minor deviation compared to locking this person up for a period of ten years.

The second aspect concerns the moral weight of the two types of deviation; that is, how should we theoretically compare upward and downward deviations from the proportionate punishment? No one seems to believe that downward deviations are generally morally more problematic than upward deviations. This leaves two possibilities. Either it might be held that —leaving aside the just-mentioned question concerning the size of deviations —both downward and upward deviations constitute violations of justice and should be regarded with equal concern. In this view, there is *symmetry* with regard to the moral significance of over- and underpunishment. Alternatively, it might be held that, even though both

downward and upward deviation from the proportionate punishment is cause for concern, overpunishment is nevertheless worse than underpunishment. This is the *asymmetry* view. Which is then the more plausible? As mentioned, retributivists have on this point usually been silent. However, a recent exception is Göran Duus-Otterström, who has argued in favor of accepting asymmetry. What he suggests is that, while overpunishment involves excessive suffering, which the retributivist along with every other reasonable person must regard as morally problematic, this is not the case with regard to underpunishment. Therefore, even though both types of deviation are morally problematic, overpunishment is *ceteris paribus* worse (Duus-Otterström 2013).

Where does all this lead with regard to what positive retributivism implies, when it comes to the assessment of the alternatives of either bringing trial incompetents to trial and overpunishing those who have committed crimes or abstaining from bringing them to trial in the first place? Given the theoretical deficiencies in the development of the retributivist view on penal distribution, there is no clear answer. There is no generally accepted answer with regard to what constitutes the proportionate punishment for different crimes; even those retributivists who agree that the existing penal order is clearly excessive do not agree upon precisely what constitutes the appropriate penal levels. Moreover, even though there are arguments in favor of adopting an attitude of asymmetry, the question about the relative weight of over- and underpunishment is not fully resolved (for instance, even if the asymmetry view is correct, it is still not clear how one should balance deviations of different sizes, that is, how an instance of minor overpunishment should be assessed relatively to an instance of severe underpunishment). Thus, all in all, it is fair to conclude that it is simply not clear what positive retributivism implies. However, this is tantamount to holding that it is not clear whether there actually exists a positive retributivist ground in favor of ensuring, with the necessary medical means, that incompetent defendants are brought to trial and punished for their possible crimes.

Summing up, the point of departure of the above discussion is the argument that there is a strong reason in favor of administering psychotropic forcible medication of incompetent defendants, because the bringing of defendants to trial is a vital step in ensuring that those who have committed crimes are appropriately punished. However, as we have now seen, it is far from obvious that the punishment of this group of people carries the moral weight that this argument presupposes. From a utilitarian point of view, it is unclear whether or not it would be desirable to punish these people. In fact, it seems most reasonable to believe that nothing

would be gained either in terms of general prevention or in particular prevention. Nor is it clear that punishment of these people would be of moral significance if seen from a retributivist point of view. If it is correct, as several retributivist have suggested, that the existing penal order involves punishments that are out of proportion to those which criminals deserve then, from a negative retributivist view, it would seem preferable not to punish them while, from a positive retributivist perspective it was left theoretically unclear whether this would be preferable. Thus, on closer scrutiny the main argument in favor of forcible medication of trial incompetent defendants, namely, that this practice is justified on penal theoretical grounds, seems far less convincing than has generally been assumed in debate.

## 3. A FEW OBJECTIONS

Some might find the above discussion premature. Thus, in the following I will try to present a little more support in favor of the conclusion by considering it in the light of a few possible objections.

A first objection is that the above considerations somehow rest on a confusion of the distinction between, on the one hand, the significance of establishing criminal guilt and, on the other, the sentencing of criminals. The guilt phase and the sentencing phase are separate parts in the work of the criminal court and this, it might be held, is precisely how it should be. Therefore, the discussion so far is defective by inappropriately drawing on penal theoretical considerations, that is, on considerations that are only relevant in relation to sentencing.

Now, it is of course correct that the establishment of guilt and the sentencing of someone who is found guilty are usually regarded as different phases of the work of the criminal court. However, obviously this does not show that the moral significance of adjudicating guilt or innocence is not provided by considerations of the moral importance of punishing criminals, that is, by penal theory. The argument, that it is important to be able to distinguish the guilty from the innocent because it is vital to punish those who are guilty, does not rest on confusion. However, though this answer is relatively straightforward, there may still be something to the objection. It could be held that the previous considerations have focused solely on penal theory, thereby ignoring the fact that the guilt phase of the criminal court could be valuable in itself. In other words, it might be suggested that one should not hold, what has been called, an instrumentalist view of the criminal trial.

Whether an instrumentalist or a non-instrumentalist view on the guilty phase of the criminal court is correct is not a question that will be discussed more comprehensively here; and, as indicated in the outline of the *pros* and *cons* in the previous section, an argument based on a non-instrumental view has not been presented in the debate. Given the purpose of this article it is sufficient to keep in mind that even if there exist non-instrumental reasons in favor of adjudicating guilt and innocence this obviously does not show that there are no instrumental reasons. In fact, a rejection of instrumental reasons would be conspicuously implausible. Therefore, it is still relevant to show, as has been argued above, that the instrumental reasons —i.e. the reasons based on the moral significance of punishing criminals—do not carry the weight that one might at first sight believe and which has been underlined by courts and legal theorists.

A second objection that may have struck some readers of the previous discussion concerns the scope of the outlined argument. The considerations have been presented as focusing on the question as to whether it is morally acceptable to forcibly medicate defendants who suffer from impairments of trial competence. However, it might seem as if the penal theoretical discussion has a wider scope. Put somewhat differently: If it is really correct to hold that there are no penal theoretical reasons in favor of bringing defendants to trial (or perhaps even reasons against doing so), does it not follow that there is no value in bringing *anyone* to trial? And if so, does this not seriously undermine the plausibility of the argument?

The answer to this objection is twofold. First, whether it is correct that the argument has a wider scope depends upon which penal theoretical view one is defending. From a utilitarian point of view, it is certainly not correct that the argument can be extrapolated to include all defendants. As we have seen, the argument was that curable trial incompetent defendants only constitute a very small fraction of all defendants, and that the fact that they are not punished will not have any effect in terms of crime prevention. The picture is obviously very different if the state decides to abstain from bringing all defendants to trial. As mentioned, it is generally agreed that this would have rather radical consequences for the general crime level.[19] Turning instead to the retributive view of punishment, the picture is a little different. If it is correct that in a state of overpunishment it would be preferable if trial incompetent defendants were not treated, brought to

19 It is correct, though, that the arguments presented here could perhaps be applied in relation to other small fractions of defendants. Whether this is likely depends upon a more precise analysis of the members of this sub-group. However, in my view this should be regarded simply as an implication of the utilitarian approach rather than an objection. After all, as we have seen, the basic idea of the utilitarian outlook is that a punishment in itself should be regarded as an "evil".

trial, and subsequently punished —or if it is simply theoretically unclear whether this would be preferable —then this conclusion may be extrapolatable to other defendants. However, this brings us to the second answer. Even if this wider implication is correct, that is, if the argument in this way has implications for other groups of defendants, this does not show that my argument concerning trial incompetence is defective. All it shows is that, under certain non-ideal conditions, retributivism may have some radical and perhaps not yet fully acknowledged implications; which is obviously not the same as holding that the argument I have advanced is flawed.

This brings us to the third and final objection. It might strike some that the previous conclusion concerning the implications of retributivism is premature or even dubious precisely because it is based on considerations of what this penal theory implies under non-ideal circumstances. Would it not be more reasonable to consider whether trial incompetent defendants should be forcibly treated under ideal conditions? And even if one insists on adopting a non-ideal perspective, is all that follows not simply that the state should change the existing penal order in order to adapt to what justice requires? Moreover, would it not sound almost absurd if the state were to proclaim: "We do not take the requisite medical steps to ensure that trial incompetent defendants are brought to trial because we are already punishing in a way that is clearly excessive and hence unjust"?

The answer to the latter question is that this does not constitute an objection against the considerations that have been presented in this paper. What I have been considering is the overall question as to whether it is morally desirable to use compulsory measures to ensure that incompetent defendants end up in trial. However, the question as to what sort of (legal) justification the state should use if it decided not to accept forcible medication is another question. It is probably correct that the above proclamation would not only be highly unusual but might also have some undesirable consequences; however, this is fully consistent with the view defended here, namely, that it may not be morally desirable if the state medicates and punishes those who are trial incompetent.[20]

But what then of the first two questions? Why consider the implications of retributivism under non-ideal conditions? If one wishes to consider —as a purely philosophical exercise —whether forcible treatment of trial incompetent defendants is acceptable under ideal penal conditions, then this is of course quite all right. However, if the purpose is to try to clarify

20 For instance, if it were held unconstitutional to forcibly medicate a defendant because this would violate certain legal rights, this would be fully consistent with the view presented here.

what we should do under the actual penal order when the criminal court is confronted with trial incompetent defendants —that is, if we wish to present guidance with regard to whether Charles Sell ought to be medicated against his will or, more generally, whether other people who are currently placed in corresponding situations should be made subject to compulsory treatment —then we have to engage in considerations under the actual existing penal order which, as we have seen, many modern retributivists themselves regard as non-ideal. And it is this practical, or for that sake, real-life approach to the question that has been taken in this article. Therefore, the answers to the above questions are: first, it is an ethical problem as to what we should actually do with trial incompetent defendants that drove the previous discussion and, second, even though retributivists should obviously try to change the existing penal order in accordance with the prescriptions of their theory, this does not alter the fact that the theory may also have implications in real-life circumstances under which the ideal has not yet been realized.

## 4. CONCLUSION

The time has come to sum up the previous considerations. What we have seen is that the question as to whether it is acceptable for the state to administer forcible medication in order to restore the competence of defendants who do not possess the cognitive abilities to stand trial, has usually and understandably been framed as a dilemma between, on the one hand, the interest or protection of the individual and, on the other, the significance of the fact that defendants are brought to trial in order to ensure the punishing of those who have committed crimes. However, what I have argued is that, on closer scrutiny, it is far less obvious than has often been assumed that state punishment of criminals really constitutes a reason in favor of the forcible medication of defendants.

Following a utilitarian view of punishment, it was not clear that the imposition of punishment of this small group of criminals would contribute to anything in terms of crime prevention. And, without a gain in terms of crimes being prevented, it would actually be wrong to inflict punitive suffering on members of this fraction of defendants. From a retributivist point of view, things were a little more complicated. However, given the assumption —to which many modern retributivists subscribe —namely, that actual penal practice involves a problem of the overpunishment of criminals, it becomes much less obvious that there is a justice-based reason in favor of forcible treatment of incompetents. On a negative retributivist view, punishing these people under such conditions would be

wrong. While, from a positive retributivist point of view, it was not theoretically clear whether it would be desirable to punish these people. All in all —and as pointed out in the beginning —I do not believe these considerations warrant a strong case against the use of involuntary medication of trial incompetent defendants. Not all retributivists would accept the view of overpunishment, and the implications of positive retributivism under such conditions have not yet been theoretically satisfactorily developed. But I believe that the previous considerations justify the more modest conclusion, namely, that it is far less obvious than is usually assumed in the debate, that bringing about the punishment of criminals under the prevailing penal order constitutes a reason in favor of forcible medication of defendants who are not competent to stand trial. And that those theorists who have held that the scales should tip in favor of forcible medication, by taking for granted the state's interest in bringing criminals to justice, face serious penal theoretical challenges in order to underpin this conclusion.

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# Justice, Fairness, and the Brain Drain

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## ABSTRACT

The emigration of skilled professionals from developing societies to more wealthy ones has troubling ethical implications. This form of emigration may undermine the efforts of developing countries to build robust political institutions, as those who leave are those most able to demand institutional change and reform in government. Such emigration also represents a regressive transfer of wealth, as those educated by an impoverished society frequently use that education to benefit the more well-off. Gillian Brock and Michael Blake agree that this phenomenon deserves moral attention, but disagree about what states of origin might legitimately do in response. Brock argues that the state has some right to condition exit upon the performance of some specified term of public service; Blake, in contrast, argues that liberalism demands robust rights of exit, even when that exit does not tend to move the world towards global justice. This overview examines their respective arguments, as well as their shared assumptions about both liberal theory and empirical fact.

**Keywords**: emigration, justice, international law, freedom.

## INTRODUCTION

We tend to think that at least some forms of inequality are wrong – are, indeed, unjust. To fully explain why, though, we have to describe at least three features of the inequality in question. The first is the *what* of inequality: what is that thing whose distribution is to be taken as morally pernicious? What is it, to use the language of an earlier debate, that is the

*currency* of justice in this context? The second question is the *why* of inequality: why is this particular form of inequality to be taken as morally problematic? Not all cases of inequality are worthy of being regarded as unjust; why should this one be so viewed? The final question is the *how* of justice. Given that we now know what the inequality is, and why it is unjust, what is there to be done about that injustice? Not all proposed policy solutions, after all, are both effective and permissible; what is the range of rightful solutions to this existing injustice?

In *Debating Brain Drain: May States Restrict Emigration?* Gillian Brock and Michael Blake focus on a particular sort of inequality, and ask both why that inequality might be unjust, and how that injustice might be legitimately addressed. The inequality in question involves the emigration of highly-skilled (and highly-educated) people from developing countries to wealthy countries —a phenomenon generally referred to as the brain drain. The facts of the brain drain are startling. Look, for example, at the contrast between Japan and Malawi. Japan has around twenty-one physicians per 10,000 people, while Malawi has only one physician for every *fifty thousand* people.[1] This radical inequality in medical skills and talents has, obviously, bad consequences for health; people born in Malawi will live, on average, 32 years fewer than their counterparts born in Japan.[2] This inequality, moreover, does not emerge simply because the Malawian government is disinterested in medical education; indeed, many developing societies spend a significant portion of their budgets on training a new generation of medical personnel. The difficulty is that such medical training makes those people desirable on the global market for talent, and many of those trained simply leave the developing world for the developed one. Thus, in 2000, Ghana trained 250 new nurses —and lost 500 nurses to emigration (Awases et al. 2004). In 2001, Zimbabwe graduated 40 pharmacists— and lost 60 (Katere and Matowe 2003). In 2002 alone, Malawi lost 75 nurses to the United Kingdom —a cohort that represented 12% of all the nurses resident in Malawi (Ross et al. 2005: 260). The result has been a continued shortage of medical personnel in developing countries, especially in sub-Saharan Africa, despite considerable investment. It is tempting to conclude that —as a recent editorial put it— America is stealing the world's doctors (McAllester 2012).

Brock and Blake take this sort of inequality as – at the very least – morally troubling. They have a common vision of the *what* of this particular

1 The data are from studies between 2005 and 2012; they are available at http://kff.org/global-indicator/physicians/.

2 Figures are from 2012 life expectancy data, available at http://cia.gov/library/publications/the-world-factbook.

inequality. The book is, however, a sustained disagreement about the *why* and the *how*. The book is not intended primarily as an empirical study – although the empirical facts are, of course, enormously relevant to the policy conclusions that ought to be adopted. The book is, instead, an argument between philosophers who are committed to the idea of global justice, about why the brain drain is troubling, and what might be legitimately done to counteract the injustice it represents. Our focus includes an inquiry into what might be done at the global level, and by wealthy states, to counteract the brain drain. Our primary inquiry, however, is on the most vexed question of all: may developing states, in the name of justice, prevent or delay the emigration of skilled professionals —or does the right to exit make such policies morally illegitimate?

Brock argues, in her portion of the book, that the unregulated emigration of skilled professionals —including, but not limited to, medical personnel— can represent a significant form of injustice. The injustice may involve the frustration of the legitimate expectations of the fellow citizens of the would-be emigrants; they have spent money, which the developing society does not have in abundance, to educate a medical student, only to have the benefits from that investment go to those already well situated. The effects of such emigration may also undermine those institutions that are necessary for the administration of justice. Development as a flourishing society, that is, requires the creation and maintenance of political institutions, and these institutions are most likely to be sustained by educated and active citizens —exactly that group of citizens whose departure from the developing society is in question. In view of considerations like these, Brock argues that it would be legitimate for many states to engage in policies designed to delay emigration of these professionals, either through some form of conditional repayment scheme or, under certain circumstances, through a temporary restriction of emigration itself. There are, of course, limits here; Brock's conclusions apply only to states that are poor, but sufficiently responsible and legitimate —and the amount of time owed by the would-be emigrant cannot include more than a few years. Nonetheless, Brock argues that the developing state is within its right to condition the exit of the would-be emigrant, and that such states may end up finding these policies both justified and effective.

Blake, in contrast, regards these policies as likely ineffective, and usually unjust. He accepts that the brain drain represents a problematic form of inequality —but that there are some inequalities that could not be eliminated except through means that are, themselves, morally prohibited; these are cases, he argues, of moral tragedy, in which we cannot hope to arrive at a just world through just means. He argues, in particular, that the

polices imagined by Brock are generally unfair, in that they force the burden of making the world just onto a particular subset of the world's population that had comparatively little role in making that world unjust. These policies, moreover, are likely ineffective given the ways in which restrictions on emigration can sometimes lead to reduced demand for educational services. Most centrally, though, Blake argues that these policies are illiberal. The just state has a right to govern over those people who are within its territorial borders; it has no comparable right to insist upon those people's continued presence within those borders. This right is defensible with reference to political history, but also with reference to the question of political justification; no justification can be given to the one prevented from leaving that that citizen is bound to accept as morally motivating. Blake concludes that the range of acceptable policy options for those trying to overcome the brain drain is comparatively small.

Both Brock and Blake, then, accept that the brain drain is morally disquieting, but disagree about how that disquiet is to be understood – and how it is that we might respond to the circumstances of the brain drain. They agree, however, that sustained inquiry into the brain drain would be of benefit to the world as a whole, and are gratified that the current exchange might help that sustained inquiry begin.

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# Emigration in a Time of Cholera: Freedom, Brain Drain, and Human Rights[1]

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## ABSTRACT

Can brain drain justify curtailing the right to emigrate? This article presents what might be called an "emergency justification" for emigration restrictions, one that defends the curtailment of a right as a means to prevent a severe cost. The justification presented in this article contrasts with the positions taken by Gillian Brock and Michael Blake in their highly engaging book *Debating Brain Drain*. While both authors mention the possibility of an emergency justification, neither pays it sufficient attention. As a result, both list various conditions for justifying emigration restrictions that prove superfluous. This article thus criticizes Brock and Blake for their treatment of emigration restrictions. But it also criticizes them for failing to condemn the more pressing danger: unjustified immigration restrictions.

**Keywords:** emigration, immigration, freedom, brain drain, human rights, Michael Blake, Gillian Brock.

## INTRODUCTION

Can brain drain justify curtailing the right to emigrate? This article presents what might be called an "emergency justification" for emigration restrictions. An emergency justification defends the curtailment of a right as a means to prevent a severe cost. Given the importance of the right to emigrate in protecting personal liberty, only an emergency justification could succeed in justifying counter-brain-drain emigration restrictions. An emergency justification, moreover, has a firm basis within international

1 The article benefited from excellent feedback from Edinburgh University's Ethics Seminar and the workshop on the Ethics of Boundaries at the University of Oslo. I would like to thank the respective organizers, Guy Fletcher and Kim Angell.

law. The emergency justification I shall present contrasts with the positions taken by Gillian Brock and Michael Blake in their highly engaging book, *Debating Brain Drain* (2015). While both authors mention the possibility of an emergency justification, neither pays it sufficient attention. Understating the importance of the emergency justification is thus the first point of criticism this article makes of Brock and Blake. The second (closely related) point is that they offer an inaccurate list of conditions for justifying emigration restrictions. The emergency justification presented here involves five conditions: Necessity, Efficacy, Proportionality, Duty to Assist, and Duty to Stay. Brock and Blake offer a variety of further conditions, all of which prove superfluous. This article will thus sort through the possible conditions for justifying emigration restrictions, distinguishing the genuine from the fake.

The article starts by offering an account of the moral foundations of the right to emigrate (section 1). It then outlines the emergency justification for restrictions and the five relevant conditions (sections 2 to 4). Sections 5-7 turn to Brock and Blake. We find some things to admire but also much to disagree with: their misleading framing of the issue (section 5), the phantom conditions they impose on emigration restrictions (section 6), and their failure to condemn the more pressing danger: immigration restrictions (section 7).

So can emigration restrictions be justified on brain drain grounds? Two tasks require separation. First, explicating the conditions under which a right may be curtailed. Second, assessing whether those conditions are fulfilled in the real world. This article focuses predominantly on the first of these tasks. It is only in the final section (section 8), that it turns to the second. The view presented there is that the relevant conditions are unlikely to be fulfilled. Given current empirical uncertainties, there is no compelling case for emigration restrictions to stem the brain drain.

## 1. THE MORAL FOUNDATIONS OF THE RIGHT TO EMIGRATE

When assessing the ethics of emigration, it is helpful to start by considering the position taken in international law. In law, the human right to emigrate comes coupled with the right to free movement. Article 12 of the International Covenant on Civil Political Rights (ICCPR) declares:

> 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

That these rights come coupled together is no accident. The freedom to emigrate extends the freedom to move. Foreigners and citizens can move freely within the borders of a country (Article 12.1) and leave those borders to explore other states (Article 12.2).

But why do people have these rights? Again, international law offers guidance. Among the rights listed in the ICCPR and other human rights documents are a set protecting basic liberties. The set, which I shall term "human freedom rights", includes freedom of association, expression, religion, occupational choice, and marriage. As a set, human freedom rights allow us to make basic life decisions regarding which (if any) religion we practice, with whom we associate and communicate, whom (if anyone) we marry, and which career we pursue. These rights entitle us to choose among the full range of, what we may call, "life options": friends, family, civic associations, expressive opportunities, jobs, and marriage partners. When governments restrict our range of life options —banning us from meeting certain people, practicing certain religions, and so on and so forth —they risk violating our human freedom rights. Under ordinary circumstances, we should be allowed to make basic life decisions without government interference.

The human rights to freedom of movement and to emigrate derive their importance from these other human freedom rights. Our range of life options depends on our range of physical space. If one is banned from moving freely within a country or from leaving a country, then one cannot visit friends or family, attend a religious or educational institution, express one's ideas at a meeting or cultural event, seek employment or pursue a love affair, in the place one wishes to go. Restrictions on free movement and free emigration are, at the same time, restrictions on free association, expression, religion, occupational choice, and marriage.

Since it will prove relevant below, two other rights deserve mention. First, consider the right to immigrate. While this right is unrecognized in international law, the same argument applies. If people are to be free to access the full range of life options, then they must be free to enter other countries. The freedom to emigrate is insufficient to ensure access to exterior options if the borders of other states remain closed. Without the freedom to immigrate, people are unable to meet, associate, communicate, marry, worship, and work with people in those countries. Immigration restrictions, no less than emigration restrictions, trespass on the personal domain.[2]

2 Clearly much more needs to be said to properly defend the idea of a human right to immigrate. I offer an extended defense in other work; see in particular Oberman (2016).

The second right is the right to stay in one's own country. Like the rights to move, emigrate, and immigrate, the right to stay enables people to access life options; in this case, the options available within their home country. However, the right to stay is of particular importance. To see this, it is worth distinguishing between two kinds of life options: what I term "attachments" and "possibilities". Attachments are those options that a person has chosen and now wishes to pursue. Possibilities are those options that the person has not chosen, although they may come to choose sometime in the future. While our human freedom rights protect our ability to access both attachments and possibilities, it is attachments that tend to be of greatest significance. It is the freedom to be with *our* friends and family, to practice *our* religion, to pursue *our* career, and to be part of *our* community that we cherish the most. The fact that people's attachments tend to be located within their own country lends the right to stay particular weight. Important as it is that people are permitted to migrate to other countries, it is generally more important that people can remain in their own.

The human right to emigrate exists then because of the role it plays within a larger set of human freedom rights. It protects our ability to communicate, associate, worship, work, and marry with people living abroad. Human freedom rights, as a whole, entitle us to make basic life decisions free from government restriction on the options available to us. If we are prevented from migrating, our range of life options is significantly curtailed.

## 2. THE EMERGENCY JUSTIFICATION

Is the human right to emigrate absolute? Not according to international law. Article 12.2 of the ICCPR proclaims the right. Article 12.3 immediately qualifies it. Restrictions on the human right to emigrate may be justified if they "are provided by law" and "necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant".

The right to emigrate is not the only right regarded as non-absolute in international law. Most of the rights the ICCPR lists are subject to limitations or may be derogated from in times of emergency. Interestingly, however, there are some rights that are treated as absolute. These include the right to life (Article 6), the right not to be tortured (Article 7), and the right not to be enslaved (Article 8).

I think the position taken in international law is eminently sensible. The right to emigrate and other human freedom rights are important, but it would be a mistake to insist that they always be respected. Sometimes, in emergency situations, human rights can justifiably be curtailed. Thus a political demonstration might be justifiably banned, thereby restricting freedom of speech, if it would result in widespread rioting. Or people might be justifiably subject to quarantine, thereby restricting their freedom of movement, to prevent an epidemic.

International law is also wise to distinguish between different rights. While many rights can be overridden, some should be treated as absolute. Consider the right not to be tortured. Philosophers and TV shows can dream up scenarios involving ticking time bombs and the like in which torture seems permissible. But in the real world, such instances are so rare and the danger of institutionalizing torture so grave, that it would be a mistake to incorporate exemptions into law. Torture marks such a severe infraction of a person's basic interests that it is incomparable to measured restrictions of free speech, movement, and other basic liberties. As far as the law is concerned, the right not to be tortured should be regarded as absolute even though human freedom rights need not.

We have then a possible justification for counter-brain-drain emigration restrictions that is compatible with international law. Restrictions might be justified because the costs of brain drain are so severe. If, for instance, the flight of medical professionals from poor countries leaves needy people without care, then that might provide adequate reason for restrictions. Public health, after all, is one ground for emigration restrictions that the ICCPR explicitly cites. Countenancing restrictions on such occasions does not involve denying the existence of a right to emigrate. Rather it involves recognizing that the right is sometimes in tension with other human rights, such as the right to health. As we saw from the quarantine case, the right to health sometimes takes precedence.

Emigration restrictions cannot be justified, however, unless a series of demanding conditions are fulfilled. Three of these conditions apply in the case of any non-absolute human right. These I discuss in the next section. Two further conditions apply specifically to restrictions on migration for the sake of preventing brain drain. These I discuss in section 4.

## 3. NECESSITY, EFFICACY, PROPORTIONALITY

There are three standard conditions on the permissibility of human rights

curtailment. One finds such conditions stipulated in various places in international law, but here I offer my own formulation:

1. Necessity: there must be convincing evidence that the proposed curtailment is necessary to prevent a severe cost.
2. Efficacy: there must be convincing evidence that the proposed curtailment will be effective in preventing the severe cost.
3. Proportionality: the curtailment of the right must be proportionate to the severity of the cost.

A comment on each. Necessity ensures that human rights are not curtailed when reasonable alternative measures are available. A government is not justified in banning a demonstration to stop a riot, for instance, if enhanced policing would work just as well. This example involves a ready alternative, but Necessity can require us to consider radical change. Many corrupt and repressive governments may find it necessary to curtail rights to prevent severe costs because their corruption and repression has caused such harm. On such occasions, the curtailment of human rights is, in fact, unnecessary. The governments have a reasonable alternative: to end their corruption and repression. This explains, incidentally, why the Berlin Wall —the most famous example of an emigration restriction —was unnecessary. Given the many failings of the GDR regime, the wall may well have been necessary for the maintenance of a functioning society in East Germany, but since that regime was itself unnecessary, so was the wall. It is no accident that the two fell together.

Little need be said concerning Efficacy. Clearly, governments cannot justify curtailing rights when doing so is ineffective. But notice the phrasing of Necessity and Efficacy: "there must be strong evidence". When government seeks to curtail rights to prevent costs, the burden is on government to provide the evidence that the proposed curtailment is necessary and effective. Restrictions of human rights cannot be justified when the empirical case for them is weak.

Proportionality is separate to both Necessity and Efficacy. Even when there are no other means to prevent a severe cost and the proposed curtailment is effective, we might still judge it disproportionate. Much will depend on the degree to which the right is restricted as well as the severity of the cost to be prevented. Rights can be restricted to a greater or lesser degree. The complete prohibition of free speech within a country is clearly different to a ban on a particular demonstration in a particular city. The greater the restriction the less likely it is to prove proportionate.

## 4. THE DUTY CONDITIONS

The above three conditions apply in the case of all human rights curtailments. There are two conditions, however, which are more specific to the brain drain case. To see this, note that counter-brain-drain emigration restrictions represent the curtailment of a human right by a certain means and for a certain purpose. They operate through the use of coercion to try to get one group of people to stay and assist another group of people. When one coerces one group of people to try to get them to assist another group of people, one must do more than show that the coercion used is necessary, effective, and proportionate. One must show that those who are being coerced have a duty to do what they are being coerced to do. To fail to do this is to come much too close to treating the coerced party merely as a means. Each person has her own life to lead. One cannot treat people as mere tools to be used in the service of others.[3]

When applied to the brain drain case, this latest condition on justified coercion can be broken down into two parts.

4. Duty to Assist: Skilled workers must have a duty to assist their compatriots.
5. Duty to Stay: Skilled workers must have a duty to stay in the country to provide the assistance they owe.

Let us consider each of these conditions in turn. Why would skilled workers have a duty to assist their poor compatriots? There are at least two reasons. First, many skilled workers received their training at government expense. They may therefore be obligated to assist their compatriots in some way as a form of reciprocation. It would seem wrong to consume resources that belong to poor people, knowing that they expect to benefit as a result and yet do nothing to help them. Second, there is arguably a general duty upon people to help those in need simply because they are in need. This duty falls on everyone, skilled workers included.[4]

A duty to assist does not necessarily translate into a duty to stay. For one thing, skilled workers may be able to provide the necessary assistance from abroad by way of international transfers. For another, the burdens of

3 It is worth distinguishing the claim made here from two more ambitious claims. First, I am not arguing that coercion can only be applied to enforce a pre-existing duty. The concern here is specifically with the use of coercion to force one group of people to assist others. Nor am I holding that to coerce people to get them to assist others is, in itself, to treat them merely as a means. One does not treat others merely as a means if one enforces a duty they owe to others. Here I am at odds with Blake; see section 6.3 below.

4 I develop both these points at greater length in Oberman (2013: 434-9). See also sections 6.5 and 6.6 below.

staying might be unacceptably high. Here, I assume a conception of morality under which there are limits to the level of altruistic sacrifice people can be asked to bear. It is reasonable for people to refuse to provide assistance when doing so involves particular hardship. For this reason, skilled workers who are subject to persecution, separated from their family, living in dire poverty or working in dangerous conditions do not have a duty to stay. It is only when a skilled worker cannot provide sufficient assistance from abroad and is enjoying a decent life at home that skilled workers have a duty to stay.

Let me sum up. We have seen that the human right to emigrate is important since it enables people to pursue life options beyond borders. We have also seen that it is non-absolute. Like many other human rights, there are occasions in which the potential costs are so high that restrictions might be justified. Restrictions could only be justified, however, if a series of demanding conditions has first been satisfied: Necessity, Efficacy, Proportionality, Duty to Assist, and Duty to Stay.

## 5. CURTAILMENT, FACILITATION, VIOLATION

Central to the above discussion has been the concept of a human rights curtailment, so this is worth defining more exactly. When a government curtails a right it prevents people from doing something that falls squarely within the right's scope. Rights curtailments constitute a non-trivial frustration of the underlying interest or value. A government that curtails a right cannot claim that its actions are consistent with the right's fulfillment. The two are in conflict and this must be recognized. The curtailment might still be justified, but to justify it, one must point to competing considerations of overriding importance. An emergency justification seeks to do just that.

With this in mind, let us turn to Brock and Blake's treatment of the brain drain issue. Both acknowledge the possibility of an emergency justification (more on that below). Unfortunately, both tend to muddle the curtailment of a human right with other ways rights might be circumscribed. This muddling occurs in their eagerness to make emigration restrictions seem easier (Brock) or harder (Blake) to justify.

Brock's aim is to defend compulsory service programs. Under these programs, skilled workers would be required to fulfill some years of service before being permitted to emigrate. Brock's mistake, when defending these programs, is to muddle *curtailing* a human right with *facilitating* its exercise. Thus she compares preventing a skilled worker from emigrating

for a number of years with the requirement that people wait their turn when exiting a plane or car park (Brock and Blake 2015: 248). One can see how such comparisons could work to make compulsory service programs seem more attractive. It would be foolish to kick up a fuss about exit queues, so perhaps it is foolish to worry too much about temporary emigration restrictions.

But these comparisons fail. One difference is the severity of restriction. Being prevented from living where one wishes for a number of years is a severe restriction on one's autonomy. A five-minute wait while the plane or car park empties is not. There is another difference however. The restrictions in the plane and car park cases represent solutions to coordination problems. If everyone attempts to exit a plane or car park at once, the result is deadlock. On such occasions, a strong argument for intervention is to enable people to better exercise their right to free movement. In the emigration case, no similar argument applies. The aim of compulsory service programs is not to facilitate emigration but to counter the suffering of one group of people by forcing another group to stay and assist them. A restriction on the freedom to emigrate that was truly analogous to Brock's cases would be the requirement that when people leave a country they queue patiently at the border. A compulsory service program is not a form of queuing.

To be fair to Brock, her more general point is that rights to basic liberties should not be treated as absolute and that the temporary nature of a restriction can aid in its justification. This is correct. But the danger of her comparisons is that they make the task of justifying compulsory service programs seem much easier than it is.

Blake's mistake is to muddle the idea of *curtailing* a human right with *violating* it. He does this when denying Brock's claim that the temporary nature of compulsory service programs makes them easier to justify. Replying to Brock, Blake argues that "[w]e cannot think that the violation of a human right is legitimized merely because it is brief" (Brock and Blake 2015: 291). After all, he reasons, it is unjust to wrongfully incarcerate someone for a day, even if it is only a day (Brock and Blake 2015: 290). "A temporary violation of human rights is a violation nonetheless" (Brock and Blake 2015: 291).

Now it is certainly true that human rights violations remain unjust even when temporary. But this point proves much less than Blake thinks. The claim that Brock is making is that the brevity of a restriction can help justify the *curtailment* of the right to emigrate; she is not defending the *violation* of the right. A rights violation is unjustified by definition. Once we know that the right is violated, matters are clear. The difficult part is

discerning the circumstances in which the right to emigrate is violated from the circumstances in which it may be justifiably curtailed. And it is on the question of justifiable curtailment that the brevity of a restriction proves relevant.

As we have seen, the degree to which a right is restricted is an important factor in deciding whether Proportionality is fulfilled. A compulsory service program that lasts a lifetime is much less likely to be proportionate than one that lasts a year. Brevity cannot expunge the injustice of a right's violations, but it can help to show that no human rights violation has occurred. This is the fact that Brock emphasizes, but Blake, in failing to distinguish violation from curtailment, manages to disregard.

Blake's failure to distinguish the two concepts is actually symptomatic of two wider problems with his part of the book: a tendency to mischaracterize international human rights law and to make hyperbolic comparisons between emigration restrictions and other forms of coercion. Blake styles himself as a defender of "liberal orthodoxy" and the "status quo", a position he identifies with the Universal Declaration of Human Rights (UDHR) and its inclusion of a right to emigrate (Brock and Blake 2015: 111-112). Strangely, however, he never mentions the fact that the UDHR, like the ICCPR, lists circumstances under which the right to emigrate may be justifiably overridden (see UDHR Article 28). Nor does he acknowledge the distinction between different kinds of rights. While the ICCPR characterizes the right to emigrate as non-absolute, Blake's favorite comparisons are to rights it treats as absolute. To restrict migration is, in his view, akin to torture, kidnapping, and slavery (Brock and Blake 2015: 120-121, 183). It requires people to "sacrifice their own lives in the name of others" (Brock and Blake 2015: 169). This hyperbolic language contrasts markedly with the orthodoxy that Blake claims to defend. While for Blake, it seems, all rights are on par and all restrictions equally egregious, international law is careful to distinguish different rights and different levels of restriction.

The result of all this muddling of concepts and misleading comparisons is that what should be brought to the fore is pushed to back: the emergency justification for emigration restrictions. While Blake and Brock both recognize the possibility of a justification of this form, neither offers it much space. Brock believes she "can make the central case needed without resorting to this line of argument" (Brock and Blake 2015: 285). Her eschewal of an emergency justification is in keeping with her misplaced identification of compulsory service programs with trivial restrictions to solve coordination problems. One need not argue that a rush to leave a plane or a car park would cause catastrophe to justify the demand that

passengers and drivers wait their turn. If emigration restrictions were a form of queuing, an emergency justification would be unnecessary.

Blake says more than Brock regarding emergencies and much of what he says makes good sense. He believes an emergency justification can succeed given certain conditions and his list includes Necessity and Efficacy (Brock and Blake 2015: 211). Still his blunt approach to human rights makes the emergency justification seem much more extreme than it is. In Blake's description, it is as if there are two possible worlds: an ordinary world, in which human rights law and liberal principles apply, and a brutal world, where matters have got so bad that "liberalism's demands must be suspended" (Brock and Blake 2015: 209). In the latter world, no holds are barred. Kidnapping of foreign skilled workers is permissible. The right to emigrate can be entirely suspended. All moral rights, in fact, are to be set aside (Brock and Blake 2015: 210).

Blake's characterization of the emergency justification is more dramatic than accurate. When we curtail certain rights to prevent severe costs, we are not tossing law aside, but drawing on relevant clauses in international law. When we place some restrictions on some rights for some period, we are not suspending all rights entirely. Indeed, it is telling that Blake does not include Proportionality among his list of conditions. Had he done so, he may have been encouraged to abandon his all-or-nothing approach to human rights and recognize that the brevity of a restriction can aid in its justification.

## 6. PHANTOM CONDITIONS

I've listed five conditions. Blake and Brock list others. To my mind, their additional conditions are unnecessary. Let me consider each in turn.

### *6.1 Legitimacy: Governments can only restrict emigration if they are legitimate*

Both Brock and Blake are rightly concerned not to license tyrannical regimes to further oppress their people. Their solution is the Legitimacy condition. On Brock's definition, a government is legitimate if it comes to power through a democratic process, shows a concern for justice, and makes good faith efforts to respect human rights (Brock and Blake 2015: 85-86).

I sympathize with the motivation behind Brock and Blake's inclusion of Leitimacy but I think it unnecessary. A state that is seriously misgoverned is unlikely to fulfill the five conditions outlined above. Corrupt and

repressive governments could do much to improve the lives of their citizens by embarking upon reforms. Being corrupt and repressive, they are also less likely to make effective use of the skilled workers they retain. (As economists often note, "brain waste" is as grave a problem as brain drain.) So emigration restrictions imposed by such governments are likely to fail both Necessity and Efficacy. They may also fail Duty to Stay. If skilled workers are themselves persecuted or living in desperate poverty they are morally free to leave. In short, the five conditions I listed offer sufficient protection against the misuse of the emergency justification by a tyrannical regime.

But is it not possible that at least some illegitimate governments might fulfill the five conditions? Yes and this is not a problem. Imagine the following scenario. A government fails to hold democratic elections, represents a dominant ethnicity, and violates the rights of minorities. The government is, nevertheless, reasonably competent and is making great strides in eradicating poverty. (Vietnam and China are possible real world examples.) Now, suppose the government seeks to impose counter-brain-drain emigration restrictions against well-off skilled workers from the dominant ethnic group. As long as the five conditions are fulfilled, I do not think this objectionable. What Blake and Brock refer to under the label of legitimacy is, in my view, nothing but a stand in for other concerns.

Note, I am not claiming here that illegitimate governments are permissible. Illegitimate governments, being illegitimate, should step down. But the question we are asking is not whether illegitimate governments should hold power but whether, when they do hold power, they perform a further wrong by imposing emigration restrictions. Brock and Blake say, "Definitely yes"; I say, "It depends whether the five conditions are fulfilled".

### *6.2 Contractual Agreements: Only skilled workers who have signed a contract can be prevented from leaving*

Under Brock's compulsory service programs, governments would invite skilled workers to agree to stay for a number of years in exchange for training. Brock stresses this fact in reply to Blake's objections. Skilled workers are not like the victims of kidnapping, as Blake suggests, since what they are being forced to do is simply fulfill a contract they consented to (Brock and Blake 2015: 253).

I can see how the existence of a contract can aid in justifying restrictions. Emigration restrictions are much more likely to be proportionate if agreed to in advance. Nevertheless, there could be occasions, when the costs are

particularly high, in which a government could justifiably restrict emigration without prior agreement. The idea that human rights curtailments always require prior agreement is clearly false. When a government bans a demonstration to prevent a riot, it does not require the prior agreement of the demonstrators. When a government restricts the movements of infected people during an epidemic, it does not require the prior agreement of those it quarantines. In short, contractual agreements may be a contributory factor in the process of justifying emigration restrictions but not a necessary condition.

### *6.3. Benefiting the Coerced Party: Coercion is not permissible unless it benefits those subjected to it*

This is an important element in Blake's critique of compulsory service programs. Blake argues that society cannot "coerce the individual except when we can, in some specific way, say, 'We do this for *your* benefit, and not simply that of others'" (Brock and Blake 2015: 205). He associates this condition with Rawlsian liberalism and its critique of utilitarianism. A utilitarian would permit the coercion of one group of people merely because it is useful to others. A Rawlsian, Blake argues, finds this unacceptable. Each person has her own life to lead. One cannot treat people as mere tools to be used in the service of others.

If Benefiting the Coerced Party were a genuine condition, compulsory service requirements would be wrong. These programs are not implemented for the sake of the skilled workers themselves but their compatriots. Benefiting the Coerced Party is, however, a phantom condition. To see this, note that the motivation behind most laws is to benefit people besides the coerced party. Laws against rape are not imposed for the sake of rapists but their victims. Laws requiring dentists to be qualified are not imposed for the sake of dentists but their patients. Laws preventing mining corporations from operating on native reservations are not imposed for the sake of the corporations but the natives —and so on and so forth. One of the basic things we want governments to do is to ensure that other people treat us decently, even when —one might say, especially when —it is in their interests to treat us otherwise.

Despite leaning on the Benefiting the Coerced Party at various stages, Blake himself raises doubts. He notes that something as benign as redistributive taxation would seem to violate the condition. His response is to argue that redistributive taxation is nevertheless justified because wealthy people have their properties and persons protected by their state and will go on to benefit in this way into the future. Emigrants, on the other hand, will not experience this benefit after emigrating (Brock and Blake

2015: 205-207).

This response involves refashioning the condition in ways that might be questioned. But suffice to note here that even with this refashioning, Blake is still unable to distinguish redistributive taxation from emigration restrictions. For the desired distinction is not, in fact, between wealthy taxpayers and emigrants but between wealthy taxpayers and those subject to emigration restrictions. While emigrants do not enjoy the protection of property and person after leaving, those subject to emigration restrictions do not leave. They will thus enjoy the protection of person and property into the future no less than wealthy taxpayers. If protection of property and person is sufficient to fulfill Blake's condition in the case of redistributive taxation, then that same benefit is sufficient in the case of emigration restrictions.

What about Blake's claim that Benefiting the Coerced Party is entailed by Rawlsian liberalism? Here, Blake gets things precisely wrong. Rawlsians have no problem with some people being forced to make sacrifices for others. That is exactly what Rawls's two principles of justice require. It is the use of coercion to benefit the coerced party —paternalism —that Rawlsians have the most trouble justifying.

Blake is right that we should oppose using people merely as tools for others. But this opposition to mere using need not require us to adopt Benefiting the Coerced Party. Consider three purposes to which coercion may be applied against party A:

(1) To use A as a means to benefit some other party, B.

(2) To enforce moral duties that A owes B.

(3) To benefit A.

Blake is right to find (1) troubling. Where he errs is in assuming coercion can therefore only be justified when purpose (3) is (also) being pursued. The possibility of (2) seems to have escaped him. While coercing people merely because it benefits others is rarely justified, enforcing people's moral duties to others is the bread and butter of the law. In short, the solution to the concern that compulsory service programs involve mere using is not Benefitting the Coerced Party but the two duty conditions outlined above: Duty to Assist and Duty to Stay.

### *6.4 Compensation: One cannot curtail someone's human rights without compensation*

This is another of Blake's conditions; one that he believes it is difficult to fulfill. He wonders whether "we will ever be in a position to adequately

compensate … the prevented emigrant for what we have done to them" (Brock and Blake 2015: 211).

But no such condition applies. The idea that human rights curtailments require compensation seems reasonable when copious resources are available. But in the brain drain case, resources are scarce. We know this because any country that is justified in imposing emigration restrictions fulfills Necessity: it lacks the funds to raise salaries, improve working conditions, or pursue any other non-coercive solution to the brain drain problem. Given this lack of resources, it will often be unreasonable to expect poor countries to use limited funds for compensation.

The stance taken here applies to other human rights curtailments. If a poor country is trying to cope with an epidemic, it may be justified in quarantining. Ideally, those quarantined would be compensated, but it would be a mistake to insist that compensation always be dispensed. In a poor country, every penny that is spent on compensation could be spent on meeting more urgent needs.[5]

The stance also fits the logic of emergency justifications. In recognizing the possibility of emergency justifications, we acknowledge that sometimes a person's rights may be curtailed to prevent a severe cost. In rejecting Compensation, we likewise acknowledge that sometimes a person's claim for compensation can be overridden to prevent a severe cost. If a person's human freedom rights are not absolute, there seems no reason to treat their claim to compensation as such. Blake's combination of an emergency justification with Compensation is morally contradictory.

### *6.5 Fairness: No one should be forced to provide more than her fair share of assistance*

I have claimed that everyone is obliged to assist the global poor. If we take this point seriously, we must radically re-conceptualize the brain drain problem. In rich countries, brain drain is not an acute problem. They have the resources to train and retain skilled workers. Now, the world as a whole is a rich place. Were resources to be shared out globally, there is no reason why sufficient numbers of skilled workers could not be trained and retained to run adequate public services for everybody everywhere. From this perspective, brain drain does not represent a migration problem but a problem of global inequality.

5 Recall, once more, that we are discussing here compensation for the curtailment of a human right. The case for compensation when a human right is violated might be stronger. This is another place in which the distinction between curtailment and violation proves important.

Anticipating a view of this kind, Blake asks how it can be fair to force skilled workers from poor countries to stay and assist their compatriots. Is this not forcing one group of people to make up for the unfairness of others? Is that not unjust (Brock and Blake 2015:169-173)? The correct answer, to my mind, is yes, counter-brain-drain emigration restrictions involve forcing skilled workers to make an unfairly large contribution, but no, this does not make restrictions unjust.

Governments routinely force people to bear unfair costs. Consider the criminal justice system. If it is unfair to fail to pay one's share of the costs of meeting some need, then it is also unfair to unjustly create a need that others must meet. This is what criminals do. In a perfectly just society, there would be no crime, so there would be no need for the police, the courts, and the prison service. Criminals unfairly create this need. Nevertheless, it is much better that governments force citizens to bear the costs of criminal justice, than leave people unprotected.[6]

Indeed, talk of unfairness in such cases can itself be misleading for there are actually two forms of unfairness here. There is the unfairness of forcing some to correct for the failings of others (the unfairness Blake highlights) and there is the unfairness that would result were nothing done (an unfairness Blake neglects). In both cases, people suffer due to the failings of others. Where the difference lies is in who suffers and by how much. Unfair as it may be if skilled workers are forced to stay, a world in which the poorest people lack basic services is the least fair of all.

### *6.6 Coercing Foreigners: Poor country skilled workers cannot be forced to stay unless rich country skilled workers can be forced to migrate*

The cosmopolitan view just outlined entails that skilled workers in rich countries have as significant duties towards the global poor as skilled workers in poor countries. But this view generates what might be called the "foreign worker problem". If emigration restrictions forcing skilled workers from poor countries to stay were permissible, why would it not be permissible to force skilled workers in rich countries to migrate to poor countries to apply their skills? For many, this forced migration proposal will seem intuitively objectionable. But if it is objectionable, must we not also condemn emigration restrictions?

Blake raises the foreign worker problem using the example of a foreign

6 In response, Blake might try to distinguish between costs that have been unfairly created (the criminal justice case) and costs that have been unfairly shirked (the brain drain case) and argue that governments are permitted to force third parties to bear the former but not the latter. But the problem with this response is that there seems no relevant moral distinction between shirking and creating to be found here (see Murphy 2000: 124-126).

worker kidnapped by poor state's government (Brock and Blake 2015:130). Like Brock, I find this analogy unhelpful (Brock and Blake 2015: 253-254). It suggests the sudden capture and confinement of a person, by a foreign state, without legal oversight. To my mind a much better analogy would be this: rich countries pass a law that enables the conscription of their own skilled workers into a program that sends them to poor countries to fulfill some period of service. This is not kidnapping but it is controversial, so the foreign worker problem remains.

Two responses. First, I do not think we can deny the possibility that forced migration might, in some extreme occasions, be justified. Not even Blake denies it. He accepts that global poverty constitutes an ethical emergency and that emergencies call for extraordinary measures. His claim is that emigration restrictions cannot be justified except when forced migration is justified: the Coercing Foreigners condition. If the conscription proposal still sounds radical this is because cosmopolitanism is radical. The dominant view has long been that people are obliged to make significant sacrifices only for their own compatriots. Cosmopolitanism challenges this view. We should not be surprised if a radical approach to global ethics has some surprising implications when applied to real world problems.

Second, Coercing Foreigners is a phantom condition. It is, in fact, much harder to justify forced migration than emigration restrictions even assuming a cosmopolitan perspective. This is because forced migration is less likely to satisfy the relevant conditions. Consider Necessity. Rich countries, unlike poor countries, have the resources to provide powerful financial incentives. This is how they retain their own skilled workers. If they used these resources to raise salaries and improve conditions in poor countries, sufficient numbers of workers could be retained without need for coercion. The conscription proposal seems unnecessary. When unnecessary, it is unjust.

Next consider Proportionality. Recall the distinction between the right to stay and the right to emigrate. The right to stay is typically much more important because it protects people's abilities to access their attachments (life options already committed to) not just mere possibilities (as yet unchosen options). Because people's strongest attachments, such as their friends, family, and community, tend to be situated within their home country, forcing people to leave is less likely to prove a proportionate response to brain drain than forcing people to remain. For the same reason, foreign skilled workers are less likely to have a duty to migrate than citizen skilled workers are to have a duty to stay. People do not have duties to undergo particular hardship for the sake of those in need and separation

from one's strongest attachments often involves such hardship.

I have made the Proportionality point in previous work (Oberman 2013: 438). In this book, Blake responds. He notes that rich country skilled workers would have the resources to enjoy a decent quality of life in poor countries. Many poor country skilled workers, by contrast, live in severe poverty. Separation from attachments is, in this way, balanced out by material advantage (Brock and Blake 2015: 133).

There is something true in this response but also something misleading. What is true is that emigration restrictions are difficult to justify when skilled workers themselves live in severe poverty. Severe poverty is one factor that can negate a Duty to Stay. What is misleading is the suggestion that among people who are not severely poor, those separated from attachments have no special complaint when they enjoy greater material advantages. People have basic interests in not being forcibly removed from their families, friends, and communities. People have no basic interests in the perks of an expat lifestyle. Governments cannot act then as if the one balances out the other.

Since it is less likely that forced migration will satisfy the five conditions than emigration restrictions, Coercing Foreigners is a phantom condition. Emigration restrictions can be justified even when forced migration is not.

## 7. THE ELEPHANT IN THE ROOM

In the contemporary world, few states impose emigration restrictions. Almost all states impose immigration restrictions. In section 1, we found that the same freedom is at stake in each case: the freedom of individuals to make basic decisions about their lives. It is surprising then that Brock has nothing to say regarding immigration restrictions and even more surprising that Blake defends them.

Compare the following:

1. Hasma lives in a poor country and wants to migrate abroad. She possesses scarce skills. If she migrates, her compatriots will suffer severe costs. To prevent these costs, Hasma's state subjects her to emigration restrictions for two years. Since it is poor, it is unable to compensate her.

2. Nazma lives in a poor country and wants to migrate abroad. She does not possess scarce skills. If she migrates, no one will suffer in either host or home countries. Unfortunately, every state Nazma wishes to migrate to subjects her to immigration restrictions for her

entire life. Although they are rich, they refuse to compensate her.

Which of these two women has the stronger complaint? Surely Nazma. She is barred for life, without compensation, for no good reason. But on Blake's account, it is Hasma who suffers injustice. How can this be? Blake offers two kinds of argument. In other work, he presents a justification for immigration restrictions (Blake 2013). In this book, he presents an alternative foundation of the right to emigrate. The former argument has already been subject to criticism (see for instance Brezger and Cassee 2016); so let me here consider the latter.

According to Blake, the primary purpose of the right to emigrate is to uphold our interest in forming consensual relationships with states (Brock and Blake 2015: 198-199). Suppose Nazma is from India and wishes to go to Belgium to join friends and pursue her career. Once there, she would also like to make new friends, attend university, join a religious congregation, and find a partner. For Blake, Nazma has a right to leave India because she has an interest in forming a consensual relationship with Belgium. Since relationships are two-way things, Belgium is free not to enter into a relationship with her. It can spurn her if it wishes by imposing immigration restrictions. But as a third party, India has no right to stop a Nazma-Belgium relationship from developing. This explains the immigration/emigration asymmetry. The interest that grounds the right to emigrate is an interest in forming consensual relationships with states, and that interest is frustrated only by emigration restrictions not immigration restrictions (203).

How plausible is this as a foundational argument for the right to emigrate? Not very. It is strikingly at odds with the reasons why people migrate. People do not migrate to have relationships with states, but with the people who live in states. This is reflected in my account of the right to emigrate. Nazma has a right to emigrate, I would argue, so that she can have the consensual relationships with friends, employers, teachers, co-worshippers, and partners she desires. She has an essential interest in having relationships with people in Belgium, not with Belgium itself. Someone who is passionate about forming new relationships with states is a bit of a crackpot. Someone who is passionate about enjoying relationships with other people is a typical human being.

Blake seeks to motivate his account by noting that migrants often feel emotional when undergoing naturalization. This emotion, he claims, indicates the strength of interest we have in forming relationships with states (Brock and Blake 2015: 199). What he fails to mention is that migrants are naturalized after years of living in a country. If some migrants are teary eyed at citizenship ceremonies, it is because they have made their new

state their home. This sense of belonging might ground a right to citizenship, but it cannot ground a right to emigrate. An interest in being recognized as a member of a state does not entail an interest in becoming a member.

Note further that if we really were worried about making our relationships with states consensual, the right to emigrate would be insufficient. Three points bring this out. (1) We are born into a state and would find it difficult to leave our state, due to financial, linguistic, and cultural ties, even if the borders were open. (2) Since states have taken over the earth's surface, we cannot leave the state system altogether. (3) Because of (2), a person who is prevented from entering other states is prevented from leaving their own. Together, these points make states very different to clubs, religions, or marriages, in which consent is crucial. States, as John Rawls emphasizes, are not consensual associations (Rawls 1993: 222). This lack of consent does not particularly bother us as long as states treat us justly. Just states, after all, do not require us to have recreational, spiritual, or romantic relationships with them, but allow us to pursue our own.

The people of Planet Earth live inside states. When states prevent us from migrating, they interfere with our relationships. States have taken over the earth's inhabitable land; the least they can do is allow us to freely interact.

## 8. EMPIRICAL UNCERTAINTIES

This article has specified five conditions for justifying emigration restrictions on brain drain grounds. Since I have rejected conditions that Brock and Blake defend, it might appear that I believe that emigration restrictions are easy to justify. But this is not so. We cannot assume that a set of conditions are easily fulfilled simply because they are fewer in number.

To judge whether the conditions are fulfilled requires an extensive examination of the empirical literature. I will not undertake this here. Having investigated the issue elsewhere, however, I am confident of three points (Oberman 2015). First, many skilled workers in countries experiencing brain drain suffer particular hardship due to poverty, persecution, unsafe working conditions, or some other misfortune. Second, there are many things governments of poor countries could be doing to improve the lives of their citizens besides restricting emigration. These two points lend us reason to doubt the fulfillment of Necessity, Proportionality, and Duty to Stay.

The third point is that there is significant empirical uncertainty as to the effects of skilled worker migration on poor countries. Skilled worker migration has a number of positive effects, including the receipt of remittances and the incentivizing of education, which might outweigh the negative. The fact of uncertainty here is important. Brock draws upon various sources to question the positive effects of skilled worker migration. But to justify the curtailment of a human right one must do more than show that some journal articles suggest that there is a genuine problem. One must be able to find wide agreement among experts that skilled migration is causing severe costs.

Among migration economists there seems to be only one point of agreement: migration, as a general rule, benefits the global poor. There is no agreement as to when or where exceptions occur. Indeed, it is telling that some of empirical sources Brock uses to support her pessimistic view ill fit the role. For instance, while Brock makes frequent reference to a survey article by economists Frédéric Docquier and Hillel Rapoport, the article concludes that, "many developing countries appear to actually benefit from high-skill emigration", that "skilled emigration need not deplete a country's human capital stock", and that the conditions for success "depend on [non-coercive] public policies" such as the creation of diaspora networks (Docquier and Rapoport 2012: 725). One can tell the extent of empirical uncertainties when witnesses called for the prosecution speak up for the defense.

What stands then in the way of justifying emigration restrictions is not a lack of government legitimacy, contractual agreements, compensation, fairness, benefits for the coerced party, or the need to justify the coercion of foreigners. It is something much more mundane. Counter-brain-drain emigration restrictions are hard to justify because the empirical data fails to provide a convincing case for them. While we can imagine a world in which emigration restrictions could be justified to prevent skilled migration, it is probably not our own.

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# The Distinction Between Taxation and Public Service in the Debate on Emigration[1]

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## ABSTRACT

Are taxation and public service requirement for prospective emigrants justifiable in a liberal state? Brock thinks that taxation and service are normatively on a par. By contrast, Blake thinks that public service is impermissible, and only justified under emergency conditions when the liberal state itself is under threat. I argue that neither Brock nor Blake have adequately argued their case. Brock's normative grounds for obligations and how exactly prospective emigrants incur enforceable obligations are not spelled out in sufficient detail. As a result, she is too quick to draw an analogy between taxation and service requirement, without considering the morally salient difference between the two. I discuss a plausible ground, fair reciprocity in social cooperation, and draw out its implications for Brock's view. By contrast, Blake has not adequately shown that restricting life plans *directly* is unjustifiable, while restricting life plans *indirectly* by reducing the resources available to persons is justifiable. His account only shows that public service requires a different, more compelling justification than taxation. He does not, however, offer adequate support for the extreme justificatory burden he places on public service requirement. Both authors owe us an account of the resources and powers that can be legitimately claimed for purposes of social justice; whether there is a tenable normative boundary between transferring resources to the needy versus providing socially useful services to them.

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**Keywords:** brain drain, emigration, fair reciprocity, ownership of talents, emigration tax, public service

## INTRODUCTION

One of the hardest questions about the brain drain concerns the tension between the needs of source populations and the freedom of the migrating professionals, and whether any kind of constraint on the latter is ever justifiable. Gillian Brock and Michael Blake's *Debating Brain Drain* takes on this difficult challenge, provides a rich set of normative arguments, and shows how they figure in the policy arena of skilled labor migration. The normative discussion assumes the perspective of poor source country governments that face the task of ethically guided policy-design in a deeply unjust world, where wealthy receiving countries fail to discharge their duties of international justice. What may source countries permissibly do to address the problem of high skilled emigration?

In this commentary, I focus on a key disagreement between Brock and Blake. Is a public service requirement for prospective emigrants justifiable in a liberal state? Brock thinks that taxation and service are normatively on a par. By contrast, Blake thinks that public service is an impermissible path to liberal justice, and only justified under emergency conditions when the liberal state itself is under threat. I argue that neither Brock nor Blake have adequately argued their case. Brock's grounds of obligations and how exactly prospective emigrants incur enforceable obligations are not spelled out in sufficient detail. As a result, she is too quick to draw an analogy between taxation and service requirement, without considering the morally salient difference between the two. By contrast, Blake's account only shows that public service requires a different, more compelling justification than taxation, and does not show that it is impermissible in liberal states. Blake does not offer adequate support for the extreme justificatory burden he places on a public service requirement.

## 1. RECIPROCITY AND THE BENEFITS OF SOCIAL COOPERATION

Brock provides a variety of reasons why skilled emigrants have moral obligations towards their country of origin or training. These include the duty to reciprocate for the benefits received; fair return for government investment; loyalty to fellow citizens in upholding institutions; responsibility for creating disadvantage, and responsibility for the

unintended harmful side effects of skills shortage. These special moral responsibilities, Brock argues, jointly provide the ground for state restrictions on emigration (Brock and Blake 2015: 65-68).

The various sources of duties that serve as the building blocks of Brock's position problematically draw together two separate normative questions: 1) Do skilled workers have moral responsibilities towards their country of training or origin? 2) Can states legitimately coerce them to discharge those responsibilities? (also see Eyal and Hurst 2014) A variety of moral obligations may arise from brain drain, but not all of them are legitimately enforceable in a liberal state. We need to unpack the grounds of obligations owed by emigrants towards those who remain, and analyze more precisely the way in which they give rise to obligations that are enforceable by liberal states.

I focus on two related grounds for emigration restrictions, both of which concern what persons owe to their society in virtue of having received certain benefits, in particular, those of education and of social cooperation more generally. These grounds are: (a) that governments must pursue a fair return on their investments and (b) the duty to reciprocate for the benefits received from social cooperation. As Brock writes, "governments are entitled to claim compensation from those who will benefit from their investment" (Brock and Blake 2015: 68). Skilled professionals accumulate "debts that are typically discharged by being a productive member of that society in adulthood" (Brock and Blake 2015: 68).

The argument for fair return on investment rests on the idea that the education and training of medical skills, both in public and private institutional settings, may be seen as part of a collective enterprise jointly sustained by all through research, training, health care, which involve a broad range of social and economic resources, the rule of law, general services and infrastructure, public safety, human corps, and so on (Brock and Blake 2015: 76). Poor countries allocate scarce public resources to supply socially valuable skills, such as medical training, and they do that with the expectation that trained doctors will deliver health care services over the course of their productive lifetime.

How do individuals incur enforceable obligations for enjoying the social goods jointly produced in a cooperative scheme? How should we understand the underlying ideal of justice or fairness and the nature of the normative relationship that gives rise to such obligations? These are the questions that need further analysis for a better understanding of Brock's position.

One possible way of understanding the basis of reciprocity owed by the emigrants may be the contribution made by those left behind. On a *contribution based reciprocity* account, however, duties of distributive justice arise only among (potential) net contributors to the cooperative surplus. The unappealing implication of this account is that those who, for whatever reason, lack the capacity to contribute are not entitled to social resources.[2] This account would be inconsistent with Brock's moral concern with the unfulfilled needs of those left behind and her commitment to the imperative of moral equality, according to which "[a]ll human beings needs and interests matter … and deserve equal consideration" (Brock and Blake 2015: 25). So why reciprocity is owed to everyone, and not merely to (potential) contributors, requires a different justification.

A more plausible account of why would-be emigrants have obligations to their home society is rooted in the idea of *fair reciprocity* in social cooperation (Rawls 1971). The departure from the contribution-based account is that moral standing is not attached to the capacity to contribute to the social product. The fair reciprocity account acknowledges the morally arbitrary distribution of natural abilities. Moreover, it recognizes that a person's capacity to contribute depends in part on the design of the cooperative framework and the rules that govern the production and distribution of social goods. It starts from an assumption of fundamental moral equality, so the terms on which social goods are produced and confer value on the talents and abilities of individuals must be justified from a benchmark of equality. Fair terms render the benefits drawn from the scheme of morally legitimate entitlements. What equal citizens owe one another and governments may justifiably enforce is the duty that each plays their part in upholding the fair terms of cooperation.

According to Brock the minimal requirement of a fair scheme is that its social and political arrangements support "the core ingredients for a decent life" (Brock and Blake 2015: 25). When the labor supply for one or more of these core ingredients is critically low, those who lack secure access to these important goods have a reasonable complaint. The complaint is that when emigrating professionals leave and deploy their skills abroad unconditionally,they fail to discharge part of their duty of fair reciprocity in sharing the burdens and benefits of an ongoing scheme of social cooperation. This, on my view, is the more plausible way of spelling out the idea of reciprocity underlying Brock's account. However, there are two problems that arise: 1) Do higher burdens depend on higher capacity? 2) Is a compulsory public service requirement included in the fair terms of cooperation?

2 For a critical discussion of this view see, for example, Buchanan (1990).

The first is a matter of clarification. Brock thinks that those with greater capacity should contribute more. As she writes, we "often think it fair to treat people differently on the basis of the varying ways in which they can contribute to promoting justice" (Brock and Blake 2015: 245). We do this, according to her, when we accept differential tax burdens. On an account of justice as fair reciprocity, however, differential contributions to uphold fair terms do not, strictly speaking, depend on differential capacities. The idea is not that those with higher talents or skills ought to shoulder greater burdens, because they are more talented, as Brock seems to think. Rather, the idea is that they may legitimately expect higher social rewards for their initially undeserved capacities on the condition that background institutions are fairly arranged to the benefit of the least advantaged. A fairly organized social scheme has to strike a difficult balance between providing incentives for the talented to develop and deploy their skills and allowing them to obtain benefits on terms that those who gain less have no reason to reject. This, I believe, is a more plausible way of understanding the normative underpinnings of a fair tax system.

The second problem runs deeper and concerns a key disagreement between Brock and Blake. Should upholding fair terms of cooperation include a public service requirement for would-be emigrants, as Brock thinks? Or is compulsory public service an impermissible requirement of liberal justice, as Blake thinks? (I return to Blake's account in the next section.) Brock seems to think that there is no morally significant distinction between making societal demands on a person's material resources and her labor, so the move from income tax to a one or two-year public service requirement is a relatively straightforward one. She argues that if the coercive state practice of redistributive taxation is justified for the benefit of others, then providing services that involve our labor may also be required for the benefit of others. Brock draws the analogy between the two when she writes that "redistributive taxation involves, *in effect*, having to labor for the benefit of others" (Brock and Blake 2015: 97). While I welcome her conclusion that a highly conditional service requirement may sometimes be justified, her claim that taxation and service are analogous is too quick, and unfounded. There are relevant disanalogies between requiring persons to pay taxes and to dedicate labor hours to sustain background justice. These disanalogies require careful consideration before we can draw the conclusion that mandatory service, of some sort, is permissible for furthering social justice.

Liberal political morality draws a sharp distinction between two aspects of rightful ownership of our talents. It holds that persons have a

strong, nearly exclusive, right to control what happens to their capacities and how they are put to use. The right to control the use of our talents is justified by reference to our fundamental interest in autonomy and pursuing valuable ends for ourselves. By contrast, the right to draw material benefits from the use of our talents importantly depends on the contribution and cooperation of others. Rightful ownership of the material benefits depends on the idea of fairness embodied in the terms of social cooperation (Christman 1991). So how we use our talents and what kind of benefits we may permissibly obtain are justified in a different way. The normative distinction between the right to control the use of our talents and the right to benefit from our talents is thought to ground the moral significance of the distinction between service and taxation, at least among liberals.

The challenge for Brock, then, is whether she can provide an adequate justification of compulsory service consistent with her liberal commitments. Does she think that a person's right to control the use of her talent can sometimes be restricted by liberal states? The conditions under which such a restriction is justified would need to be spelled out and shown to be consistent with liberalism. At places, Brock seems to cross the bounds of liberal political morality. She writes, that "[t]hose people who have received the necessary training are, in a way and in part, community investments" (Brock and Blake 2015: 62). It is important to distinguish the skills that are developed and trained through societal investment from the persons who carry them. Skills are in a way and in part community investments for which fair returns may be claimed. But persons themselves are not. Much depends, then, on how Brock would, if pressed on this point, fill in "*in a way*" and "*in part*" in the sentence above. She would need to elaborate on how exactly skills depend on the investment made by others, and how, in virtue of this contribution-dependence, state restrictions on the deployment of skills may be justified.

There is another more general understanding of fairness as fair play that comes to the fore in parts of Brock's account. She relies on a general principle of fairness when she argues that emigrants owe a fair return for the benefits received from their home society. The principle of fairness holds that when people engage in a benefit-producing activity they incur enforceable obligations to do their fair share (Olsaretti 2013). In the joint production of a public good, such as public safety or public health, everyone who enjoys the benefits should do their fair share. However, even on this account, further argument would be needed on Brock's part. There is considerable disagreement about the nature of the good produced, the nature of cooperation, and the relevant constraints under which the fair

play principle applies. Is the intention to benefit from the scheme a necessary condition? Or is the idea that the goods produced are taken to be "presumptively beneficial" sufficient to incur obligations? (Klosko 1987) These are some of the questions Brock would need to answer for a more compelling account of prospective emigrants' enforceable fair share.

To conclude, Brock still owes us an account of how we should understand the moral significance of the distinction between taxation and public service, and under what conditions the state can restrict the right to control the way we deploy our talents and skills. Her answer from consent underpinning educational contracts does not go far enough because it does not address the deeper question raised here about the terms of cooperation we may justifiably consent to, in the first place. Are the terms of the contract the state offers to students fair to start with? If so, why?

## 2. THE JUSTIFICATORY BURDEN FOR TAXATION AND PUBLIC SERVICE

Blake's response to the alleged analogy between taxation and public service is that this is the inverse of an old argument made by Robert Nozick, who famously objected to redistributive taxation as tantamount to forced labor (Nozick 1974). Brock, according to Blake, should be seen as turning the above claim around: if we think income taxes are permissible then we should also think that forced labor is permissible (Brock and Blake 2015: 174). Blake thinks that both of them are wrong for the same reason, so what could be said in response to Nozick should be a good enough response to Brock.

Blake here rehearses the standard liberal view according to which individuals have an exclusive right to decide what happens to their bodies and how they use their talents, which bars others from interfering. However, they do not have an exclusive right to the income that flows from the use of their talents. Talents are considered inviolable, personal resources not up for grabs for social purposes, and should not be distributed in the name of social justice. By contrast, income and wealth are social resources that may be claimed appealing to the idea of fairness in cooperation.

In the remaining part of my commentary I analyze this fundamental difference between Brock and Blake's view. Are talents and labor hours more similar to organs and body parts as Blake thinks, or closer to income and wealth, as Brock thinks? I cannot hope to settle this question in a short

commentary or provide an alternative answer in the space available.[3] What strikes me as problematic in Blake's reply, however, is that he simply takes for granted this sharp distinction. In responding to Brock he does not argue for the view, but rather, spells it out. I do not claim that there should not be any distinction at all between what kind of powers and resources we can and cannot claim for purposes of social justice. I do think, however, that the way we draw the line should be more carefully examined. The question to be asked is whether there is a normatively relevant distinction between the *use of our talents* and the *benefits that flow from them* that renders the former inviolable.

Cécile Fabre (2006) has questioned the standard liberal way of drawing the boundary and whether we have an *exclusive* right to control our body and person. She argues for a *highly qualified* right to personal integrity. Her starting point is that the state should provide its citizens with a minimally flourishing life, including opportunities to form and revise their plans of life. With respect to others who fall below the threshold of sufficiency, "if it is true that we lack the right to withhold access to material resources from those who need them, we also lack the right to withhold access to our person from those who need it" (Fabre 2006: 2). She endorses an analogy between distributing social resources to those in dire need and distributing "personal" resources. That is, under conditions of extreme deprivation, other persons may have a justified claim to things liberals take to be inalienable parts of our person. These things, on Fabre's account, include the body, its organs, the maternal womb, and our talents and skills that are necessary for addressing the basic needs of others.

Fabre's endorsement of the legitimacy of transgressing bodily integrity (under certain limited circumstances) is highly controversial. The idea of "body exceptionalism", namely the belief that there is "a prophylactic line that comes close to making the body inviolate, that is, making body parts not parts of social resources at all" (Dworkin 1983), is an important liberal assumption that I do not question here. I do think, however, that Fabre's question, i.e. whether skills (rather than talents) and labor may be considered social resources to be claimed by others under conditions of extreme scarcity, is worth considering in the context of the brain drain. The question is whether there is a tenable normative boundary between transferring resources to the needy versus providing socially useful services to them.

What distinguishes the use of talents from the income that flows from them, according to Blake, is that talents come attached to persons. There is

3 I argue for a middle ground between their two positions in Kollar (manuscript) .

a difference between the coerced transfers of goods and coerced restrictions of life plans. He writes that life plans are a "more dangerous and difficult site of coercion" (Brock and Blake 2015: 175). I argue that Blake has not adequately shown that restricting life plans *directly* is unjustifiable, while restricting life plans *indirectly*, by reducing the resources available to persons, is justifiable. In fact, he has only claimed that there is a *difference* between the two, and that restricting life plans directly is *more difficult* to justify. So, if his objection to Brock is that taxation and service require different justifications, and that the latter requires very compelling reasons, then we agree. There is still room for disagreement concerning what counts as adequate or strong enough liberal justification for coercively restricting life plans.

On one extreme, Blake thinks that the justificatory burden is so high that only a state of emergency can meet it. Only states that face emergencies may permissibly suspend liberal rights. He also thinks that the current critical health worker shortage in Sub-Saharan Africa might qualify as such a dire situation (Brock and Blake 2015: 210).[4] On the other extreme, Fabre thinks that those in dire need have legitimate claims on the material resources as well as service provision of the provider, as long as they do not jeopardize the provider's prospects for a minimally flourishing life.

On my view there is a plausible middle ground between these two extremes. We need not put the bar of justification as high as the state of emergency, as Blake does. The claim that liberal states can justifiably restrict our right to control the use of our talents under less than emergency conditions is what would need to be established here.[5] We should also not put the bar of justification as low as the service provider's claim to a minimally flourishing life, as Fabre does. Instead, we may set the relevant circumstances to be unfavorable conditions of *extreme scarcity in skills* for essential goods, and make service requirement conditional upon the provider's prospect for a *reasonably autonomous life*. It seems that under conditions of critical skills shortage, where non-coercive incentives have proved to be futile, a carefully designed short-term compulsory service program that allows ample room for the personal autonomy of prospective emigrants may be justified. Forcing a medical graduate in South Africa to deliver health care services locally for 20 years is clearly ruled out because neither the critical shortage nor the reasonable autonomy conditions are met. A one-year service requirement in Sierra Leone may, however, pass

4 I have argued elsewhere why I think Blake's emergency justification of compulsory medical service fails. See Kollar (2016) and the response by Blake (2016).

5 I argue elsewhere that a qualified service requirement may be part of the fair terms of benefiting from skills across borders under conditions of extreme scarcity in source countries. See Kollar (2016: fn. 3).

the test of an autonomy-sensitive measure under extreme skills shortage and resource scarcity coupled with the dire burden of disease.

To conclude, I have argued that Blake has not successfully shown that public service is an unjustifiable policy measure in a liberal state. He has only shown that it requires a more compelling justification than taxation. Blake thinks that a public service requirement amounts to the suspension of a liberal right that requires an emergency justification. I think that under unfavorable social conditions, public service may be justified as a moral constraint on our right to control our talents. The question is a complex one and our divergence in the answer points to a deep, but reasonable, disagreement.

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# Who is Afraid of the Brain Drain? A Development Economist's View[1]

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## ABSTRACT

In *Debating Brain Drain*, Brock and Blake (2015) discuss the pros and cons of high-skill mobility prevention to curb the brain drain from developing countries from a legal and political perspective. I complement this discussion with the insights from recent economic research on brain drain, globalization, and development. Two main results are emphasized: the fact that educational investments are higher when high-skill migration is not constrained, and the role of skilled diasporas in promoting the integration of migrants' home countries into the global economy. Both results strengthen the rationale for letting skilled people go.

**Keywords:** Brain Drain, Migration, Globalization, Development

## 1. INTRODUCTION

Gillian Brock and Michael Blake's (2015) book *Debating Brain Drain: May Governments Restrict Emigration?* discusses and offers a new perspective on an idea put forth in liberal political theory and international human rights law, namely that emigration is a fundamental human right and shall therefore not be questioned. The book is split into two parts arguing for and against the possibility for developing countries to impose restrictions on emigration to remedy their losses incurred through the "brain drain" (that is, the emigration of highly-skilled workers). Brock argues that the governments of developing countries may impose temporary restrictions on emigration when they experience net losses from the loss of their skilled workers whereas Blake argues against such restrictions. However, both authors agree that "that despite a huge range of benefits that accrue to

1 This short essay draws largely on joint work with Frederic Docquier (Docquier and Rapoport: 2012a, 2012b). See also Gibson and McKenzie (2011) for an overview of the brain drain literature.

countries of origin, there are some cases in which net losses may be occurring" (Brock and Blake 2015: 42).

While I will not disagree with the statement that some countries experience losses from high-skilled emigration, I disagree with Brock's policy conclusion of putting restrictive laws into place that discourage the emigration of the highly-skilled. In this article, I will argue from an economic standpoint that we should not take the notion of "brain drain" as the only dimension there is to the emigration of the highly-skilled. Once we establish a positive or "brain effect" of high-skill emigration (and we will, with the help of a number of theoretical and empirical economic papers), the normative and economic argument for the restriction of emigration will partly collapse as home countries can actually benefit from the emigration of their most talented representatives. I posit that there are dynamic and long-term effects of high skilled emigration that work through indirect channels to benefit the countries of origin, for instance through international trade and investment, social remittances, and incentive schemes for the ones left behind. Even if some countries may suffer net losses from the emigration of highly-skilled individuals, I argue that instead of limiting the "drain effect" through the prohibition of emigration, one should rather foster the "brain effect" by putting institutions into place that reinforce the benefits of emigration.

## 2. SHOULD WE TAX (OR BAN) THE BRAIN DRAIN?

Forty years ago, the great international economist Jagdish Bhagwati proposed to institute a "tax on brains" to curb the brain drain from developing to economically advanced countries. Himself a member of the super highly-skilled Indian academic diaspora, a graduate from Cambridge University and then a Professor at MIT, and then at Columbia University, he was well placed to reflect on his personal experience to write on the topic. His proposal, now known as the "Bhagwati tax" proposal, was at odds at the time with his otherwise very neo-classical views on free trade but well in the spirit of the New International Economic Order that was gaining momentum in the 1970s in many political, civil society, and academic circles.

The very principle of a tax on brains rests on the notion that origin countries should be compensated for the loss of human capital incurred as a result of the brain drain. The compensators should be those who gain from the move, that is, the high-skill emigrant herself and the receiving country that will enjoy the return from that human capital, reaping the benefits from an investment financed by others. It is in line with the more

radical view that brain drain is a form of neo-colonialism whereby the economically advanced countries keep depriving developing countries of their resources, a modern form of spoliation. And human capital may indeed be the scarcest resource of all for developing countries, one whose outmigration may seriously damage the growth and development prospects of the migrants' home countries. This negative and pessimistic view of the brain drain (the term itself is quite pejorative) is well summarized in the following citation from Michael Todaro's popular development economics textbook, a must read for any undergraduate students in economic development studies:

> "The irony of international migration today is that many of the people who migrate legally from poor to richer lands are the very ones that Third World countries can least afford to lose: the highly educated and skilled. Since the great majority of these migrants move on a permanent basis, this perverse brain drain not only represents a loss of valuable human resources but could prove to be a serious constraint on the future economic progress of Third World nations" (Todaro 1996: 119).

It is noteworthy that the above citation, taken from the 5th edition of the textbook, was still present in the 10th edition nearly 20 years later. This shows that the dominant view about brain drain and development has not evolved so much in spite of the fact that the last 20 years have seen a boom in economics research on brain drain and development which is much more balanced than the overwhelmingly negative literature of the 1970s and 1980s. Before I briefly review this more recent literature, let me first say that the economic case for or against the brain drain has important policy implications. To the same extent that the presumption of losses for the origin countries served as background justification for policy proposals to curb the brain drain through, say, a Bhagwati tax in the 1970s, the same presumption serves as a justification today for limiting the free movement of highly-skilled professionals originating from certain developing countries. These limits range from unilateral sanctions imposed by home-country governments on those who would fail to return early enough (such as removal of citizenship, imposing military conscription on returnees — or putting them in jail for deserting) to host countries forbidding the recruitment of highly-skilled professionals from certain countries. A famous example is the ban on recruitment of health professionals from Africa enacted by the British authorities in the mid-2000s.

## 3. FREEDOM OF MOVEMENT FOR ALL BUT THE HIGHLY-SKILLED?

There are many reasons to oppose restricting the free movement of people in general, and the fact that one is highly-skilled should not create an exception. Imposing restrictions on entry is widely accepted even though one's birthplace explains two-thirds to three-quarters of global inequality (that is, within-country inequality generated by differences in education, experience, gender, race, family background, etc., accounts for only one quarter to one-third of total inequality in the world, the rest being due to differences in income per capita across countries). It is difficult to reconcile the basic fact that international movements are heavily constrained with any notion of global justice. For one thing, if we were to decide on the rules governing international migration under a veil of ignorance, it seems obvious to me that we would opt, if not for open borders, at least for borders which would be much more open than we currently experience. We should also recall that 200 years ago, at the onset of the industrial revolution, the ratio of income per capita between the richest and the poorest country in the world was about 2 or 3. It is now orders of magnitude higher, closer to 100 (in Purchasing Power Parity!). This explosion of inequality between countries has been accompanied by the introduction of passports, visas, and all kinds of restrictions on people's free movement, exactly at a time when the incentives to migrate became stronger.

Even if we abstract from considerations of global justice and tolerate that countries impose restrictions on immigration, it does not follow that they can impose restrictions on exit, that is, on emigration. Other contributors in this symposium will be able to discuss better than I can the legal and normative foundations for the right to emigrate; and indeed, restrictions on emigration have only been imposed on a large scale in dictatorships and authoritarian regimes such as the former Communist countries of Europe, or, in the more recent past, in Cuba, China, Iran, and North Korea. It is not morally and legally equivalent to build a wall to prevent people from coming in or to prevent them from going out. And again, justifying such restrictions —or giving them a hand —because the people under consideration have valuable skills does not resist serious examination. States are not residual claimants of one's human capital. And what do we know about the personal motives and circumstances that lead people to emigrate? Should it make a difference if someone wants to emigrate because of wage differentials or out of fear of persecution in her home country? Should it make a difference if that person is a medical doctor from Ethiopia, an engineer from Bolivia, or a nurse from the Philippines?

While I believe that the policy debate should take seriously the rights of individual migrants rather than focusing exclusively on the losses to origin countries (that is the debate should also be a principled one), I note that the losses for the origin countries still serve as underlying justification for restrictive policies. In the rest of this article, therefore, I focus on that particular aspect of the debate. The line of argument I want to propose is the following: the brain drain is not necessarily a curse for developing countries but could be an opportunity. The presumption among the general public and among policymakers may still be that the brain drain is bad, but the evidence is that it is not, at least in most cases. Let's see why.

## 4. THERE IS MORE THAN MEETS THE EYE: BRAIN DRAIN AND HUMAN CAPITAL FORMATION IN DEVELOPING COUNTRIES

The traditional (and still widely shared) view of the brain drain is that it is depriving home countries of part of their human capital, which is essential for growth. To discuss this idea let me use the metaphor of a cake (the country's stock of human capital), with the brain drain being equivalent to cutting a piece of the cake (say a quarter) and sending it abroad —hence the loss. In terms of sheer loss this view neglects two things. First, those abroad form a diaspora which can keep interacting with the home country in many economically useful ways. I will discuss diaspora links in the next section. And second, this view fails to ask how the cake was made. The truth, however, is that the size of the initial cake, the one from which the piece is taken, is bigger when there are more emigration options. Or, in economists' jargon, the stock of human capital is endogenous to migration. The brain drain may in fact consist in cutting a piece of the human capital cake, but from a bigger cake than the one that would exist if there were no brain drain. Overall, it is not obvious which effect dominates: the incentive effect (increases in size of the cake due to the existence of emigration options —let's call this the brain effect), or the exit effect (decreases due to emigration —let's call this the drain effect). Under certain conditions that have been well specified theoretically and verified empirically in a wide range of studies, the brain drain could in fact result in a brain gain.

The theoretical intuition is best explained through simple numerical examples.[2] Assume the following data: individuals in a developing country can either be "skilled" (if they invest in a certain education program) or

2 Early theoretical contributions include Mountford (1997), Vidal (1998), Stark et al. (1998) and Docquier and Rapoport (1999).

unskilled (if they don't). The wage for an unskilled worker is, say, 1,000, and for a skilled worker 5,000. Based on the costs of acquiring education (which includes forgone wages during the first period, the direct costs of schooling, etc.), a certain number of people, say 10 percent of the population, make that investment. Now assume that for skilled workers only, there is a certain probability, say 20 percent, of emigration to a high-wage destination where skilled workers can obtain a wage of 30,000. The expected wage for a high-skill worker is now equal to 80 percent of the domestic wage plus 20 percent of the foreign wage, that is to 10,000. In other words, it is now doubled thanks to the opportunity of emigration. Based on this, we can expect that some people who will invest in education would otherwise not have done so without the possibility of enjoying a higher return on their human capital abroad. How big is this incentive effect, and can it be strong enough to dominate the brain drain effect? To continue the numerical example, if the proportion of people who invest in education rises to 15 percent, and if we still assume that 20 percent of them leave, there would be more educated people in the country than had the economy been closed to migration. Is this just a theoretical possibility, or a real one? Well, the empirical studies that have tried to answer this question tend to support the brain gain (or beneficial brain drain) hypothesis. This holds true both for the studies using cross-country comparisons and for country case studies.

The main cross-country study is a paper I have co-authored with Michel Beine and Frederic Docquier (2008).[3] We proceed in two steps: we first estimate the elasticity of human capital to skilled emigration, measuring how emigration prospects for the highly-skilled affect gross human capital formation in home countries, controlling for past human capital levels and a series of country-characteristics. In this paper, we also account for the fact that there may be a feedback effect from human capital formation back to skilled emigration prospects with an Instrumental Variable Approach.[4] We find a point-estimate of around 5 percent, that is, doubling the propensity of emigration for the highly-skilled (people with college education or more) generates an increase in the pre-migration stock of human capital of 5 percent.

3 See Beine et al. (2008) and its extension in Beine et al. (2010).

4 If there is not only an effect of skilled emigration prospects on human capital formation, but there is also a reverse direction of causality from human capital formation on migration prospects, or if emigration and human capital formation are jointly driven by third, unobserved (omitted) variables, we call this "endogeneity". In order to disentangle the first effect from the second and address the omitted variable problem, we use an Instrumental Variable Approach. It consists in predicting the variable of interest, emigration, using variables that have no independent effect on the dependent variable, human capital formation; that is, that presumably only affect human capital formation through their impact on skilled emigration prospects.

In a second step we then use that point-estimate to compute the net gains or losses for all the countries of our sample (which consists of 127 developing countries). For this we need to proceed with a counterfactual simulation. Again, this is best illustrated through a numerical example. Assume a country with a population normalized to 100 people, out of whom 20 are educated and 80 are not. Let us further assume that emigration rates are 1/2 for the educated (50 percent) and 1/8 for the uneducated, that is, emigration propensities are higher for the educated by a factor of 4 (in the theoretical example above, the emigration propensity of non-educated workers was implicitly normalized to zero). After emigration, the country is left with 10 educated (as 10 out of 20 have emigrated) and 70 non-educated (as 10 out of 80 have emigrated). Has that county lost or gained from the brain drain, given what we know about the incentive effect?

Let us denote by $H_a$ the *ex-ante* stock of human capital, before migration takes place. This is something we can observe and which in our case equals to 20 percent (then $H_a = 0.2$). The *ex-post* stock of human capital, after emigration is netted out, is also observed and in our case equals to 10/80 (then $H_p = 0.125$). But what would have been the country's stock of human capital if there had been no emigration? To answer the question we do the following counterfactual simulation: the counterfactual stock of human capital, $H_{cf}$, equals the *ex-ante* stock minus the incentive effect. That is, $H_{cf} = H_a - a.ln(p_s/p_u)$[5], where $a$ is the elasticity of human capital to emigration obtained in step 1 and $p_s$ and $p_u$ are the respective emigration propensities of skilled and unskilled workers. With our numerical example and point-estimate for the elasticity, this gives: $H_{cf} = 0.2 - 0.05.ln(4) = 0.13$. That is, the counterfactual stock of human capital without emigration in our virtual economy would have been 13 percent. This means that it has lost half a percentage point (or 4 percent) of its human capital because of the brain drain, and not 20 percent, as one would think if we were not factoring in the fact the human capital formation is partly determined by emigration prospects.

When turning to real data, we found that there are more losing than winning countries and that the losers tend to lose more, but that in terms of head counts or absolute changes, the gains from the winners out-weight the losses of the losers. For example, Surinam may well lose 20 percent of its human capital and China may gain only 1 percent, but 1 percent of the Chinese stock of human capital is way bigger than 20 percent of the

5 ln is the logarithm of the relative emigration propensity between skilled and non-skilled immigrants. This is typically used in empirical analyses to get the "elasticity" of a variable, that is a 1% change in the explanatory variable leads to a ß% change in the dependent variable.

Surinamese stock of human capital. So while there are loser and winners, the brain drain contributes to an increase in the overall number of highly-skilled people living in the developing world.[6]

## 5. COUNTRY CASE-STUDIES: TWO "NATURAL EXPERIMENTS"

What about the country case-studies? There are many such studies using micro (household or individual) data, notably on countries with very high levels of brain drain, such as small Pacific or Caribbean islands. These studies have consistently found an overall positive effect of emigration on human capital formation, suggesting that even in extreme cases of very high brain drain, home countries can still experience a net gain, as if there was a special regime for these countries.

I will report here on just two studies which I see as the most convincing for the reason that they rely on so-called "natural experiments" which are based on specific and arguably random events in a country that acted as an exogenous shock to either migration or human capital formation. Those shocks will then show their impact on the variables we are interested in and alleviate the usual concerns about feedback effect or other unobservable convoluting factors that cause "endogeneity" (see footnote 4 above).

Let me start with the study on Fiji by Chand and Clemens (2008). The story is the following (I apologize for the caricature I am making of Fijian past and recent political history). Fiji is a former British Colony initially populated by Polynesians (let's call them native Fijians). During colonial times, the British brought many Indian workers to work on the sugar and other plantations. Around independence and thereafter, the two populations were of similar socio-economic status (income and education levels were quite similar) and about equal demographic size. Fijian political history became more turbulent in the late 1980s and early 1990s against the background of ethnic tensions that culminated in a military coup led by native Fijian officers. Following the coup, a discriminatory policy was introduced, favoring the native Fijians and putting in place restrictions on Indians' access to universities, public employment, and more. Facing violence and discrimination, many Indian Fijians started to contemplate emigration. Where to go? Obviously, the two main destinations are Australia and New Zealand. However, emigration to those countries is

6 See Mountford and Rapoport (2011, 2016) for analyses of the brain drain impact on the world distribution of income.

strongly restricted and regulated by a "points-based system" which is distorted to favor the highly educated and skilled. Indian Fijians, therefore, started to heavily invest in education and in spite of the discrimination they faced at home; they shortly overtook the Native Fijians in terms of educational attainment. Some did migrate, but some did not, and twenty years after the coup, the Indian Fijians living in Fiji enjoy much higher human capital and living standards than their "native" compatriots. As David Landes would put it: "don't beat up the little guys!" This is a perfect illustration, in my view, of the "option value" argument we put forward in Katz and Rapoport (2005). We argue that the "option value", that is the economic returns to attaining education, increases when political and macroeconomic instability is high in the source country. Why? Because attaining education provides you with the opportunity to emigrate. In other words, education allows you to diversify your income risk by simply moving abroad where there is less uncertainty. So if there is an economic or political shock at home, education will allow you to be less affected by that and thus seems more attractive than in an environment that is overall stable.

The second micro study is from Nepal (Shreshta 2016). Again, I will caricature the complex history of Nepal in order to make the intuitive argument. Nepal is populated by ethnic groups that are close to either Tibetans or to Indians, and some other remote groups such as the Gurkas constitute a local minority. Such minority groups became enrolled on the side of the colonial power, England, in the course of the 19th century, culminating with the enrolment of Gurka men in the British Army. For more than a century, young Gurka men have been raised and trained to pass the very stringent tests required to join the British Army, bringing their families pride and income (the salary of a British soldier is about 100 times higher than rural wages in Nepal). Still, the Gurkas remained one of the most disadvantaged ethnic groups in Nepal in terms of education and income. In the early 1990s, the British Army introduced literacy and numeracy tests for its new recruits all over the world, and required the completion of middle-schooling. All of a sudden, being physically and mentally fit was not enough. Guess what happened? The Gurkas started to send their kids not just to physical training but also to school and collectively invested in the hiring of teachers and in schooling infrastructures. Even girls started to go to school thanks to economies of scale and peer effects. But only 1 percent of the candidates pass the test, and so the Gurkas who don't go to the army end up applying their human capital in other domains, such as agriculture. Today, the Gurka group has attained a higher than average level of education in Nepal, a catching-up process fully attributable to the change in the recruitment rules of the British Army.

I like this story because I see it as fully exemplifying the insights from the beneficial brain drain theory: international migration is characterized by small chances to succeed (in emigrating) and high stakes in case of success (high wage differentials). In this context more people will invest, or some people will invest more in education to increase their chances of emigration and of enjoying the higher wages and better amenities (for the most part) abroad. For those who remain, the investment made may have turned out unprofitable to them, but it is still socially beneficial and can even turn out individually beneficial due to externalities. Emigration prospects play the role, here, of an education subsidy (to the extent that educational attainment is not credit constrained), bringing private investment in education closer to its socially optimal level (as social returns to education are higher than private returns). Based on the above, it is doubtful that Ethiopia or Ghana would end up with more doctors and nurses if these were banned from emigrating, or whether the Philippines would have some of the best and popular nursing schools, and India some of the best and popular engineering schools of the developing world, if their graduates were banned or discouraged (through taxation or through a mercantilist rhetoric portraying them as traitors) from joyfully selling themselves to Western exploiters.

## 6. SKILLED DIASPORA NETWORKS

The above-described "incentive" effect takes place before migration occurs; once migrants have left, however, they can still affect economic, political, and social outcomes in their home country. By sending money or returning after some time[7] or by forming diaspora networks that serve as bridges between host and home countries. Along those bridges, many things can circulate: goods, investments, technologies, ideas, and values, to mention a few. This is the last strand of brain drain research I want to emphasize before concluding. Indeed, being able to draw on a network of skilled compatriots scattered around the world (especially if they live in the leading countries in terms of technological innovation, financial power, and democratic standards) is crucial to many developing and emerging countries in their search for better integration into the global economy.

There is growing evidence and understanding that migrants in general, and skilled migrants in particular, favor the economic, financial, and even political and cultural integration of their home country into the global economy. The recent literature has consistently shown this, starting from

7 On brain drain and remittances, see Bollard et al. (2011) and Docquier et al. (2012).

the "trade creating" effect of migration (Parsons & Vezina forthcoming; Felbermayr and Jung 2009) and ending with the uncovering of "social remittances" (Levitt and Lamba Nieves 2011) in the realms of demography or politics).

Two forces are at play. First, an "information channel", whereby migrants reduce transaction costs between their host and home countries, allowing more trade flows (both imports and exports) and inflows of Foreign Direct Investments as well as other forms of financial investments (e.g., international bank loans, purchase of home-country bonds, etc.). While for trade, there is no substantial difference between low- and high-skill migrants in terms of their ability to convey the relevant transaction-facilitating information, for financial flows in general, and for FDI in particular, skilled migrants seems to have a significant advantage.[8]

And second, a "knowledge diffusion channel", whereby migrants transfer knowledge, including technological knowledge, but also social norms, preferences and values (e.g. preferences for lower fertility or for democracy), from the host to the home economy. It is not clear whether high- or low-skill migrants have an advantage in initiating such transfers, except for innovation adoption and diffusion, where, quite obviously, there is a strong advantage for the former.[9]

## 7. CONCLUSION

As we have seen, the recent economic literature does not support the traditional and still very popular view that the brain drain is an impediment to developing countries' current and future economic performance. To the contrary, the possibility for people to "sell" their human capital abroad generates incentives to invest more in human capital, and a demand for higher quality, more internationally transferrable education, which ultimately also benefits those who do not emigrate. There are also counteracting forces of course: the depletion effect of emigration, the lack of incentives if people are credit-constrained, and some diversion in terms of fields of study away from the home countries' needs (e.g., geriatrics

8 On trade, see Gould (1994), Rauch and Trindade (2002) on the role of ethnic Chinese networks and, more recently, Parsons and Vezina (forthcoming), who exploit the natural experiment of the Vietnamese boat people of the second half of the 1970s to identify the effect of migration networks using US States —Vietnam trade data. On FDI, see notably Kugler and Rapoport (2007), and Kugler et al. (2013) on financial flows.

9 On technological knowledge diffusion see Kerr (2008), Agrawal et al. (2011) and Bahar and Rapoport (forthcoming). On political remittances, Spilimbergo (2009), Docquier et al. (2016) and Barsbai et al. (2016). On "Malthusian" remittances, see Fargues (2007), Beine et al. (2013), Bertoli and Marchetta (2015) and Daudin et al. (2016).

instead of pediatrics). And the benefits from skilled diasporas, which appear to be considerable and multi-dimensional, should not be overlooked. So even if one adopts a consequentialist view that focuses exclusively on the effects of migration on the source countries, disregarding people's rights to emigrate and giving little weight to the migrants themselves, the evidence does not support what I would call the now outdated mercantilist view of the brain drain.

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# Expanding the Brain Drain Debate

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## ABSTRACT

The article argues that Blake and Brock do not disagree on any important issues of principle, thus bringing their positions closer together than is suggested in the "debate" language that frames their book. The article also recommends that the discussion of the brain drain be expanded beyond the question of whether or not governments may restrict emigration to include questions about the moral responsibilities of rich states to prevent harmful brain drain and the moral responsibilities of skilled individuals to serve the communities in which they have been raised.

**Keywords:** brain drain, emigration, immigration, moral duties, skilled medical personnel

## INTRODUCTION

The subtitle of *Debating Brain Drain* is the question "May Governments Restrict Emigration?" As this suggests, the central focus of the book is on the question of whether or not it is morally permissible for the governments of poor states to take legal measures to reduce the movement of their talented and skilled citizens to other countries, especially rich ones. Gillian Brock and Michael Blake are distinguished philosophers, and they provide a nuanced, thoughtful, and illuminating discussion of this question. While they differ in the emphasis they place on certain considerations, I do not think there is any real disagreement between the authors on the fundamental question posed in the subtitle, and I do not disagree with their shared conclusion. I should perhaps acknowledge, however, that in claiming that Brock and Blake are in basic agreement, I am disagreeing to some extent with Brock and Blake.

## 1. THE BROCK/BLAKE CONSENSUS

Brock and Blake agree that there are empirical disputes about the effects of the emigration of talented and skilled people from poor states on the people left behind in those states and on the ability of those states to build better economic and political institutions. Brock's reading of the literature leaves her more pessimistic about the consequences of such emigration and Blake's reading leaves him more optimistic. Both acknowledge, however, that they are not specialists with an independent basis for judging the overall effects of emigration. Neither am I, and so I will try to construct a response that does not depend on a particular view of the empirical literature. Obviously, it makes no sense for poor states to seek ways to reduce emigration that is beneficial to them. So, it is appropriate to focus, as the authors do, on cases where emigration is actually harmful to those left behind in poor states. Both authors treat the emigration of skilled medical personnel as the prime example of such a case.

Blake argues that, from a liberal perspective, individuals have a fundamental moral right to emigrate and a fundamental moral right to renounce their citizenship in their country of origin if they have another citizenship (Blake and Brock 2015: 114) He points out that these moral rights are reflected in the Universal Declaration of Human Rights, and he insists that states normally may not use coercive measures to prevent individuals from exercising these rights, even when doing so would be good for other citizens. I agree with Blake about these claims.[1] So far as I can tell, so does Brock. It may be fair to say that Brock does not emphasize the moral importance of the right to leave in the way that Blake does, but she does accept that right as a constraint upon morally legitimate policies. Nothing in Brock's account suggests that she thinks it is morally acceptable for a state to adopt policies that violate the Universal Declaration of Human Rights, including its provisions regarding the right of exit and the right to change nationalities.

The key point for Brock is that these rights are not absolute. That is something that Blake also acknowledges, however. While Blake insists that the right to exit and the right to renunciation are so fundamental that they may not be restricted for the sake of distributive justice or the promotion of the good of others, he explicitly says that "violation of a free and informed

1 I would enter a note of caution, however, about Blake's claim that the right to change nationality (which is what the UDHR protects) entails a right to renounce "any particularistic claim of justice" towards the inhabitants of the state one has left (Brock and Blake 2015: 114). Blake seems to be assuming here that all particularistic claims of justice must be legally enforceable. As I will argue below, this presupposes far too narrow a conception of justice.

contract" can be grounds for limiting these fundamental liberties (Brock and Blake 2015: 115). A hundred pages later, he says that this makes it morally permissible for states to use contracts to limit emigration temporarily (Brock and Blake 2015: 215). While he insists that this is only a "very qualified yes" to the use of this technique, so far as I can see the qualifications he wants to impose are all ones that Brock herself accepts as limits on the policies that states may legitimately use to reduce unwanted emigration. This becomes particularly clear in her discussion on p. 275 of the ways in which their views converge around educational contracts, taxation of emigrant citizens, organization of medical training, etc. I can find no actual policy proposal that Brock endorses that Blake rejects.[2]

The fact that Brock and Blake do not disagree about permissible policies does not prove that there are no significant philosophical differences between them. People can sometimes agree on policy proposals while disagreeing about principles. For example, conservatives may favor reducing criminal sentences because they think keeping people in prison is too costly, even though they regard long sentences as morally acceptable in principle. Liberals may favor reducing criminal sentences because they think that long sentences are unfair in principle. In that sort of case, the parties agree on a policy but not on moral principles. But I don't think that is what is going on in the Brock/Blake exchange. While Blake talks more about freedom and Brock more about reducing the harms of emigration, each accepts the other's principles. Brock does accept the principle that states may not violate the freedoms that Blake is emphasizing. That is why she focuses on contractual arrangements and on the background conditions within which agreements take place. Indeed, I think it becomes clear in Brock's response to Blake that the whole purpose of her long discussion of the limited character of the demands being made upon potential emigrants was not to say, as Blake seems to think, that intrusions on fundamental rights are acceptable so long as they are only modest intrusions, but rather to show that the contractual conditions required of those seeking medical training are not so unconscionable as to void the claim that it is legitimate to enforce the contract (see Brock and Blake 2015:

2 Blake says that "many of the 'compulsory service' proposals Brock defends … are unavailable for use by a liberal state" (Brock and Blake 2015: 112). The footnote specifies that he is actually rejecting only the first three of the seven proposals that Brock mentions (on 49-50), and he offers no reason for thinking that these three proposals would be unacceptable if constructed as contracts rather than as imposed policies. I would add that Brock herself notes that the label "compulsory service" given to these proposals was supplied by the authors of the article she is discussing and is not a label that she herself would necessarily accept. In any event, her actual policy proposals on p. 275, which use the same sorts of mechanisms as the ones discussed on pp. 49-50, all involve contractual agreements that meet Blake's concerns.

256 and 271). And Blake does accept the ideas that the emigration of skilled medical personnel from poor states contributes to global injustice, that poor states have strong and legitimate reasons to try to reduce this emigration if they can do so in a way that respects human freedom, and that contractually agreed upon restrictions on emigration are morally permissible given appropriate background circumstances. He may be more skeptical than Brock about how effective such permissible policies will be but that is an empirical disagreement not a difference of principle. In sum, the contrasts between them on the key question that the book addresses are more rhetorical than real, reflecting differences in emphasis rather than actual disagreements.

## 2. EXPANDING THE MORAL TERRAIN OF THE DEBATE

One thing that puzzles me about the overarching framework of the book is that its focus is overwhelmingly on the question of what legal restrictions poor states may place on the emigration of their talented and skilled citizens. This is an important question but not the only one we should ask. Indeed, the authors themselves wander off at various points to explore other parts of the moral terrain in which the brain drain problem is situated, only to have such explorations short-circuited, as it were, by a renewed focus on this question of what legal restrictions poor states may legitimately enact. In the rest of my comments, I want to bring more clearly into view some of the other moral issues related to the brain drain.

## 3. THE DUTIES OF RICH STATES

Brock and Blake seem to agree that the brain drain problem emerges primarily as a byproduct of global inequalities that are themselves deeply unjust. They also both agree that rich states benefit from these unjust global inequalities. So, it seems natural to ask what (if anything) rich states ought to do to address this problem. Even if we wanted to keep the focus entirely on what to do about the brain drain problem, rather than on the broader question of what to do about the global inequality that gives rise to the brain drain problem, why should we limit our normative evaluation to the behavior of poor states? Are there morally permissible, or perhaps morally obligatory, steps that rich states can and should take with respect to the brain drain? After all, the brain drain exists as a problem only because rich states are willing to admit the talented and skilled from poor states. So, one solution might be for rich states to stop such admissions. What should we think of that approach to the issue?

Brock has written extensively about global justice, of course, and she summarizes some of her key claims in chapter 2 of this book. Surprisingly, however, she does not say much about what she thinks rich states ought to do (if anything) with respect to the brain drain problem. In particular, she does not address the possibility of changing the immigration polices of rich states (apart from endorsing Blake's support of "ethical recruitment" while expressing skepticism about the effectiveness of that approach). By contrast, Blake does spend five pages on the topic (Brock and Blake 2015: 219-224). So, let me start with that. Blake's discussion is brief, but it provides a basis for beginning to identify some of the issues we need to consider in thinking about rich states and the brain drain.

Blake begins by raising the possibility of a rich state excluding immigrants whose entry will contribute to the brain drain. He rejects that idea for three reasons.

Blake's first argument is "that the right to exclude is limited at best" (Brock and Blake 2015: 219). Having argued for open borders and for freedom of movement as a human right, I am myself quite sympathetic to this formulation, but it seems to me to be a curious claim for an author who is at pains elsewhere to defend the right of states to control immigration. In elaborating the point, Blake says that "those suffering under a non-representative regime" have "rights to be admitted into a functioning liberal democratic state" (Brock and Blake 2015: 219). This sounds like an expansive definition of who ought to qualify as a refugee. Again, I'm sympathetic but I would note that a great many people would probably qualify as refugees under this formulation, and Blake has provided no basis for restricting the number admitted. So, treating the right to exclude as limited in this way seems to open the door to mass migration from poor states to rich ones, not a brain drain but a population drain. That raises a number of interesting questions that go well beyond the issue of the brain drain, but I don't have space to explore them here.[3] The main point is that this limitation on the right to exclude is not one that has any special bearing on the highly skilled. If the requirements to qualify for entry on the grounds that one is "suffering under a non-representative regime" are interpreted more narrowly, the right to exclude will seem more robust. That is the conventional view, and normally it is Blake's view as well. From that perspective, most people from poor states don't have a moral claim to entry into rich states, whether they are talented and skilled or not, and rich states thus do no wrong in excluding them.

3 For an attempt to do so, see Carens (2013: chs. 10-12).

Blake's second argument is that "exclusion might produce underemployment and undocumented migration rather than foreign skills acquisition" (Brock and Blake 2015: 220). Blake gives no reason for supposing that this is a likely development, and it seems to me empirically implausible. The more important point, however, is that this suggestion is a distraction from the questions about principles that are the primary focus of the book. No one favors counter-productive policies. It is a premise of the whole brain drain discussion in the book that no state should adopt policies to reduce emigration from poor states if those policies are ultimately harmful to those left behind in the poor states. The philosophical debate is about whether it is morally justifiable, or perhaps even morally obligatory, to find ways to reduce emigration from poor states when that is beneficial to the poor states and their populations. It seems plausible to suppose that there are at least some circumstances under which reduced emigration would be beneficial. So, the key question is whether, under those circumstances, restrictions on immigration by rich states would be morally permissible, or perhaps even morally obligatory, if the restrictions helped to contribute to a reduction in emigration that would be beneficial to poor states.

Blake's third argument is that for a rich state to restrict entry of the talented and skilled from poor states would be "objectionably paternalistic" (Brock and Blake 2015: 220). Blake notes that he has argued that a poor state may not restrict the liberty of its own citizens for the sake of social justice and contends that it would be "equally disturbing" for a rich state to do this to the "foreign poor" (Brock and Blake 2015: 220). But this argument ignores the difference between a right of exit from one's own state and a right of entry to another state. On Blake's own view and in international human rights documents, this difference is fundamental. The former, the right of exit, is a basic human right. The latter, the right to enter a state where one is not a citizen, is not conventionally seen as a basic human right.[4] So, denying entry is normally not as "disturbing" as denying exit. Of course, some reasons for denying entry (e.g., racial discrimination) may be morally objectionable, but on the conventional view states can justifiably refuse entry for many reasons that would not constitute a justification for refusing exit. The conventional freedom and human rights objections to restrictions on exit that constrain the way poor states may deal with their own citizens thus do not apply to restrictions on entry imposed by rich states.

4 For a defense of the view that freedom of movement should be seen as a basic human right, see Carens (2013: ch. 11). Blake himself explicitly rejects this view, however.

It seems to me therefore that Blake has not offered any compelling moral reason why rich states should not restrict the entry of talented and skilled immigrants from poor states, when doing so would reduce the sort of brain drain that he himself sees as morally undesirable. Indeed, the logic of Blake's own argument seems to lead to just such restrictions. A bit later on in this section, Blake says that the most important thing that rich states can do to address the brain drain problem is to invest the resources needed to train their own doctors and nurses domestically (Brock and Blake 2015: 223). (I agree with this recommendation, by the way.) Blake does not fully spell out why this approach would help to address the brain drain, but the implicit rationale seems to be this. If rich states had nothing to gain by admitting doctors and nurses (because they had an adequate internal supply), they would no longer give foreign doctors and nurses priority in admissions and indeed might not admit them at all, since the opportunities for foreign medical personnel to use their talents and skills productively in the receiving state would be limited. If skilled medical personnel cannot get into rich states, they will stay home and the harmful brain drain will be reduced. Notice that there are two implicit presuppositions that underlie Blake's view, the first empirical and the second normative. First, rich states will construct their admissions policy with a view to their own interests. They admit skilled medical personnel now only because they see it as advantageous to do so. If they no longer have anything to gain by admitting skilled medical personnel, they will cease to admit them or at least cease to give them priority in admissions. Second, this sort of restrictive immigration policy is morally permissible because (on the conventional view) immigrants with particular talents and skills have no special moral claim to priority in admission or indeed to admission at all. States are free to select immigrants on whatever basis they want, so long as they do not engage in impermissible forms of discrimination such as selection on the basis of race or religion and so long as they respect certain kinds of moral claims to admission such as those made by asylum seekers who qualify under the Geneva Convention and close family members who have a moral claim for family reunification.[5] So, while Blake ostensibly resists the idea that rich states should address the brain drain problem by restricting certain kinds of immigration, he actually recommends a course of action that is designed to lead to precisely that result. Indeed, we could go further. While Blake does not explicitly describe the domestic production of an adequate supply of medical personnel as a moral duty for rich states, it seems to me that his own analysis implies that it is, precisely because the failure to do this is directly

5 For a fuller discussion of acceptable and unacceptable criteria of selection and exclusion under the conventional view, see Carens (2013: chs. 9-10).

connected to the reasons why rich states recruit skilled medical personnel from poor states.

Notice that what I am talking about is quite different from the "ethical recruitment" policies that Blake and Brock endorse. Recruitment efforts already presuppose the existence of demand for the people with the skills and talents being recruited and the possibility of people with those skills and demands gaining admission. If doctors and nurses from a poor state stood no better chance of gaining admission to rich states than any other normal citizen of the same poor state, there would be no recruiters knocking at their doors.

## 4. MORALITY AND INTEREST

Brock and Blake have focused their discussion on what poor states may legitimately do to reduce harmful brain drain, and I have explored what rich states might do. There is, however, an important difference between the position of rich states and poor states with respect to the relationship between morality and interest when it comes to the brain drain. Assume (as an unrealistic but analytically useful simplification) that governments want to act in the interests of those they govern. The governments of poor states have an interest in reducing emigration that harms those left behind. They have to be able to distinguish between harmful and beneficial emigration, of course, and to find policies that reduce the former but not the latter (at least on balance). As we see in this book, that is not always easy. But in this process, morality acts primarily as a constraint upon policy choices, not as the main motivation for a policy choice. To be morally acceptable, the policy must respect the moral claims of the state's own citizens, especially their basic human rights which include the right of exit. But the main motivation and justification for a (morally permissible) policy that reduces emigration can be simply that it serves the interests of the population that is being governed.

Contrast this with the situation of the governments of rich states. If rich states stop giving preference in admission to skilled medical personnel from poor states (and assume here, for the sake of this argument, that this would in fact reduce harmful emigration from poor states), they will have to spend more money on training and educating medical personnel domestically or leave their populations underserved. Either way, they will be adopting a policy that is contrary to the interests of the population that

they govern, at least as interests are conventionally understood.[6] Here morality becomes not simply a constraint on acceptable public policy, but its main motivation and justification. Duty, not interest, would be the driving force behind the proposed policy change. The government would have to say we are adopting this course because it is morally wrong to continue to take advantage of the medical training provided by poor states to serve our needs in the rich states. That might work politically in some contexts, but it might not in others. As a general matter, it is easier to get governments (and ordinary people) to act in accordance with moral duty when their duty coincides with their interests, at least their long-run interests, than when it conflicts with their interests (as is sometimes the case).

## 5. MORAL TRAGEDY AND THE BRAIN DRAIN

One issue on which Brock and Blake do disagree is on whether it is appropriate to see the brain drain as a moral tragedy. Towards the end of his initial statement, Blake suggests that we think of the brain drain as a moral tragedy, i.e., a situation in which "we face significant injustice, and yet we cannot move away from that injustice without deploying means that are themselves unjust" (Brock and Blake 2015: 226). Brock expresses skepticism that this is an appropriate way to characterize the brain drain problem, given the range of policies that she and Blake agree it would be morally permissible to employ to reduce the effects of the brain drain (Brock and Blake 2015: 267-273). I agree with Brock, but I would like to sharpen the critique even further.

Blake sets his worries about whether we know how to address the morally undesirable forms of brain drain in ways that are morally acceptable in the context of a wider concern about whether we know how to reduce global inequalities (which he regards as unjust) in ways that are morally acceptable. In effect, this attributes the enduring character of global injustice to a failure of knowledge, rather than a failure of will, on the part of rich states and their populations. I think that is a mistake. I do not mean to deny that there are lots of puzzles about the best way to eliminate poverty or promote economic development or reduce global inequalities and that some policies adopted with the best of intentions have proven to be counterproductive. But I also think that there are many, many examples of rich states simply pursuing their own interests at the

6 As Plato shows in the *Republic*, it is possible to argue that we always have an overriding interest in being just regardless of how that affects our interests conventionally understood. I set aside here the possibility of reinterpreting our interests in this way.

expense of poor states (e.g., in trade negotiations). In such cases, it is not knowledge of what would benefit poor states that is lacking but the willingness to put their interests ahead of the interests of rich states. Or take the current refugee crisis. In my view, what justice requires is plain enough: the admission and settlement of large numbers of refugees in Europe and North America. The problem is not that we don't know how to do this, but rather that most rich states and their populations are unwilling to do what is morally required. So, they offload the responsibility for refugees onto the states nearest the ones from which the refugees are fleeing. There is no moral justification for this course of action. It is a failure of will, not knowledge. In sum, it is essential not to characterize these sorts of moral failures as moral tragedies brought on by our ignorance about what to do to reduce global injustice.

With respect to the brain drain, the situation is perhaps a little more complicated. Nevertheless, Blake's own analysis shows that one important way to reduce the demand for skilled medical personnel from poor states is for rich states to produce an adequate supply from within their own populations. And, as I have just argued, if they did that, the rich states would no longer have any incentive to give priority in admission to skilled medical personnel from poor states and they would violate no moral rights (as conventionally understood) in not giving admission priority to skilled medical personnel. I don't say this would solve all of the issues raised in the brain drain debate, but it seems like one relatively clear and positive step that the rich states could take. Again, the main problem, it seems to me, is not a lack of knowledge but an unwillingness on the part of rich states and their populations to do what is morally required when that conflicts with their interests.

## 6. DUTIES AND COMMUNITIES

Finally, the brain drain raises a number of interesting and important questions about the nature and extent of our moral obligations to particular communities or persons. Leave aside for a moment questions about legal restrictions. Do skilled medical personnel in poor states have a moral duty to stay at home and put their abilities to use in serving their fellow citizens? Do they act unjustly if they move to a rich state, even if they are legally free to do so?

Brock and Blake touch upon these questions, but again I think their exploration of them is short-circuited by their focus on legal constraints and the possibility of contractual agreements that can make legal constraints justifiable. Brock spends a bit of time at the beginning of

chapter four identifying normative arguments about the duties of citizens to contribute, but she frames this as a part of a report to a government seeking to implement a legally binding policy, and, as I indicated before, her focus is on showing that the conditions to which people are asked to consent are not unreasonable. So, we don't really get the fuller sort of inquiry that would be required to explore questions about the nature and extent of our moral duties to contribute to the political communities in which we live and whether we have any obligations beyond what can be extracted from a formal contractual arrangement. This is an important question for the brain drain because if skilled medical personnel in poor states only stay at home as long as it takes to fulfill the requirements of a reasonable contractual agreement, the existence of such policies will not do much to remedy the problem.

It may matter a lot whether people with medical training feel they have a duty to stay and help out or whether they feel morally entitled simply to pursue their own interests and inclinations wherever those lead. And our ideas about our duties and our entitlements do not simply fall from the sky. They are taught to us, formally and informally, by our families, our schools, and our society. There is no social order without social norms. But, of course, some social norms infringe unduly on personal freedoms, and some ways of inculcating social norms are morally problematic. Leave aside for the moment questions about the ways in which the normative ideas are passed on. What sorts of norms and values is it morally permissible for a political community to seek to transmit with respect to the concerns raised by the brain drain? For example, would it be morally acceptable for a poor state to teach children that those with special gifts and opportunities for advanced training have a particular obligation to use their gifts and training in ways that will benefit the community? Would it be morally acceptable to tell students that they should not seek medical training unless they are willing to commit themselves to working within their home state over the long run, at least under normal circumstances, (even if there were no effort to enforce this commitment legally)? Would it be morally acceptable to make that norm part of their professional training? Medical ethics routinely comprises part of the training of doctors. Would it be reasonable to see this sort of norm as one component of medical ethics for doctors in poor states? Would it be morally acceptable if this sort of expectation became part of a wider social culture, so that most people in a poor state felt it would normally be wrong for skilled medical personnel to move to a rich country?

I think that Brock might be inclined to respond positively to some of these questions, but her focus on what legal requirements states can

impose prevents her from exploring them adequately. This is not a criticism. To explore one topic thoroughly, one often has to bracket others. My goal here is simply to draw attention to some of the interesting questions that have been left unaddressed.

It might seem as though Blake provides more resources than Brock for answering at least some of these questions, and in Blake's case the answer would appear to be in the negative, because he does spend a fair amount of time in chapters 7 and 8 criticizing arguments that seem to advance these sorts of claims about our moral duties. At almost every critical juncture in his discussion, however, Blake falls back upon an insistence that whatever sorts of moral duties we might have towards our communities or towards other people, they don't justify using the coercive power of the state to compel people to take on certain jobs or perform certain tasks or to forfeit their legal right to exit. So, in the end, he doesn't really tell us whether or not it is morally acceptable to have social expectations about what people do with their talents and skills or whether it is appropriate to see such expectations as legitimate moral duties. Nor does he show that it can never be morally wrong, even unjust, to leave a society, even when one has the legal right to do so.

Consider, for example, Blake's discussion of the novel *Stoner* in which the main character chooses to become an English professor rather than to acquire agricultural knowledge and return home to help with the family farm as his parents expected him to do when they paid for his college education. Blake says that we can disagree about the morality of Stoner's choice but he should not be forced to study agriculture and to return to the farm. I certainly agree, but I would be interested to know whether Blake thinks that Stoner's choice is morally justifiable or not and why. The fact that Stoner should not be forced to act in a particular way does not help us in answering that question. Would it be reasonable to say that Stoner has failed in a moral duty in acting as he did, and even perhaps that he acted unjustly? (Of course, we would need more information than Blake provides to assess that question since it would presumably depend in part on whether he simply abandoned his parents or took positive steps to repay the money they had invested in his education or to provide for them in some other way.) Blake sometimes writes as though any moral demand on a person to act in a certain way or to choose a certain path is an unreasonable infringement on free choice, but he doesn't really develop that line of argument systematically, and I think it would be hard to sustain. At one point he distinguishes between "a duty of virtue" and "an enforceable duty of politics", but I see no reason to assume that every political duty must be legally enforceable (Brock and Blake 2015: 121). Similarly, on the same page, he seems to want to limit

the terms "justice" and "rights" to matters that are legally enforceable, but he provides no reason for this restriction and I don't think it corresponds to the way we use these terms in ordinary moral life.

Later in the book, in criticizing the idea that it might be appropriate to say that people with greater abilities have stronger obligations because of those abilities, he criticizes the conventional gendered division of labor within the family, saying "we should recognize that we ought to allocate the burden of parenting fairly" (Brock and Blake 2015: 172). In this context he has no difficulty in recognizing that the language of fairness (justice?) can be invoked even when there is no question of legal enforcement of the requirements of fairness. The "we ought to allocate" is precisely a recognition of the existence of social norms (in this case, norms relating to gender) which are constructed collectively and which are an appropriate topic for political and moral disputation. So, in the same way, I don't think that Blake could rule out of bounds, as he sometimes seems to try to do, the sorts of moral demands that some people would like to address to skilled medical personnel in poor states. But as with Brock, I think the main reason that Blake does not provide answers to the questions I have asked is simply because he has chosen to focus primarily on the issue of legitimate legal restrictions on exit, and that is a reasonable strategic choice.

So, how should we answer the sorts of questions I have posed? I must confess that I do not have a clear answer. On the one hand, like Brock and, I think, more than Blake, I am sympathetic to the idea that a just society can include legitimate expectations and social norms with respect to the ways in which people make use of their talents and skills. Choice is morally important, but it is not the only morally important consideration. In that respect, I'm sympathetic to the idea that it is reasonable to expect skilled medical personnel in a poor state to use their abilities to meet the health needs of their fellow citizens rather than using them simply for material gain or professional advancement in another society. On the other hand, we don't live in a just world. So, I would also be sympathetic to a doctor or nurse from a poor state who said, "Why should I be the one to bear the burdens of serving the health needs of this community especially since they are in important respects the byproducts of an unjust social order? Why shouldn't skilled medical personnel from rich states be the ones with a duty to come and address these problems?" From this perspective, those who go to work for Medecins sans Frontieres are simply fulfilling a moral duty, not acting altruistically as we are often inclined to think. And the doctors who stay in their home rich states are the ones failing in their moral duties, not the doctors who leave the poor states.

To be frank, that is just the starting point for some of the intellectual puzzles that emerge when we seek to talk about moral duties in an unjust world. Often we invoke the language of rights and duties in a context that simply screens this background injustice from view. That is understandable and perhaps even necessary to guide action in the world, but from an intellectual and moral perspective it is also unsatisfactory. I think that these deeper puzzles about moral rights and duties in an unjust world that emerge from thinking about the brain drain in a wider perspective deserve the same sort of extensive and thoughtful treatment that Brock and Blake have given to the question of whether states may legally restrict emigration.

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# Ethics, Politics, and Emigration

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## ABSTRACT

In my chapters from *Debating Brain Drain,* I argue that the brain drain represents a moral tragedy; it is a moral problem, to which no solution exists that is both effective and morally permissible. Against this, Kieran Oberman, Joseph Carens, and Eszter Kollar argue that we ought to approach the question of the brain drain with alternative theoretical assumptions, on which that problem might be more tractable. This paper responds to these critics, and shows why their own alternative analyses are not without significant difficulties. In the end, I suggest, we cannot solve the problem of the brain drain without abandoning those parts of liberal political thought that make it morally attractive.

**Keywords:** emigration, justice, virtue, international law, freedom.

## INTRODUCTION

The only point of writing philosophy, I often think, is the conversation that comes after. If that conversation features disagreement, that isn't a sign of disrespect, but a sign that the work in question deserves to be taken seriously, so that its shortcomings can be better understood. Being criticized, then, isn't a bad thing; in fact, it's the best anyone who writes philosophy can reasonably hope for.

None of that makes the criticism easier to deal with, of course. There are times when, in face of criticism, I want to retrench, and defend my view against all those who would dispute it. There are other times — perhaps fewer —when what I want to do is simply admit that there's something wrong with my view, or a problem I'm not sure how to solve. There are still other times when what I most want to do is figure out how the disagreement actually began; what it is that the critics accept that I do not. Much disagreement, after all, begins in the margins, with the

unarticulated assumptions about where arguments begin —and where they end.

In the present context, I want to use this last strategy, and understand how it is that my critics and I disagree about the ethical analysis of political institutions. There will be, I expect, some retrenchment along the way —but I am primarily interested in understanding where my critics and I disagree, rather than in vindicating my view against their criticisms. I want to focus on three of these critics in particular— Kieran Oberman, Joseph Carens, and Eszter Kollar —and show that their criticisms stem from particular visions of how to bring ethical norms to bear on politics. I will focus only in passing on the essay of Hillel Rapoport; his empirical conclusions are welcome, but do not in themselves do more than support my conclusions. I can't deal with all of the criticisms my critics raise, of course; doing so would require more space, and brain, than I have at present. I want, instead, to see how my view might be accepted, even in the face of their criticisms, as a valid inference from a plausible set of assumptions about how ethics and politics might be related. Those who disagree with that set of assumptions, of course, will find in this essay no independent reason to accept my conclusions.

The best way to explain my assumptions, though, is with reference to the alternative moral framework used by Oberman; it is to that task, then, that I now turn.

## 1. KIERAN OBERMAN: ON ETHICS, JUSTIFICATION, AND LOVE

Oberman, in the course of his wide-ranging critique of my view, asserts that we can simply use the state to enforce someone's moral duty to his or her fellows —a possibility he says seems to have simply escaped me. Perhaps it did; but I think there are a number of follow-up questions that seem to have escaped *him*.[1] Let's start with this one: which duties, exactly,

1 Oberman also argues that my description of the supposed "liberal orthodoxy" rests on a mistaken view of international law, which distinguishes different categories of human rights, with different degrees of inviolability. In this, he cites Article 28 of the Universal Declaration of Human Rights, which makes no such distinction; and the International Covenant on Civil and Political Rights, which does permit such distinctions, but whose legal force is much less clear. (My adopted country, for instance, has signed the ICCPR subject to five reservations, five understandings, four declarations, and one proviso.) More to the point, though, I take the simple statement of right in the UDHR as a concise statement of a view I believe worth defending; Article 28 is not the blank check Oberman seems to imply, but a fairly limited principle consistent with the view of emergency justifications I defend here. If Oberman were proven right about international law more broadly, though, so

are rightly susceptible to collective political enforcement? Many things are ethical duties —from the duty to avoid murder, to the duty to donate a sufficient quantity of one's income to charity, to the duty to consider environmental and health effects when choosing one's lunch. Which of these is rightly within the state's coercive grasp? One answer, of course —which seems to be Oberman's— is to treat this as a question to be answered only with reference to aspects of these broad moral duties, such as their stringency, relative importance, and so on. This analysis of emigration seems to undergird Oberman's five conditions, which he presents as an alternative approach to the morality of the brain drain. But many of us think this isn't quite enough; are there no limits on what politics ought to concern itself with? Isn't there something more required than the bare existence of a moral duty, before we can start using law to order people about? Are there some duties, perhaps, that are merely duties of virtue, rather than obligations of right? Perhaps if something is an obligation of right, could it not be possible that we ought not think that politics is licensed to require it; could there never be a right to do what is wrong? To make things even worse, let's take another question Oberman ignores: what do you do in cases of serious moral disagreement? You say I have a duty to become a vegan; I say cheeseburgers are morally permissible. We both want to use law to coercively prevent (or, perhaps, mandate) the consumption of beef. Is our contest to be settled only with relation to how many people our respective moral arguments convince, or is something more required before we can figure out what is compatible with justice in political life?

Thoughts such as these are, in historical terms, what gave John Rawls's contractarian methodology its particular appeal. Rawls's methodology requires that we take individuals as having rights to have the coercive powers of the state justified *to them*, taken as individuals with their own interests and non-infinite quantity of altruism; indeed, Rawls speaks in *Political Liberalism* of those who are least advantaged as having a veto right over distributive principles —a veto he takes to be expressive of the sorts of respect for persons that precludes us from using another as a mere means for the benefit of another (see Rawls 1993: 282). Rawls wants to give those coerced, in other words, a sort of veto right against principles that propose to justify policy simply with reference to the interests and needs of others. Instead, the original position is supposed to justify principles with reference to individuals considered as rational agents, whose asset can be

much the worse for that law. The "liberal orthodoxy" I describe is either a defensible conclusion, or it isn't —I don't claim that its status as orthodoxy is an independent reason to support that conclusion. For details on the United States' approach to the ICCPR, see http://hrlibrary.umn.edu/usdocs/civilres.html.

given with reference to self-interest, within a set of constraints modeling what we take to be —here and now— an expression of morally appropriate limits on self-interested dealing.

All this is familiar. It is often described with reference to the concept of *hypothetical consent* —the thought, that is, that we ought to be presented with justification for political coercion to which we could be expected to agree. This agreement is hypothetical, and describes a morally appropriate context within which that consent is made; it does, however, insist on seeing people as possessed of their own capacities to pursue individual interests and goals, to which some appeal must be made in the course of justification. Rawls's difference principle, for example, provides the least advantaged with a reason, to accept the inequality they face; we appeal not to the altruism of the least well-off, but to the principle that any alternative social arrangement would make them worse off. We do not simply appeal to altruism and moral duty in the course of seeking justification for inequality. Oberman simply ignores all this, and claims that Rawls's methods are compatible with simply asserting a moral duty and taking it as sufficient justification for political coercion. If they were, of course, Rawls might have stopped after writing "Two Concepts of Rules" in 1955; a great many trees died needlessly in the Seventies. The arguments Oberman gives in defense of this proposition, moreover, seem wrong to me as well. Oberman argues that Rawls has no problem with some people being "forced to make sacrifices for the sake of others"; indeed, he claims, that's what the two principles of justice require. This is simply wrong; it would be true only if the baseline of expectations were whatever we acquired in the open market —which Rawls explicitly denies.[2] Instead, our baseline of expectations is equality, and those whose income is taxed do not make "sacrifices" of anything to which they had moral title. Oberman similarly argues that laws against rape protect victims, not rapists. That, too, seems simply incorrect; such laws protect *everyone*, including rapists. (Most of us, in our better moments, think that even rapists have moral and legal rights against sexual assault in prison.) Rapists have *bodies*, and those bodies are rightly protected against violent assault. Such laws could be justified to all who are embodied, as reflecting norms that are rightly made the subject of government coercion. The point, of course, is that we can justify the right of the state to coercively protect bodies —by punishing those who transgress against the bodies of others— to all people, in the contractarian manner described above. The simple appeal to moral duty

2 "As understood in justice as fairness, reciprocity is a relation between citizens expressed by principles of justice that regulate a social world in which everyone benefits judged with respect to an appropriate benchmark of equality defined with reference to that world" (Rawls 1993: 17).

is not enough; and, more to the point, it is not needed. The Rawlsian argument begins with the justification to all, taken as creatures with both limited altruism and a capacity to hold a conception of the good —as individuals to whom justification must be given in terms more substantive than the simple assertion of duty permits.

What, then, can this sort of methodology permit, when it comes to the right to prevent exit? I think the answer is: very little. That the state should have the right to protect bodies, by punishing those who assault them, seems justifiable to all those who are embodied. That the state should have the right to insist upon permanent allegiance, by preventing the exit of those who are otherwise able to leave that state and join another —well, I await what sort of justification could be provided that would pass the tests of reciprocal justification. As should be clear by now, a simple assertion of moral duty will not be enough. The justification has to be one that parties in something like the original position would accept; I cannot imagine what, consistent with Rawls's view, that justification could be. Oberman's method is, I think, wrong as an interpretation of Rawls's methodology, but also wrong as a piece of ethical reasoning. Rawls was *right* to look for something apart from naked assertions of duty as required for the legitimate exercise of political power. What politics *is* must be understood, before we can understand what politics *ought to be*. Those whose exit is prevented must be given a justification for why it is that the state should have this sort of power; Oberman has provided none.

Instead, throughout Oberman's critique, it seems as if the thought that politics is transformative —that it alters what we owe to one another, and that what states do gives rise to special duties of justification to specifically those subject to that state power —is not so much argued against as ignored. Politics is, instead, some sort of afterthought to pre-existing moral rights and duties. Take, for instance, Oberman's thought that states have taken over the world's surface, and must therefore (as compensation?) let us move about that surface. This seems an odd view of ethics; I accept, instead, the Kantian argument that our first duty in the state of nature is *to leave that state of nature,* by setting up territorial states. The division of the world into states does not leave our moral rights alone, but creates the circumstances under which the defense of rights is possible —as well as new obligations and rights, specifically held between fellow nationals. Against this, Oberman offers the thought that we cannot justify exclusion with reference to the obligations of citizenship, since people fall in love with particular others, not with states. I think he's right about the empirical story; if I met a man who loved his state more than his spouse, I would

think that man had missed something important about both marriage and patriotism. I'm not sure, though, why this tells us anything at all about political right. There is a suggestion, here, of a sort of sentimental consequentialism: the most powerful emotion wins, and love trumps borders. I think this misdescribes the moral terrain. Politics is a realm in which we are able to do what is ordinarily forbidden; we can intend to use violence and coercion against individual persons, and call that violence right. This permission to use coercion gives rise —on Rawls's vision, and on my own —to distinct forms of ethical obligation. We have to figure out, in short, not just what ethics full stop would say about desirable goals, but what it is that coercive political institutions are ethically permitted to *do*. On my view, this gives rise to a limited but real right to exclude even those whose lives might be made much better through the rights of migration. To take his example: we have no obligation to let Nazma become a member of our legal community, even though she has fallen in love with someone already here, and this fact can be justified with reference to the distinct duties that fellow citizens will have towards each other —duties that Oberman's account neglects entirely. (They may not be as poignant as the value of love for the lover, but the duties of citizenship do not thereby warrant being ignored completely.) We may, in other words, have to let love bow before politics. This does not seem, in other contexts, so morally problematic. If I fall in love with a particular painting on Oberman's wall, he does not thereby acquire a duty to let me enter his house; the fact that I love that painting more than he loves his house isn't sufficient to overcome his rights of property. The relationship he has with his house —let's imagine he's not particularly sentimental about it— is, and should be, a source of duties, quite apart from the strength of my sentimental attachment.

Oberman would, of course, reply that his house is not a country, and he would be right to make that reply. That doesn't, however, change the moral story: we have reason to examine the nature of each institutional site, and examine what duties and rights might emerge, being quite careful to figure out how those rights and duties can be justified. Property rights —like sovereignty, or the control of borders— may or may not be justified in their present forms; their justification, though, must examine more than the strength or centrality of some pre-political moral norms. Or so, at any rate, it seems to me. Oberman wants to do away with all that, and simply ask: what moral duties are the strongest, such that we have the right to prevent exit? How can we fulfill these moral values, using only free-standing moral values such as proportionality, efficiency, and so on? His view is coherent, at least, and I can see why it might attract its adherents. That does not stop it from resting on a view of political ethics I find impossible to support;

once that view is abandoned, his arguments against my own conclusions seem to fall as well.

## 2. JOSEPH CARENS: ON ETHICS, VIRTUE, AND POLICY

Joseph Carens picks up, in part, the challenge raised by Oberman: can't we simply assert that those who emigrate from a developing country are, in fact, morally wrong in doing so —perhaps even unjust? Carens supplements this question with a further complaint: what justifies my use of the concept of justice, as intrinsically connected with state coercion? This, as Carens recognizes, is not so much a disagreement with my view as a dispute about terminology —coupled with a request that I actually do something I avoid, which is describing whether or not those who emigrate violate ethical duties in doing so. The more central challenge raised by Carens has to do with the possibility of an effective response to the challenge of the brain drain. I suggest that there are empirical and philosophical reasons to think that a developed state's policy of excluding migrants from developing countries would be unlikely to make the world a more just place. Carens disputes these, and asks: if we could exclude such migrants, wouldn't we have a solid moral reason to do so —indeed, perhaps a duty? As before, these worries reflect, in part, a distinct vision of the relationship between politics and ethics; Carens and I disagree about what would have to be in place for a given policy to be rightly considered mandated by justice.

We can begin, though, with the first worry: what justifies me in linking justice so closely to the notion of political enforcement? What prevents us, similarly, from regarding the protagonist of *Stoner* —who frustrates his parents' desires, and overturns their settled expectations that his education would help their farm— as *unjust?* After all, we can regard a great many things —from states, to states of affairs, to individual persons— as exhibiting or failing to exhibit the virtue of justice.

Carens is absolutely right about this; we could choose a more or less capacious account of what it is to which the term "justice" applies. I would only say, in my defense, that Rawls and Kant seem to use the language in terms rather similar to my own. John Rawls describes his subject in *A Theory of Justice* as social justice, which he takes to be the primary virtue of social institutions (Rawls 1971: 7). This gloss is specified, in *Political Liberalism*, as making reference specifically to the coercive institutions of a democratic state. Rawls is, thus, not interested in "justice" *simpliciter*, but justice as a particular sort of normative concept suitable for the analysis of coercive political institutions. Before Rawls, of course, Immanuel Kant described public right as involving a necessary connection to the coercive

enforcement of law; the job of public institutions was not to make people morally perfect —duties of beneficence and self-respect, for instance, were described by Kant under the heading of the doctrine of virtue, rather than the doctrine of right— but to coerce people into respect for the public rights of others. As Paul Guyer notes: the central idea of Kant's legal and political philosophy is that we must not only define right, but also institute a system for the coercive enforcement of that right —namely, a state; "the coercive enforcement of right is then not merely permissible but mandatory" (Guyer 2014: 307). All this, I must say, seems unproblematic to me; I am surprised that Carens finds this link between political coercion and the concept of justice so idiosyncratic.

All this is separable from Carens's more substantive question, though: what can we say about those who, like Stoner, satisfy themselves, rather than those who sacrificed so much? Stoner's parents purchased an education for their son, with the expectation that he would use that to become an effective farmer; he thwarted their wishes. Is he not morally pernicious —even unjust, on a broader notion of that term —in so doing?

My answer, I'm afraid, is: no —or, at least, not necessarily. Stoner may have some duties of beneficence, on which he is obligated to take account of the interests and ends of others in forming his own plan of life. He would, in other words, be failing at the task of being a righteous person, were he to ignore every opportunity to make the success of other's goods as a part of his own good. He might well take his parents' plans as providing one particular avenue within which he might fulfill his duties of beneficence. His parents, though, are not wronged —and cannot call him unjust— if he refuses this particular course of action. His duty is an imperfect one, and his parents are not entitled to the particular sorts of actions that his decision to remain on the farm would entail. (Indeed, if Stoner's antipathy to farming were great enough, he might be betraying a duty to himself, were he to embark upon a life wholly alien to his own values and ends.[3])This does not, of course, determine how we ought to see the ethical quality of those who leave their developing countries for well-paid lives in developed societies; if their departure causes the wholesale devastation of those left behind, we would perhaps be right to revisit the relevance of Stoner as an analogy. For my purposes, I want the analogy to stand for only this: we are not morally wrong, and certainly not unjust, in all those cases in which we frustrate the wishes of those who helped educate us. The individual has a right to build her life that is capable of trumping the wishes of those who would prefer she built it along other lines.

3 Stoner might, for instance, be rightly criticized as abandoning his duty to build a life of value to himself (see Hill 1973).

I will revisit this thought when I examine the arguments of Eszter Kollar. For the moment, I will transition to the final, and most significant, of Carens's challenges. I paint the brain drain as a problem without a simple solution —a moral tragedy, as I describe it, without a permissible policy solution capable of transforming the world from unjust to just. What, asks Carens, is wrong with the thought that we might exclude the highly-educated? Do countries receiving migrants not have a strong obligation to cease doing so in ways that contribute to underdevelopment? Against this, I raise empirical and philosophical objections; Carens rejects both.

On the empirical front, Carens thinks it is simply implausible that the refusal to permit emigration would lead to brain waste and undocumented migration. I note only, in passing, that Hillel Rapoport's contribution to this exchange provides some empirical evidence that this contention might be not only plausible, but likely. If returns to education are reduced, through reduced ability to transform that education into desirable forms of life, then fewer people will seek that education.[4] Mobility rights for the well-educated, in contrast, tend to increase the number of people who want to become well-educated, and not all of those people will in fact end up leaving their countries of origin. Carens is right, perhaps, that this is beside the point: no-one endorses futile and counter-productive policies. (At least, we hope that no-one does, once they're aware that they're futile.) So: let's imagine that the policies might actually succeed in making the world better —less unequal, with less glaring forms of deprivation and poverty. Are these policies an adequate solution to our difficulties? Might they be mandatory, as requirements for liberal states?

My answer here cannot be that states cannot refuse these migrants; my own view is that it is permissible for states to refuse many migrants — although Carens is quite right that my view does not permit me to exclude nearly as many migrants as international practice now permits. I am, in other words, committed to the thought that this policy is permissible. The policy does, however, not seem to me to be an ethical necessity, and this is true in part because I do not think that this sort of policy would suffice to solve the problem of skilled emigration. There are two reasons for this. The first is that the policy here seems to be only one pathway through which an ethically mandatory end might be reached; it does not count as an ethically mandatory means. All states of the world with the capacity to do so have an obligation to work for global justice —which includes both economic and political rights. This is a complicated task, and it is made more complex because that task necessarily falls on a plurality of political

4 "Most of economics can be summarized in four words: 'People respond to incentives.' The rest is commentary" (Landsburg 1993: 3).

agents, each of which has obligations to the world and to their own citizens. If a political community decided to emphasize some other pathway —through extensive development policies, for instance —it might therefore be able to make the claim that it was now doing enough. I think actual states making this claim are suspect —no state is, to be brief, doing *enough*, however we might understand that concept. But I do not want to therefore describe as mandatory a policy that is, instead, one possible means to a mandatory outcome.

The second reason for this relates to what I called *paternalism* in the book; I am now convinced that I should have described this in other language. I believe, to put it in the most general terms, that politics in the ordinary sense requires that political coercion be justified to those over whom political coercion is exercised, and that democratic contestation is part of that justification. Politics is only justified when those people over whom power is exercised have a right to contest that exercise —to have, in short, some role in speaking back to, and in making, the policies that control them. I think that this is not only morally required for legitimate governance, but also empirically required as a goad against moral corruption. (When you do not have to answer to someone, it is tempting to infer that their interests and needs are exactly would you would most want them to be.) What is most problematic about the proposed restrictions on emigration is that it proposes to use some people —the would-be migrants —as sites for the benefit of others; and neither of the parties in question —neither the would-be migrants, nor those whose interests are at stake —will have any meaningful say in how that policy is drafted or interpreted. This is a fairly significant problem; it could not be solved, I think, without a more robust set of international institutions than we now have, and I am not sure that we have any morally permissible pathway from where we are now to those institutions. If we stay with the politics we have, then, we would have to have domestic citizens voting for a policy that mildly disconveniences them, significantly disconveniences the would-be migrants, and to some unknown degree provides advantages for foreign citizens. I think we would be unlikely to have such proposals raised; even if the empirics worked out —which I think they wouldn't —I think we would be unlikely to be virtuous enough to avoid the temptations to mold the proposals until they ended up shifting the balance in our own favor. If I have not written about these proposals, it is because I think we are unlikely to end up doing this, and doing this well. I would end, though, with this admission to Carens: if he could show me that Rapoport is wrong, that the policy would actually help development, *and* that the policy were not susceptible to capture by the self-interest either of voters or of those politicians beholden to them, then I would vote for it. I think it is unlikely,

given the tenor of the ongoing election in the United States, that I will provided the opportunity to do so any time soon.

## 3. ESZTER KOLLAR: ON ETHICS, THE BODY, AND THE REALM OF THE POLITICAL

I mentioned above that the individual has, on my view, a right to his or her own plan of life; to build a life from the inside, that makes sense to him or her, even if some other form of life might help others. This thought is not, of course, unlimited; there are political constraints on what we can do — my freedom is rightly limited by the freedom of others, most notably. The appeal of the thought, though, is undeniable; it offers us a way of grounding the thought that there are some prices that politics cannot make us pay, and some sacrifices we cannot be asked to make. The question, though, is what we might use to understand the limits of what politics can ask of us. One way of asking this question involves simply asking the question from within political philosophy: what do we have good reason to think should be immune from political coercion? What can people not be made to do? Another way of asking this, though, inquires about the conceptual, rather than the moral, limits of the domain of the political. What is that is immune from state coercion *ab initio*? What sorts of things are not subject to the wrangling of collective political decision-making?

As an example of this latter strategy, we might note that Rawls does not subject all goods to the principles of justice. Natural primary goods, for instance, are prepolitical, in the sense that they are not the product of the political society at issue, and so not subject to redistribution by that society. We may justly redistribute the money I earn with the labor of my hands, for instance, but cannot justly redistribute the hands themselves. (Even if I have three hands and you have none, I am free from redistributive surgery.) The money is the result of a political system, subject to collective political decision-making; the hands are natural, if by that we mean only that we do not look to political society to understand how they come into the world, or to whom they belong.

At this point, we might introduce the objection of Eszter Kollar. Kollar offers a challenge to my argument that the labor we perform is rightly regarded as immune from collective political interference. I tend, in brief, to think that forcing specific acts or patterns of acts is akin to the taking of the body itself; while not as invasive, it involves the state's trespass on an area in which it has no right to proceed. The state can take my money, I have argued, but it cannot (rightly) force me to perform a particular form

of labor. Kollar's challenge, though, is why we should be satisfied with this particular cut between the political and the pre-political. She imagines several alternatives: one extreme view, given by Cecile Fabré, argues that even the body, dependent as it is on collective political decision-making, is rightly (at least in principle) subject to collective political control. On this view, we have no pre-political rights over the body, and *a fortiori* none over the money that body manages to earn. My own view, taken as the opposite extreme by Kollar, argues that the Rawlsian cut is correct: we have reason to regard the funds we earn as subject to political control, but not the body itself, nor the specific acts undertaken by that body.[5] Kollar asks, though: why are these the only options open to us? What reason do we have to not seek a more moderate solution, on which the body is neither as open to collective interference as on Fabré's view, nor as immune as on my own? Kollar imagines a view on which we have robust, but limited, rights to regard our bodies as immune from collective political control; in cases of serious emergency, so long as our autonomy can be otherwise protected, we might have the right —on such a view —to insist upon particular forms of labor. What can be said to rule this sort of possibility out?

Kollar's argument here is significant, and I think her challenge requires me to focus on something I have often simply ignored: what is it that makes something a valid part of the world of political life, versus something to which people have strong rights against political control. Kollar believes, though, that the difference between money and the body is a difference in degree; both are subject to collective political control, at different times and in different ways. I think there is a difference in kind; money is distinct from the body, and from the actions undertaken by that body, in ways we have reason to respect. How can I vindicate this idea?

I cannot say anything that is sufficient, I suspect, but there are at least three thoughts that occur to me. The first is that the body is distinct from money in how it relates to human agency. Wealth is a social primary good; what this Rawlsian concept means is that money is useful for a great many plans of life, but does not count as more than a mere means. One who regards his money as sacred, as something more than a tool for the acquisition of other people's stuff and time, is making a mistake about the point of money. Money helps the self get further along the road to the ends it has chosen. The body is, instead, *constitutive of that self.* Having a body is a condition of having any ends at all. This is why, for me, Fabré's argument

5 I would note, in passing, that the libertarian view would include both money and the body as subject to this sort of pre-political right; Robert Nozick's vision of the minimal state is produced precisely from the conviction that people have natural rights both to the body and to what that body acquires through labor and transfer. If I am extreme, then, there are at least those whose view is more extreme (see Nozick 1974).

is unconvincing; it simply does not understand the relationship between the body and agency, between the self we are and the body we inhabit. I believe that something like this applies not simply to the body, but to the actions performed by that body. The state can, of course, tax my earnings, and so indirectly cause me to shift my patterns of agency in response; perhaps I would have to work more hours, were my tax bill to go up. But someone who proposes to force me to do a particular thing, in contrast, tells me that I shall pursue a particular end —in medicine, that I shall take the patient's ends as my highest good, shall perform this role in a particular place, and so on. This is the direct provision of particular ends, in a way that seems to not just constrain my ends but to constrain my very person, and to replace it with another. My body, my agency, my self —all these are devoted, in a limited way, to the agential choices of another. This seems to be at the heart of the condemnation of specific performance in the legal history of the United States; it runs up against the Constitutional prohibition of slavery. If there were not something different between the body and money, this would be a gross oversimplification —or, perhaps, evidence that the worst rhetorical excesses of libertarians are correct, and all taxation is indeed equivalent to forced labor. I think, instead, that forced labor is something different, and forced labor short of chattel slavery can be quite wrong indeed. If this distinction in kind is true, then we might have a right to be free from particular forms of labor even when the costs involved are quite great for others. Think, for instance, of the novel *The Children of Men,* in which the human race loses the ability to reproduce (James 1992). There exists one woman —Julian —who is capable of carrying a child to term. Would it be acceptable to force Julian to perform the particular sort of labor involved in reproduction? The consequences of not doing so, after all, would be the annihilation of humanity itself. My answer, though, would be that we are not right to force this sort of labor on Julian, even at the cost of universal extinction. We do not have a right to treat the body in this way; Julian has rights to that body that trump even the existence of the human race.

Kollar could resist this, of course, either by simply saying that Julian might be rightly coerced into reproductive labor, or by (rightly) arguing that reproductive labor is distinct from other forms of labor (see Satz 1992). Nonetheless, there is still —on my view— something disquieting about all forms of enforced labor, even when they involve less intimate forms of labor than pregnancy. This leads to a second consideration: the body seems, not to put to fine a point on it, prepolitical. This is simply to disagree with Fabré, of course; on my view, Fabré —and, to a lesser degree, Kollar —ignore the ways in which money and the body have distinct relationships with political society. Both can of course be shown to depend, in different

ways, on political processes. The long-term health of the body requires the existence of a stable society; hermits can exist, but they don't exist for long. Money, in contrast, is necessarily social, and cannot exist but for socially-created rules. (A solitary castaway who builds a currency regime is just staving off boredom.) The difference, then, is that one is a *practical* necessity, while the other is a *conceptual* necessity. Society is a practical necessity for the body to continue being an integrated body. Money, though, does not even come into existence as a meaningful concept in the absence of those forms of human relationship that are constitutive of society. I think this is another way of rephrasing Rawls's idea that the natural primary goods are immune from redistribution, since they are not the product of social processes; the social goods are social precisely in that their existence only happens once society builds norms for those goods' creation and allocation. There is, in short, an important difference in kinds between labor and taxation, and this could at the very least ground a resistance to accept the middle path Kollar's proposal represents.

My third reason for resisting that pathway, though, is quite simple: even if we can arrive at cases in which we would be right to constrain labor directly, and to insist that some perform labor for the sake of others, we ought not give ourselves permission to act on that right. As I argue in the book, there seems to be a structural similarity between torture and forced labor: we can all come up with hypotheticals under which they would be morally permissible, but we all do (or ought to) recognize that we ought not give states as we know them the permission to determine that such an eventuality has arrived. States are made of people, and people are subject to self-serving analyses and moral corruption; the right to do what is generally prohibited, in *these specific circumstances*, often ends up becoming the right to do that prohibited thing *when it is expedient*. I think there is a reason, with torture, to insist that we ought to refuse to grant the permission to use it, even when we are aware that great benefits would follow —or great evils avoided —from that torture's use.[6] The program described by Kollar is not a particularly egregious evil; certainly, forced labor is not as evil as torture, and Kollar's proposal involves insisting that one perform a particular job in a particular society, while leaving space for other autonomous pursuits —which is about as gentle as forced labor could be. Nonetheless, forced labor still strikes me as the right description for what is demanded of the educated citizen under her proposal, and I think we are right to prevent even the mildest versions of the policy. If political history teaches us anything, I think it is that what we rarely give ourselves permission to do what will eventually be done with frequency and

6 See Shue (1978).

enthusiasm; I am convinced that we ought to avoid giving ourselves this sort of permission, even if my other arguments about the nature of labor fail.[7]

In the end, Kollar, like my other commentators, reflects a distinct vision of the relationship between politics and ethics. For her, the realm of politics ought to be understood as involving even the body; for me, ethics itself requires that the domain over which we are permitted to exercise political power is curtailed. There is, in other words, a very great deal of philosophical work happening in the margins, with both of us operating from unstated visions of how it is that we might relate the demands of ethics to the realm of the political. I have learned much from her exchanges with me, as I have with Oberman and Carens; I am grateful to them for their care and attention, and look forward to the debates to come.

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7 Terry Pratchett's Sam Vimes expresses this well. "Beating people up in little rooms —he knew where that led. And if you did it for a good reason, you'd do it for a bad one" (Pratchett 2005).

# Responsibilities In An Unjust World: A Reply to Carens, Kollar, Oberman, and Rapoport

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## ABSTRACT

In this paper I respond to important concerns about the policies I believe poor developing states may be permitted to use in responding to losses associated with high skill migration, when those losses do indeed exist. I take up Joseph Carens's invitation to broaden the debate to consider the moral duties we may have surrounding the brain drain debate, given our unjust world. In response to Eszter Kollar, I show why the liberal state may sometimes justifiably control how citizens use their talents, especially in insisting that they use them to reduce compatriots' neediness. I consider Kieran Oberman's challenge that proper consideration of the human right to emigrate blocks the state's ability to use programs such as compulsory service ones. I reply to Hillel Rapoport's presentation of empirical evidence suggesting that there are important gains to be secured from high skill migration. I show why the empirical evidence presented is insufficient to make the relevant case. I also show why none of the challenges presented are sufficient to block the normative project of investigating how poor developing states may permissibly respond to losses associated with high skill migration. In particular, I argue that carefully crafted compulsory service and taxation programs may permissibly be used by such states under certain conditions.

**Keywords:** brain drain, migration, service, tax, moral duties, right to emigrate.

## INTRODUCTION

The contributors offer a stimulating collection of essays. I thank them for their reflective comments on whether and, if so how, high skill migration should matter in attempts to reduce global injustices. In what follows I cannot respond to all the many fine points made, however, I will take up at least one central issue raised by each author. In this paper I address answers to questions raised by Joseph Carens, Eszter Kollar, Kieran Oberman, and Hillel Rapoport, respectively, namely: What are our moral duties in an unjust world and do they include duties to use our skills in ways that benefit the community? May the liberal state rightfully control citizens' use of their talents, insisting they address the needs of compatriots? Does adequate consideration of the human right to emigrate block all attempts to implement "compulsory service" programs? What is the role of empirical evidence in debates about appropriate policy responses to losses associated with the brain drain and does our current state of knowledge about that evidence suggest there is no need to be concerned about high skill migration?

## 1. WHAT ARE OUR MORAL DUTIES IN AN UNJUST WORLD? A RESPONSE TO CARENS

There is much in Joseph Carens's rich discussion worthy of detailed engagement. Here I focus mainly on his core invitation to broaden out the discussion to consider the moral duties involved with high skill migration, especially in an unjust world. As Carens says: "Leave aside for a moment questions about legal restrictions. Do skilled medical personnel in poor states have a moral duty to stay at home and put their abilities to use in serving their fellow citizens? Do they act unjustly if they move to a rich state, even if they are legally free to do so?" (Carens 2017: 141) As Carens views the arguments of the book,

> "we don't really get the fuller sort of inquiry that would be required to explore questions about the nature and extent of our moral duties to contribute to the political communities in which we live and whether we have any obligations beyond what can be extracted from a formal contractual arrangement. This is an important question for the brain drain because if skilled medical personnel in poor states only stay at home as long as it takes to fulfill the requirements of a reasonable contractual agreement, the existence of such policies *will not do much to remedy the problem*" (Carens 2017: 142, added emphasis).

Now, I disagree that the package of proposals I offer concerning service and tax will not do much to address core problems unless citizens remain in countries of origin. These are empirical issues to a large extent, but if Jagdish Bhagwati's calculations about taxation are to be relied upon, the revenue received could in fact make significant contributions to remedying deprivation (Bhagwati and Hansen 2009).[1]

Let me make two other points of clarification before I discuss his central challenge. First, even though I argue for adopting policies that have the effect of managing migration in ways that promote fair outcomes for countries of origin, I do not assume that my policies will in fact restrict emigration. I accept that many people want to leave their countries of origin and I offer policies that try to ensure countries of origin are not always net losers from such arrangements. My primary purpose in the book is to argue for a view about fair terms of departure in efforts to remedy the situation in which terms of exit often heavily favor destination countries and migrants, and disadvantage those left behind in countries of origin. So when skilled citizens leave countries of origin that have subsidized the acquisition of such skills, and they leave in ways that create heavy losses for those countries of origin, what if anything, may such citizens permissibly be asked to do in attempting to address such disadvantage?

In preparation for an answer to that question, we have to confront another: how do we improve the situation in countries of origin so that citizens can genuinely choose to remain? How should we address the root causes of why people would like to leave in such high numbers? I have quite a bit to say about that (for instance, Brock 2009a). But I note that whatever we do to improve matters, it is likely that significant wage differentials between countries will remain. That is likely to be a near sufficient reason for many to seek to migrate. So the issue of ensuring fair terms of departure for poor, developing countries of origin is still salient, even if we are successful in improving quality of life in countries of origin.

So, on to the central invitation. I very much welcome this opportunity to engage in discussion about the moral duties. In fact, it was reflection on the moral duties that led me towards the political and legal solutions for which I advocate. In order to see why, I need to back track and explain the reasoning that led me in this direction. As I later also illustrate, Carens' own reasoning on these issues suggests a similar progression once we

1 Apart from Kollar, most of the authors ignore my proposals concerning taxation. This is slightly odd given that these are meant to be equally important to the service proposals and, in many ways, take account of concerns that some might have with service. The two policies might be seen as a good combination package that countries should adopt together: some of the perceived weaknesses with one policy measure can be accommodated by the other.

begin the moral analysis.

When we consider our moral duties in an unjust world, we need to think about a range of prior and surrounding questions such as these:

(MD1) What do people need for a decent life?

(MD2) What can reasonably be expected of others in helping people to secure a decent life?

(MD3) What is my share of responsibilities in helping people to secure decent lives?

In answering the first question, what a decent life minimally requires, I argue why the following are core areas for concern (e.g. Brock 2009a; Brock and Blake 2015: ch. 2):

(C1) Enabling people to meet their needs

(C2) Protecting core liberties

(C3) Securing fair terms of co-operation

(C4) Supporting social and political arrangements that can underwrite (C1)-(C3).

I also argue that just and effective institutions are central vehicles that can deliver on what we need for decent lives. In addition to global institutions, there are many state-level institutions that should be a focus for concern. State-level institutions are an important site of co-operation that ought to aspire to fairness. Furthermore, in the world we actually live in, much responsibility for ensuring core ingredients necessary for decent lives is devolved to states. For instance, states ensure the availability of key goods such as healthcare, safe water, sanitation, education, and security. States are also ideally positioned to regulate and develop the economy in pro-poor or otherwise beneficial ways. Effective, legitimate, and accountable states can play an important part in reducing injustice in our world today.

So what is my share of this duty to assist with (C1)-(C4), in particular, my share of helping to provide strong, just institutions and effective states? It seems to me that discussion towards an answer might start off assuming that we all have equal duties to assist, but further reflection could plausibly yield a more complicated picture that makes use of other relevant factors such as capacities to assist, contributions to the problematic situation, and patterns of benefits. For instance, because of the important connection between the ability to provide core goods and services (such as healthcare or education) and those capable of assisting with their provision, it may be reasonable to expect those with such skills to play a special role in certain conditions. In working out what special role such people may play, it is

relevant to consider what others may also reasonably be expected to do, both within my country and outside of it. It is plausible to arrive at a view that we share responsibilities for remedying the situation and that our shares may be adjusted depending on how many others are available to shoulder responsibility, and along with a variety of other factors, such as their different capacities, patterns of relevant benefits, and contributions to unjust institutions that persist.

Would it be fair to expect people to stay when others are doing nothing? Should we encourage people to stay under certain situations where this involves grave personal sacrifice? If so, what of their hopes and dreams? I think here the kinds of contributions —levels of sacrifice, if you will —we are asking people to make in remaining is highly relevant. What is at stake for a citizen in asking her to stay will depend on a number of situational features. It is one thing to ask a doctor of Xhosan heritage to remain in South Africa in a post-apartheid world; it is another to ask her to remain in 1986, when her basic human rights would not have been secure. A doctor who chooses to remain in Syria in 2016 is a moral hero, clearly performing supererogatory acts, not someone merely discharging his basic moral duties. Reflection on the kinds of contributions people are being asked to make informs my view about what kind of government must minimally be in place, as an important indicator of the kinds of sacrifices people are being asked to make. A situation in which a government is making good faith efforts to protect basic human rights (and being somewhat successful at doing this) typically requires much less sacrifice from those who remain than a situation in which this is not the case, and constitutes a key reason why asking the Syrian doctor to remain now or the Xhosan doctor to remain in 1986, calls for heroic acts rather than basic moral duties. So, while there might be a place for social norms that encourage people to stay, we have to be mindful of excessive burdens. People can help in all sorts of ways other than being present in a community and putting their own lives at risk. We should also not ignore the important role that large revenue streams into public budgets can play in securing core ingredients for decent lives, at least under the right circumstances.

Furthermore, human beings are highly social creatures with a deep sense of fairness and reciprocity that operates within their relevant groups. The behavior of others has a reasonably strong bearing in formulating views about what fairness requires of me, here and now. In short, we have to make room for the reasonable thought “I’m willing to play my part on condition that similarly placed others do theirs”. So an appreciation of others’ duties, how they are discharging them, and how duties will be

enforced, is relevant to my sense of what moral duty requires. Another highly relevant issue is what to do in a situation where others are *not doing their fair share*. What, if anything, can be done to enforce compliance with a fair allocation of duties? In these ways, I think reflection on these aspects of moral duties lends itself to consideration of the reliable authorities that may be able to enforce compliance. And so, inevitably, I believe we get to the political and legal issues from the moral reflections. Here, consideration of all the agents who share responsibilities is relevant as well. Agents from the developed world have a huge role to play. To give one example, they undermine states' abilities to be effective by supporting a variety of global practices and institutions that undermine revenue-raising capacity in all countries. In virtue of their capacities to make reforms, their contributions to the problems, and their patterns of benefit, it is clear their share is large. But what if they refuse to play their part or do too little? What are the moral duties in such cases? Of course, agents from the developing world might well press on, arguing that they ought to do more. But when their calls fall on deaf ears, what else may they do? When there is a high level of deprivation, what may developing countries do to solve their own problems themselves, in a context in which affluent developed states are not complying with the demands of justice? Under relevant circumstances, some in developing countries may be asked to do "a bit more" and a lot will depend on what "a bit more" consists in. Consider some of the things called "compulsory service programs" in our actual world:

(CS1) A one-year module of underserved community service and training is part of the degree requirements (call this a standard residency requirement).[2]

(CS2) There is a delay (such as one year) between completing the education necessary to be awarded the degree and the awarding of the degree.

(CS3) There is a requirement to complete a module of underserved community service (of one year's duration) as part of the requirements to gain a license to practice in that state.

(CS4) There is a requirement to complete a one-year term of under served community service in order to be considered for postgraduate training.

(CS5) Service in underserved communities is required on completio of the degree for a period of one year.

2 We could offer a perfectly good educational justification for this. We surely want people to be able to apply their skills successfully and this requires a period of practical training. If governments offer these practical training opportunities they may defensibly direct service to underserved areas.

Notice that none of (CS1)-(CS4) restricts rights to emigrate in any straightforward way. In the second option, many students may choose to spend the year between completion of their studies and award of the degree within the country. They may wisely judge that they will be more employable in other countries once they receive their formal qualifications. During that year they may be heavily dependent on government employment and governments may be able to steer them towards underserved communities. This may have the same effect as (CS5). So, none of (CS1) through (CS4) presents any relevant problems concerning restrictions on emigration. All these options are entirely liberty respecting and, through careful design, manage to secure service for underserved areas. A country could adopt a so-called compulsory service program such as any of (CS1)-(CS4), and I expect few of the contributors to this symposium would have any problems with this form of so-called compulsory service.

So, what about the seemingly different proposal labeled (CS5)? Does that present unreasonable burdens? Does it remove migrants' rights to leave?

One very important consideration is how any contracts to serve would be enforced. On my preferred account of enforcement, people should be permitted to leave states even if they do not comply with their contractual agreements. Compensation for breaches of service contracts should be pursued as we do with other breaches of contract. So, to take one example, consider violations of agreements concerning child support or alimony. Host countries have used wage garnishments and denial of licenses to enforce contracts. Destination countries have a range of ways to help enforce contracts, and there is some good precedent for co-operation here, if we consider the legal arrangements around child support and bilateral treaties that are aimed at ensuring compliance.[3]

Do programs such as (CS1) —(CS5) present unreasonable burdens? I have suggested that none of (CS1)-(CS4) do present unreasonable burdens; in fact they are rather light on burdening those with great capacities to help others, capacities that have been developed while making use of public resources. (CS5) demands a little more in asking migrants to delay plans for one year, but not so much more that it crosses into being an unreasonable burden under the circumstances. (We see further defense of this claim in the next section.) In my view, a case can be made that each of (CS1)-(CS5) could constitute the "bit more" a citizen of a developing country might reasonably be expected to do.

3 I should also note that I have argued for other mechanisms such as the ability to buy out of service contracts, so there are already other provisions in place that make migration unproblematic, should someone wish to leave.

Notice again how I have indicated that the core question is this:

> When there are net losses from high skill migration, what may developing countries do to solve their own problems, in a context in which *affluent developed states are not complying with the demands of justice*?

My arguments are focused on helping developing countries formulate permissible policies that they can implement here and now, without having to wait any longer for non-compliant developed world actors to discharge their duties. In other places I do discuss the duties developed world actors have (e.g., Brock 2009a; Brock 2014; Brock 2009b), but here my focus is firmly on developing states and the actions they may permissibly take.

Let me emphasize some other core features of my account that are necessary for such normative views to be justified and are useful in rebutting further objections. I argue that a poor, legitimate, developing state may implement carefully crafted compulsory service and taxation schemes at least when five important sets of conditions are met. For instance, states must meet legitimacy conditions, citizens must have relevant responsibilities, and certain background conditions must be met.[4] Let me emphasize three particularly relevant background conditions here:

(BC1) Evidence from the particular country indicates that skilled citizens can provide important services for which there are severe shortages.

(BC2) Governments have invested appropriately in training of skilled workers to provide for their citizens' needs and to promote beneficial development.

(BC3) Losses that result from skilled workers' otherwise uncompensated departure would not adequately be compensated for by benefits that result from citizens who leave.

For compulsory service programs such as (CS5) to be permissible in the cases that are my particular focus, governments must have made students aware of the fact that they will be expected to meet needs on completion of their training for a short period (such as one year), and such expectations should be specified in a contract students would sign before embarking on tertiary-level training. In addition, being present in the country must be important to remedying the deprivations, the compulsory service program should not require unreasonable sacrifices, and the costs of staying should not be unreasonable.

4 As proxy measures, states exercise power legitimately when they make sufficiently effective and credible efforts to protect human rights and provide other core goods and services (e.g. Brock and Blake: 2015: ch. 5).

For taxation programs to be permissible for the cases in view, in addition to the state's being legitimate, and the relevant background conditions and moral responsibilities applying, it must be the case that taxation of those skilled citizens would assist in remedying deprivation. Governments should clarify expectations by specifying such taxation arrangements in an explicit contract which the student is required to sign before accepting the opportunity for tertiary-level training. The taxation program should not require unreasonable sacrifices.

Though most contributors to the symposium ignore the taxation proposals, it is plausible to see them as part of a permissible package. I take seriously the idea that no matter how desirable a particular developing country may be, in a world characterized by significant disparities in income or wages, this will inevitably draw some citizens away. So the salient question is: what constitutes fair terms of departure? Ongoing taxation commitments for a limited period may be part of such fair terms.

Before I conclude this section, notice that some of Carens's own reflections on the moral duties nicely mirror the moves I make myself. Consider, for instance, these quotes from Carens:

> "What sorts of norms and values is it morally permissible for a political community to seek to transmit with respect to the concerns raised by the brain drain? For example, would it be morally acceptable for a poor state to teach children that those with special gifts and opportunities for advanced training have a particular obligation to use their gifts and training in ways that will benefit the community? Would it be morally acceptable to tell students that they should not seek medical training unless they are willing to commit themselves to working within their home state over the long run, at least under normal circumstances, … Would it be morally acceptable if this sort of expectation became part of a wider social culture, so that most people in a poor state felt it would normally be wrong for skilled medical personnel to move to a rich country?" (Carens 2017: 142).

So, how does he believe we should answer such questions?

> "I must confess that I do not have a clear answer. On the one hand, like Brock and, I think, more than Blake, I am sympathetic to the idea that a just society can include legitimate expectations and social norms with respect to the ways in which people make use of their talents and skills. … On the other hand, we don't live in a just world. So, I would also be sympathetic to a doctor or nurse from a poor state who said, 'Why should I be the one to bear the burdens of serving the

> health needs of this community especially since they are in important respects the byproducts of an unjust social order? Why shouldn't skilled medical personnel from rich states be the ones with a duty to come and address these problems?' … To be frank, that is just the starting point for some of the intellectual puzzles that emerge when we seek to talk about moral duties in an unjust world" (Carens 2017: 145).

As Carens's own preliminary reflections suggest, the moral issues draw us into consideration of everyone else's duties as well, as I suggested. And once we make that move, other salient considerations quickly line up, such as the ones I've emphasized. As I have tried to show, the political and legal solutions can offer important clarity missing when we consider the moral duties in isolation, apart from issues such as duty content, numbers of duty bearers and the conditions under which duties are triggered.

I should address very briefly a matter that both Carens and Oberman raise, namely that I fail to say much about what rich states ought to do with respect to the brain drain problem. I am not sure that is quite fair, given the arguments I make in *Debating Brain Drain*, especially Chapter 2, and elsewhere (such as in Brock 2009a: ch. 8; and Brock 2009b). But at any rate, the focus in this book is on what poor developing countries may permissibly do to solve their own problems themselves. So we need to focus on what is under their control. They may wish that developed country agents discharged more of their duties and may regret the existence of immigration restrictions in other countries. But getting developed world agents to change these features is not directly subject to their control. I should also emphasize that I do discuss immigration restrictions in other places (e.g. Brock 2009a), and given those extended discussions and the fact that my core question here is a different one, space limitations require focusing on the neglected question of what developing countries may do.

## 2. DOES THE LIBERAL STATE HAVE A RIGHT TO CONTROL CITIZENS' USE OF TALENTS? A RESPONSE TO KOLLAR

As Eszter Kollar argues, the following important outstanding question remains with my position:

> "The challenge for Brock, then, is whether she can provide an adequate justification of compulsory service consistent with her liberal commitments. Does she think that a person's right to control the use of her talent can sometimes be restricted by liberal states? The conditions under which such a restriction is justified would

need to be spelled out and shown to be consistent with liberalism" (Kollar 2017: 114).

So, can liberal theorists provide an account of fair terms of co-operation that include a justification for how and why the state may restrict the use of our talents and skills? I think they can and I argue the case using the work of John Rawls, arguably the most prominent liberal theorist.

In *Justice as Fairness: A Restatement*, Rawls makes explicit some important ways in which we are to understand the Principles of Justice and the priority to be given to his first principle of justice concerning the weight to be accorded liberty. The first principle states that "Each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all" (Rawls 2001: 42). Rawls adds this important clarification to his principle: "This principle may be preceded by a lexically prior principle requiring that basic needs be met, at least insofar as their being met is a necessary condition for citizens to understand and to be able fruitfully to exercise the basic rights and liberties" (Rawls 2001: 44). This seems to be a very sensible clarification to offer given the role basic needs such as security and subsistence play in being able to enjoy any of our civil and political rights, as Henry Shue and others have urged (Shue 1980; Peffer 1990). In this important discussion, Rawls not only clearly concedes that a principle of basic needs fulfillment may well be lexically prior to the principle of equal basic liberties, but he also adds further important points, such as that while there is a general presumption against imposing restrictions on liberties, there can be sufficient reason to do so (Rawls 2001: 44-47). Rawls continues the discussion with these important concessions:

> "no priority is assigned to liberty as such, as if the exercise of something called 'liberty' had a preeminent value and were the aim, if not the sole, end of political and social justice. While there is a general presumption against imposing legal and other restrictions on conduct *without a sufficient reason*, this presumption creates no special priority for any particular liberty. Throughout the history of democratic thought the focus has been on achieving certain specific rights and liberties *as well as specific constitutional guarantees*, as found, for example, in various bills of rights and declarations of the rights of man. Justice as fairness follows this traditional view" (Rawls 2001: 44-45, added emphasis).

Rawls goes on to state quite clearly that addressing needs is a constitutional essential, emphasizing that "… a social minimum providing for the basic needs of all citizens is also a constitutional essential" (Rawls

2001: 48). Furthermore, "the first principle… covers constitutional essentials" (Rawls 2001: 48). Here Rawls is making explicit that needs and liberties have equal standing as important constitutional essentials.

So I think we can marshal a general argument concerning the importance of need satisfaction via at least two arguments. One concerns the equal importance of two weighty constitutional essentials. The second stresses the importance of ensuring for all citizens the basic liberties of citizenship: everyone has a claim to the basic liberties of citizenship and the social conditions, including satisfaction of needs, that make this possible or worth having. So everyone has a prior claim to appropriate satisfaction of their needs. Rawls does not address the issue of how we might press people into the service of meeting needs, but it seems the question *must be confronted* given the priority and importance to be accorded the satisfaction of needs. My work in *Debating Brain Drain* is aimed at answering such questions, in particular for conditions of highly scarce resourcing. My short answer is that certain kinds of reasonable contributions —sacrifices if you will —can be required of citizens under specified conditions. Much work is done by the particular conditions and the shape of the particular programs according to which citizens would be making contributions. In the last section I have argued why developing countries may make use of carefully crafted programs that incentivize or require such service, such as all of (CS1)-(CS5) discussed in the previous section. We can marshal an argument that there is sufficient reason in the core cases that characterize "poor, but responsible" (Brock and Blake 2015: ch. 4) to allow deprivation to have a bearing on liberty.

There are, of course, important questions of when and where we may "force" people into serving others in liberal societies. I think the framing of such questions often ignores the ways in which liberal societies standardly require such contributions —coercion, if you will —in order to secure the very goods liberals think of as worth having. Consider examples such as compulsory jury duty and income tax, both of which are standard components of the liberal tradition of justice. Many liberal states have practices of compulsory jury duty in which all sufficiently competent citizens are required to make themselves available to serve on juries. I believe this can be justified on something like the following argument which, I hope, appeals to Kollar, because it considers what all citizens owe one another and government may justifiably enforce, as each plays her part in upholding fair terms of co-operation. It also invokes her preferred view about fair reciprocity.

We need a fair way to secure significant interests such as those protected by the right to a fair trial. Those who are sufficiently competent to participate appropriately in trials have the relevant capacities to secure

the interests protected by the rights. So it is fair to ask those with such capacities to assist, so long as the sacrifices demanded are reasonable. One important factor in deciding whether or not the sacrifices would be reasonable is the duration of time required for the trial. We seem to accept that quite significant burdens can be placed on individuals on a temporary basis. These burdens might include that for the trial's duration, the juror is expected to defer her plans, aspirations, and projects —including those related to her work. This kind of coercion is justified because of the importance of what is at stake in ensuring the core interests, rights, and needs of fellow citizens in a well-functioning state. The basic interests being served are ones that are core for all human beings, and ones that states have responsibilities to secure for all citizens.

In my view, the argument for compulsory jury service generalizes to securing other core interests essential to enjoying basic liberties, such as enjoying basic healthcare and education. The extension to requiring capable citizens to assist with these other core interests on a temporary basis seems permissible via an exactly parallel argument. Of course, it is better if those capable of assisting with core interests (such as health, security, or education) do so voluntarily, and are attracted to positions using normal employment procedures and market incentives. But the question arises about what to do when there is radical under-supply relative to the needs for such services. What may a liberal society do to remedy matters? I have been arguing that carefully designed programs may incentivize or require such conditional service. The details of my approved programs all highlight the low levels of coercion required, along with the many options available for avoiding coercion altogether. Citizens being in severe need may have a bearing on what people are at liberty to do with their skills, especially after taxpayers have subsidized the very acquisition of those skills.

I do not mean to suggest that all issues have now been resolved through my arguments. What I do hope to have established in this section is that there are tools from within the liberal tradition that (1) show that what I am proposing is perfectly justifiable from within the liberal framework, (2) that, indeed, the liberal tradition already presupposes their use in important respects, and (3) there are ways to increase service provision for the needy that are entirely respectful of liberty and fair reciprocity.

I have space to deal briefly with only one other issue raised by Kollar and I address her claim that I view taxation and service as normatively on a par. I believe we have different interpretations of the passages she cites to substantiate her case for this position. To be clear, in my view, imposing taxes is easier to justify than requiring people to serve. In *Debating Brain*

*Drain*, the order in which I discuss these issues along with some of the discussion attached to those justifications —such as not wanting to let citizens off too lightly by assuming the payment of taxation would be sufficient to discharge duties —attempted to make these points. However, I could have been clearer on these issues, and I thank Kollar for raising them.

## 3. THE APPEAL TO THE HUMAN RIGHT TO EMIGRATE AND PHANTOM CONDITIONS: A REPLY TO OBERMAN

According to Oberman, I argue for emigration restrictions and, because of the importance of the right to emigrate, only emergency situations could justify such restrictions. He believes that proper consideration of the human right to emigrate supports his view. He also outlines an emergency justification for emigration restrictions. In this section I show why the appeal to the human right to emigrate does not support his case against me as clearly as he maintains.

A few points are worth underscoring before we get to that core argument. First, I have been at pains to show how carefully crafted proposals need not actually entail restrictions on emigration that are problematic, as (CS1)-(CS4) in Section 1 illustrate. Well-designed policies may have an indirect effect on the timing of migration, so that citizens delay their departure or anyhow their departure is regulated to ensure fair terms of exit. Good policies need not prevent people who would like to exit a state from doing so.

Second, we have seen that the relationship between liberty and need satisfaction is complicated in the liberal tradition, even under the Rawlsian assumption that favorable conditions obtain. As we saw in the last section, it is not the case that only emergencies can justify restrictions on important personal liberties. Through exploring some of Rawls's work, we see how the liberal tradition must confront this issue in perfectly normal, non-emergency situations. After all, the background assumption in *A Theory of Justice* is that reasonably favorable conditions exist, such that there are sufficient resources for everyone's needs to be met. No emergency situation is encountered in these situations, and yet in such situations Rawls maintains that there can be sufficient reason to limit liberty in virtue of neediness.

Oberman's main argument starts with recognizing the importance of the human right to emigrate. However, as I show next, his discussion does not settle the debate because it fails to appreciate all except one human right. There are plenty of relevant human rights that are unfulfilled in the

situations that are my core focus. To name just a few of the rights that are relevant, there are rights to health, adequate standards of living, education, and self-determination. The question is what to do in cases where multiple human rights are under threat. So, I do not think the appeal to human rights documents proves to be as decisive as Oberman thinks. Even from within these human rights documents, the state has much leeway about balancing salient issues, when there are several human rights in play. Let us review some details.

Consider UNDHR for some salient rights and, in fact, some helpful advice about how to weigh up the rights and duties citizens have. Articles 13, 25, 26, 28 and 29 are all important.

Article 25.

(1) Everyone has the right to a standard of living adequate for the-health and well-being of himself and of his family, including food-clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

(2) Motherhood and childhood are entitled to special care and assistance.

Article 26.

(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

Article 28.

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29.

(1) Everyone has duties to the community in which alone the free and-full development of his personality is possible.

(2) In the exercise of his rights and freedoms, everyone shall be subject

> only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
>
> (3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations (UNDHR 1948).

Article 13 does indeed recognize the relevant rights to emigrate:

> "(1) Everyone has the right to freedom of movement and residence within the borders of each state.
>
> (2) Everyone has the right to leave any country, including his own, and to return to his country" (UNDHR 1948).

However, articles such as 28 and 29 make clear that this is not any kind of absolute right and that it may be limited in attempts to recognize others' rights and freedoms, "the just requirements of morality, public order and the general welfare in a democratic society" (Article 29). If we consider the human rights documents in their entirety, we see ample support for the project of trying to determine what fair contributions people may be asked to make in establishing societies in which everyone has the prospects for a decent life, including adequate protection for their most basic human rights.

I have space to deal with only one further issue raised by Oberman and here I address his "phantom conditions" argument, since it occupies such a large portion of his article. Oberman tries to make the case that some of the conditions for which I argue are not necessary to justify emigration restrictions. The basic problem with the phantom conditions argument is that Oberman misconstrues my strategy. My claim is that a certain set of conditions, when all met (such as in the case of "poor, but responsible"), can be *sufficient* to generate obligations to serve and pay additional taxes. His objections take the form of arguing that the conditions are not necessary. But my claim is not that they are necessary, only that they can be jointly sufficient such that carefully crafted compulsory service and tax proposals may permissibly be used in certain conditions. So, this whole line of argument proves to be a red herring as a criticism of my arguments, though it is interesting to see Oberman's development of a case for emigration restrictions in emergency situations and a welcome contribution to the literature.

I address Oberman's claims about the empirical literature in the next section, but in closing I should say that I do not share his assessment of what the empirical literature shows, namely that "Among migration

economists there seems to be only one point of agreement: migration, as a general rule, benefits the global poor" (Oberman 2017: 107). While I concede there is much economic research that suggests that migration can lead to economic benefits for the global poor, there is also significant research that suggests that there are important losses, both economic and non-economic.

## 4. WHAT IS THE ROLE OF EMPIRICAL EVIDENCE IN DEBATES ABOUT POLICY RESPONSES TO THE BRAIN DRAIN? A RESPONSE TO HILLEL RAPOPORT

We can address several misconceptions that ground Hillel Rapoport's concerns by drawing on discussion from previous sections. So far I hope to have shown that:

1) My proposals do not attempt to ban emigration.
2) I do not argue that those who have legitimate fears about persecution should be required to sign contracts to serve. Indeed, governments would not satisfy the legitimacy conditions if they were persecuting citizens and could not permissibly use the compulsory service and tax proposals for which I argue.
3) The carefully constructed policies for which I advocate take the rights of would-be migrants very seriously.

So many of Rapoport's concerns about the normative views can be addressed. What about the empirical claims? Rapoport believes my argument will partly collapse once he presents evidence that there are positive effects from high skill migration. Since my argument is a conditional one, *and the relevant normative question is only triggered when there are net losses*, the fact that there may be net gains in certain cases is irrelevant to the central normative inquiry. In the book I acknowledge that there are some positive effects and document several types, including the one he spends most time on concerning increased human capital formation.[5] I do not presuppose that there are always and only negative effects.

Rapoport discusses brain gain through increased human capital formation in some detail. As indicated, I discuss this consideration myself (Brock and Blake 2015: ch. 10). Some of the critical issues I raise there

5 His overall conclusion is that instead of limiting the "drain effect" through emigration restrictions, institutions should be developed to capture gains that there could be from the positive effects of skilled migration. I agree with that position and have developed such views elsewhere (e.g. Brock 2009a: ch. 8).

include whether this is always a sufficiently positive effect to outweigh other negative effects, whether the increased human capital formation necessarily benefits source countries sufficiently (rather than individuals who acquire the skills), and benefits source countries in all the areas of human well-being that are relevant.[6] I elaborate on some of these points next.

As I observe in *Debating Brain Drain*, Chapter 10, one important benefit of high skill migration is increased human capital formation (as Rapoport discusses). However, as with all the purported benefits, we need to be cautious about their magnitude, whether particular gains accrue to particular countries, whether they are sufficient to outweigh other losses, and so on. So, consider the gain of human capital formation. The areas in which additional skills are acquired may not be very useful for source countries. Enhanced training can be skewed towards usefulness in the targeted destination countries. As Gibson and McKenzie note it can lead to overinvestment in some fields (e.g. geriatric medicine) that have large payoffs overseas rather than studying in other fields —such as tropical medicine more urgently needed locally (Gibson and McKenzie 2011). There may be little urgent need for geriatrics in situations where life expectancy is around 50, whereas there might be very high urgent need for those skilled in treating diseases common to the tropics. More importantly, when there is a brain gain, it is not always significant or sufficient to outweigh other losses. For instance, Alok Bhargava, Frederic Docquier and Yasser Moullan (2011) note that the magnitude of the positive effect in the medical sector is small and insufficient to generate a net brain gain. Furthermore, even when there is brain gain it does not necessarily outweigh reduced health outcomes from medical brain drain. Bhargava and Docquier (2008) observe that medical brain drain is connected with a 20% increase in adult deaths caused by AIDS. So, even when there is increased human capital formation, the net gains for those relevantly affected are far from obvious.

Rapoport maintains that even though "there are losers and winners, the brain drain contributes to an increase in the overall number of highly-skilled people living in the developing world" (Rapoport 2017: 127). Even if this is true, it is hard to see how service programs such as (CS1)-(CS5) *eliminate* whatever incentive effects there are. Recall that my position is not to discourage people from leaving the country completely. Indeed, I assume that many high skill citizens will still want to leave, hence my advocating for the tax for five years (which he does not address). What needs to be shown is that measures such as (CS1)-(CS5) have a clear

6 Surprisingly, Rapoport and his research associates have made several of these skeptical points too in previous published writings.

dis-incentivizing effect on acquiring additional skills in the first place. No evidence of this kind is presented. In his contribution to this symposium, Rapoport claims that "the recent economic literature does not support the … view that brain drain is an impediment to developing countries' current and future economic performance" (Rapoport 2017: 130). I do not believe this conclusion is justified and I give some brief reasons for this below. Note also that I do not focus exclusively on economic performance. When looking at the effects for countries of origin I include a variety of effects on other dimensions of human well-being, such as health outcomes and political institutions. Here data can be worrying.

Having studied the recent empirical literature fairly extensively in preparation for this book, my overall assessment of the literature is that the effects of brain drain vary enormously across countries and can even vary a fair bit over time. Relevant factors as to whether high levels of skilled migration is overall good or bad for particular countries include population size, geographical features, levels of development, skill levels in the source country, and language in home and host countries. What is the case for particular countries in sub-Saharan Africa in the health sector may not hold at all for effects on trade or technology transfer for citizens in India. Small island states are more affected by brain drain than large developing countries such as China, India, and Brazil (e.g. Beine, Docquier, and Rapoport 2008). Small countries also often lose much more than large countries gain (e.g. Beine, Docquier, and Rapoport 2008). Assessments of the state of play also vary over time. As one indication of this, consider these remarks made by Hillel Rapoport and research associates, in assessing the state of play at a particular time:

> "high-skill migration is becoming a dominant pattern of international migration and a major aspect of globalization. The fact that international migration from poor to rich countries is becoming more of the brain drain type is a serious source of concern in developing countries and for the development community. Through the brain drain, it would seem, globalization is making human capital scarcer where it is already scarce and more abundant where it is already abundant, thereby contributing to increasing inequalities across countries, including among richer ones" (Docquier and Rapoport 2008).

Furthermore, as mentioned, even when brain gain does occur it is not necessarily sufficient to outweigh other bad health effects. Bhargava and Docquier (2008) find that medical brain drain can be associated with increased adult deaths from AIDS. While some studies show a positive correlation between the number of skilled migrants a country has in the

United States and levels of foreign direct investment from the US economy to countries from which migrants hale (Kugler and Rapoport 2007; Javorcik *et al*. 2011), others suggest caution about how generalizable these results are, as data sets contain only two small countries (Gibson and McKenzie 2011).

Researchers have recently examined diaspora and network effects on the quality of political and economic institutions in source countries (Docquier and Rapoport 2012). Docquier and Rapoport (2012) advise caution as there are only a few papers that explore this topic.[7] They note, "the empirical assessment of these effects is still at an early stage" (Docquier and Rapoport 2012: 711). Even among this sample we find a quite mixed result, for instance, Docquier and Marfouk (2006) find that in the study they undertook, brain drain may have positive effects on political institutions but negative ones on economic institutions (Docquier and Rapoport 2012: 711). While it is true that high-skill emigration can produce some positive network externalities, those countries that gain typically have large populations and large numbers of skilled citizens living in the diaspora. Particular policies of both the host and home countries make a difference as well (Docquier and Rapoport 2012: 725). There is also still much about which we are ignorant (Gibson and McKenzie 2011). We clearly need more research on a range of issues including the actual effects of policies aimed at reducing or capitalizing on high-skilled immigration.

Finally, it is important to note that there can be a certain fashionable element to empirical research. While early research on brain drain indicated clear losses, this could have itself stimulated other researchers to investigate more closely. In the future, researchers on this topic will raise other questions and collect other data, perhaps in response to perceived convergence. So caution is advisable when we try to make overall assessments on what the consensus opinion on such a vast body of evidence suggests is the new "received wisdom". The data available to date suggests the only fair generalizations we can make at this point are that there are some positive, along with some negative effects of brain drain, there is much we still do not know, and that the effects vary considerably for particular countries and within particular sectors. Given that Rapoport himself seems to have changed his mind about some of the evidence and what it shows, it is worth considering the normative question apart from what the current state of play about the empirical evidence suggests, even if we are able to get agreement on what that is.

7 See also Kraay et al. (2005), and Docquier and Marfouk (2006).

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# Symposium on Thomas Christiano's Views on the Legitimacy of the International Order

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Thomas Christiano, one of the more prominent democratic theorists today (Christiano 1996, 2007), is developing some of the most refined and influential normative views on the legitimacy of global institutions and international law (Christiano 2006, 2010, 2011a, 2011b, 2012, 2013), with contributions to more specific issues like immigration (Christiano 2008b, 2017) and climate change (Christiano 2015), among others.

Christiano defends a model of fair democratic association of states. While it is true that his is mainly a statist view, it is a very qualified one: he holds that the autonomy of democratic states should be preserved and should remain the basis of, and be the main legitimate actor in, an international multilateral system, with state sovereignty conditional to the fulfillment of certain global, morally mandatory aims. Christiano rejects the more demanding ideal of global democracy. But he does advocate a distinctive, and attractive, ideal of international democracy that presupposes the existence of a cosmopolitan political community and seeks to conciliate and preserve the value of national self-determination and self-government with an egalitarian, institutional framework that promotes peace, human rights, and basic justice worldwide. Christiano's cosmopolitanism is initially modest and limited, but he characterizes it as progressive, that is, its aims and requirements are meant to become more and more demanding as the cosmopolitan community develops.

This symposium has brought together three significant scholars, who, from three different perspectives, discuss Christiano's views on the international order and immigration.

The first commenter is David Álvarez, professor of philosophy at the Universities of Minho (Portugal) and Vigo (Spain). He has written extensively, mostly in Spanish, on global justice, global health, and the global order (for English publications see Álvarez 2012a, 2012b). In his contribution to this symposium, "Democratic Legitimacy, International Institutions, and Cosmopolitan Disaggregation", Álvarez pushes Christiano towards a more radical cosmopolitanism. He argues that

Christiano's idea of global morally mandatory aims imposes stronger objective restrictions on what actions democratic states may carry out internationally, and what they may say in domestic democratic deliberation, and that individual citizens are legitimated to address disaggregated, direct claims to global institutions when their states fail to meet such obligations.

The second commenter is David Lefkowitz, professor of philosophy, politics, economics, and law at the University of Richmond. He has made very significant contributions to several issues regarding authority and the duty to obey the law, criminal law theory, the *ius in bellum*, and others. He has recently written about several areas related to international law and the international system (Lefkowitz 2010, 2011, forthcoming). In his piece in this symposium, "Democracy, Legitimacy, and Governance", Lefkowitz argues that interdependence among citizens of different states is not great enough to generate a claim to legitimate common legal order. Because of this argument, he sides with Christiano in his skepticism of global democracy, but extends this rejection to Christiano's own model of fair democratic association. Lefkowitz concedes that the international system may have some instrumental value, sufficient to grant some degree of legitimacy, but holds that it is disconnected from its democratic or associative character.

The third commenter, Michael Blake, is professor of philosophy, public policy, and governance at the University of Washington and a prominent philosopher of international issues. Blake has significantly contributed to the debate on global justice, defending an institutionalist view that rejects the existence of transnational justice obligations based on the lack of a coercive international institutional system (Blake 2001, 2011, 2013a). He has also contributed significantly to debates on immigration and the brain drain (Blake 2013b, Blake and Brock 2015; see also the symposium on Blake and Brock's book in this volume), the former being the focus of his contribution to this symposium, "Migration, Legitimacy, and International Society". Blake expresses skepticism on two fronts. One target is Christiano's general view that international bodies may have legitimate authority. The other is Christiano's more specific claim, made in one of his more recent works (Christiano 2017), that a multilateralist order like the one he advocates may end up adopting justifiable common principles to govern migration.

Thomas Christiano responds to these three critics in a piece that serves to clarify and illuminate different aspects of his own theory. These concluding pages may be seen as a very useful introduction to his views on the international order.

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# Democratic Legitimacy, International Institutions and Cosmopolitan Disaggregation

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## ABSTRACT

The paper explores Thomas Christiano's conception of international legitimacy. It argues that his account fails to fully appreciate the instrumental constraints that international legitimacy imposes on national democracies. His model of Fair Voluntary Association articulates the transmission of political legitimacy through a double aggregation of political consent. First, it "pools" its authority from the foundational cosmopolitan claims of individuals involved in a deeply interdependent social world; it then translates this source of legitimacy to international organizations through state consent. However, this model fails to enforce compliance with the cosmopolitan standards and commitments regarding vulnerable populations. The paper argues (i) that the global standards of legitimacy operate as objective criteria of instrumental legitimacy for the reflective evaluation of democratic states, (ii) that the demand of consistent compliance with these cosmopolitan goals imposes external constraints on the institutions of domestic democratic deliberation; and finally, (iii) that if democratic states fail to implement reforms in this direction, then their citizens have the legitimate prerogative to disaggregate their cosmopolitan contribution and direct it to the global institutions that officially realize these goals.

**Keywords:** International legitimacy, global justice, cosmopolitanism, democracy, equality, Christiano.

## 1. GLOBAL LEGITIMACY AND STATE CONSENT

What is the most legitimate form of global authority we can reasonably hope for? Thomas Christiano (2010) presents an insightful exploration of this challenging question. His essay contrasts the aspiration to democratize international institutions directly and a defense of a Fair Democratic Association (FDA) among states as the best feasible option. He thinks an empirical evaluation of the required preconditions for the development of a legitimate democratic regime favor the latter. Such conditions presuppose equality of stakes among all those bound by the political system. Here, to have roughly equal stakes means that the same political system shapes and affects one's main interests with an overall intensity equivalent to that affecting other fellow members. This shared subjection and participation varies across different issues and topics but the overall balance of trade-offs must be equivalent. Therefore, all members subjected to this political decision-making authority have strong reasons to identify their wellbeing and prosperity with the goods and services regulated by the public authority. This is what Christiano calls "a common world". Therefore, the condition of equality of stakes requires the existence of deep interdependency among co-members.

Once this condition of equality of stakes is met, Christiano then defends his conception of legitimacy for the decision-making structure that regulates the deep interdependency of a group that shares a strong interest in enjoying a common world. The question then is: by what right should any of these individuals accept the decisions imposed on them? Christiano's conception of *public equality* defends that the strongest reasons to accept the political authority under these circumstances are those that reflect that the political decision-making advances the interests of all members in an equal way. Christiano's conception expresses the intrinsic value of collective self-government by minimizing the chances of over-inclusion and under-inclusion. Therefore, the distribution of political influence has to prevent that those not relevantly affected by a problem could impose the solution on those affected. Among members, this risk is neutralized in the overall tradeoffs of the political game within a common world. When distinctive minorities have stable preferences that only contingently and tangentially align themselves with the hegemonic view, then there is a risk of consistent subordination to majoritarian interests. The existence of permanent minorities undermines public equality because it publically manifests a breach in the mechanisms of inclusion, access, interaction, and deliberation "in a common world".

This is, however, as Christiano states, a cosmopolitan moral principle, insofar as all individuals' interests affected by the political system are given equal consideration (2010: 121). To put it in different terms, the conception of public equality holds that all equal stakeholders under a political order should be equal shareholders in decision-making.

However, for Christiano, the proper political realization of a cosmopolitan principle of equal consideration is not a global democracy. The implementation of a democratic system for a global order beyond the nation-state would not track asymmetries in stakes and would create permanent minorities. According to Christiano, the state community seems to be the most realistic scope for the realization of public equality. Consequently, the most legitimate form of global authority that we could reasonably hope for is a Fair Democratic Association (FDA) of highly representative states, legitimized through the consent of its sovereign members. Therefore, specific matters and particular interests that transcend the limits of the common world are better dealt with through specific negotiations and agreements that represent the expected contributions and compensations among the affected parties.

We could reconstruct the normative structure of Christiano's proposal for a FDA as the articulation of three main elements:

> *Voluntary Agreement*: In its ideal form, a Free Democratic Association determines its own terms of cooperation through international negotiation, adjusting their complementary skills, needs, and contributions. If the exercise of bargaining power differentials produces unacceptable conditions, the weaker party can always exit the organization. In a similar way to civil society associations, the legitimacy of these international associations rests on the voluntary acceptance of the terms of cooperation ("*Volenti non fit injuria*").
>
> *Proto-Constitutional Constraints*: In addition to these freely consented terms, Christiano admits a set of external constraints as principles of international society that are also justified through its formal value for the constitution and coexistence of decent and representative societies, like security and war conventions, the principle of honoring pacts and treaties ("*pacta sunt servanda*"), and the basic protections of *ius cogens* and human rights. This family of "traditionally observed principles" (customary international law) constitutes the basic scaffolding of the international society (Christiano 2010: 122-123).

> *Standards of Reinforced Cooperation*: A subsequent and thinner level in this international architecture is constituted by the network of institutions that articulate the cooperation around the goals of trade, poverty eradication, and climate change (Christiano 2012a: 385-390). These three dimensions represent an important degree of interdependence that is also crucial for the success of the different national societies. These areas are of crucial, vital interests. We can conceive this set of subjects as a hybrid structure that combines a voluntary bargaining process with proto-constitutional constrains. Treaty negotiations among states are still marked by the asymmetries of power, but they incorporate some degree of receptivity to the needs of developing countries, vulnerable populations or the environment as benchmarks (IMF), socio-environmental safeguards (World Bank), conventions, exemptions, etc. The degree of interdependence may justify a preferential treatment for developing countries but it is not thick enough to justify its regulation through a global democratic system.

According to Christiano then, moral cosmopolitanism would be realized through membership in a democratic state that is a member of a FDA. I will argue in the following sections that this articulation of memberships is deeply problematic. In fact, the claim that the FDA would reproduce some of the intrinsic obstacles to supranational coordination that characterize our international order of sovereign states can be defended. The normative structure of the FDA is based on voluntary state-agreements, but the representative institutions of modern democracies are designed in ways that favor domestic interests over foreign duties. Therefore, there is an institutional design problem that prevents the realization of moral cosmopolitanism through double membership.

## 2. PUBLIC EQUALITY AND MORAL COSMOPOLITANISM

Christiano's conception of public equality cannot overcome the problem of articulation between national citizenship and cosmopolitan responsibility. In order to show this difficulty, I will compare three alternative understandings of the condition of public equality as a realization of moral cosmopolitanism: a) as an existential condition; b) as a criterion for legitimacy; and c) as a prescriptive duty of justice. The *existential* reading states that stakes-equality is a (sufficient) condition for the implementation of public equality. As a criterion of legitimacy, the principle demands that democratic membership be coextensive with the

scope of stakes-equality. Finally, the prescriptive interpretation just affirms a moral duty to establish a maximally inclusive institutional order in which all individuals could see their interests affected and taken into account in an equal way. These alternative readings imply concomitant qualifications on the scope of public equality.

As an *existential condition*, it identifies the scope of the doctrine following the factual conditions of the world. The pre-existing institutional scope limits the set of individual claims to equal political influence. The validity of these claims is intrinsic to a practice that regulates the sphere of political membership, it is constitutive of its network of interactions, it is embedded in its relational structure of interdependence, and it is incorporated in the expectation of iterated, reciprocal cooperation. This social world constitutes the type of relevant interests shared by all relevantly affected, and they differ in kind and intensity from those of outsiders. Consequently, the validity of their claims to participation in the decision making differs also in kind and intensity. Even if affected, outsiders cannot be equally affected in the same way as constitutive members; therefore, equality demands that their claims are subject to specific qualifications.

This interpretation of the intrinsic value of democracy assumes the existence of a common world and derives the legitimacy of the democratic system from the "pooled rights of all persons to have a say in the common world they live in" (Christiano 2010: 122). This is a cosmopolitan value insofar it rests on the moral personality of all individuals that are "pooled" together as *demos*. However, the criteria for inclusion and exclusion are not cosmopolitan in the sense that it cannot be claimed that they are independent from the social, cultural, and national characteristics of individuals. If we consider that it is the identification of the precondition of equal stakes, which determines the scope of the *demos*, then these structural and institutional factors have a determining role in the configuration of the common world. If the common world reflects these particularities, and the projects and interests of the members are intertwined with its reproduction, then the constituency is shaped by the common world, and the kind, type, and nature of the interests affected is distinctively and idiosyncratically determined by the internal conditions of this community. Every deeply interdependent political system expresses a common world which should be regulated in a way that reflects public equality. But the reproduction of this common world becomes a constitutive feature of the conceptions of the good of the citizenry. This general interest becomes the national interest. Additionally, under this reading, the realization of the values of freedom and equality could be conceived as the allegiance to the

institutions that produce a particular *vivere libero*. Therefore, the existential condition of equality of stakes may model the latent cosmopolitan value of democracy in a republican-communitarian way. This means that the factual dependence on the existing structures of interdependence imprints a domestic and status quo bias in democratic deliberation.

The second interpretation is related to the question of global pluralism. It defends the view that wherever the equality of stakes condition obtains, the only legitimate form of political authority is one that expresses public equality. The emphasis here lies in the range of acceptable political regimes. Christiano argues elsewhere for a *pro tanto* human right to democratic self-determination, but not for its external and forceful imposition through military intervention (Christiano 2011). The justification offered for this range of permissible toleration is congruent with the conception of public equality: occupied peoples have no resources to check that the "liberating" forces treat their interests equally in a public and justifiable way. For that, interventionist forces would need to be subjected to a common supranational authority, which as discussed in the essay commented on here, would also lack the conditions for direct democratic governance. This observation, which aims to protect weaker parties from foreign domination, can be extrapolated to other dimensions of necessary cooperation to achieve effective self-government. Depending on the mercy of strangers to realize democratic self-determination may easily lead to being at the mercy of strangers. The argument in favor of a right to self-determination implicitly admits that without explicit thresholds and impartial supervision, cosmopolitan duties remain unaccountable. If the commitment with the protection and promotion of self-determination is real, then the system of cooperation cannot be entirely voluntary.

The third reading of the equal stakes condition is the more problematic one. In contrast to the previous two, it defends a prescriptive cosmopolitanism. This normative claim demands an inclusive extension of the basic structures of relational interdependence to a global scale. Cosmopolitanism then becomes an imperative duty of justice. A strong version of this prescriptive interpretation would hold that our deeply exclusionary global order is the product of a permanent minority that keeps a vast majority of the global population in conditions of segregation. Global inequality of stakes just tracks the disproportionate vested interests of these privileged populations in the distribution of goods and services. Therefore, the institutional political order should offer conditions for deeper global integration and substantive reparations. The conditions for self-determination must be justified against this ideal background of global equalization of stakes.

These three critical renderings of Christiano's condition of public equality show some of the difficulties in the articulation of an intrinsic conception of democratic legitimacy with cosmopolitan commitments. The existential premise produces a domestic bias; the legitimacy condition tends to tolerate scenarios of under-realization; and the prescriptive interpretation demands a strong justification for any permissible departure from an ideal standard of global democracy.

Although it is easy to share Christiano's reasonable concerns regarding global democracy, it is also easy to underestimate the external limitations of state consent for the realization of cosmopolitan goals. Our status quo bias contributes to the naturalization of the global cost of practical unaccountability and under-fulfillment of external duties. Legitimation through explicit state consent contributes to the tacit legitimation of the consequences of its intrinsic limitations.

Christiano is aware of the weak spots of an intrinsic conception of democratic authority and is open to the implementation of corrective mechanisms if they have sufficient instrumental justification. These internal limits can be compensated with outcome standards (minimum preference satisfaction), a bill of rights, and judicial review (Christiano 2008: 260-300). The case of the external limits however, presents specific challenges to the conception of legitimate authority in sovereign democracies. The tacit legitimation of the under-fulfillment of the duties to non-citizens cannot be countered through the usual corrective factors like political competition, electoral sanctions, public exposure, or reputational challenge (Christiano 2012b). Unlike domestic limits where those affected have a say, in the case of foreign responsibilities, neglect is overlooked or tacitly rewarded. Addressing the challenge of the external limits of democratic authority implies that Christiano's remarkable conception would need to take a substantive instrumental turn and subject domestic deliberation to de-centering mechanisms.

This paper defends that external limits to democratic authority (duties to non-citizens) also justify corrective institutional reforms. In particular, it defends that the external standards embedded in the FDA should be incorporated for the instrumental assessment and cosmopolitan legitimation of domestic democracies. State consent as a criterion for international legitimation must be qualified not only regarding the internal representativeness of the states, but also according to their cosmopolitan performance. The case of climate change will help us explore the cosmopolitan deficits in democratic deliberation and state consent.

## 3. INTERNATIONAL COMPLIANCE AND INSTRUMENTAL AGENCY

We all have important stakes in the stabilization of climate, though some countries may behave irresponsibly regarding their level of emissions. Christiano (2015) acknowledges that the model of universal state consent may produce inefficient results when it has to accommodate these non-cooperative states. In this case, Christiano admits that it may be legitimate to sacrifice the requirement of universal state adhesion in favor of a coalition of the willing with the capacity to coerce the irresponsible states into compliance. However, this alternative club model would be legitimatized by the moral value of the goal itself, not by their limited club consent. This would be a case of instrumental legitimacy applied to international organizations. This case of legitimate interference also shows that the states affected by the sanctions system have their international legitimacy undermined due to their inobservance of some global goals that weren't actually validated and specified through binding treatises (the universal method). Therefore, the objectivity of this goal derives from a hypothetical reconstruction of a counterfactual Fair Democratic Agreement among reasonable states. Their legitimacy is related to the implementation of a hypothetical agreement that no party could reasonably reject. Here the club would act as a legitimate state agency or court, trusted with instrumental authority to impose duties on less reasonable parties.

Part of the normative appeal in climate change negotiations consists in that national emission rights are calculated according to the population on a per capita basis. Therefore, there is a cosmopolitan dimension implicit in state consent. On the other hand, state consent is an unsatisfactory design for the introduction of considerations of historical compensations and reparations. States represents national interests through their executive branches in international fora, but these agreements usually need domestic ratification. This process of accountability is designed to prevent that a president could favor foreign over national interest. This *risk* is kept in check by parliamentary representatives that also have an intrinsic interest in maximizing the interests of their local constituencies. Consequently, there is an institutional limit to what even the most enlightened democratic leader can concede. The terms of treaty-making, be they universal or club-based, are constrained by the epistemic and deliberative conditions of domestic constituencies.

Even self-determining democracies may fall short of recognizing these global duties due to the representative and cognitive limitations of the

national public sphere. These limitations are particularly salient in the case of climate change, where the effects occur on long term scales and where individual contributions are embedded in habitual life-styles of the domestic common world. National representative systems are hijacked by an electoral short-termism and biased against foreigners and future generations. The problem of climate change negotiations is a good case to defend the introduction of a level of parliamentarian representation in international institutions beyond the national identification of the citizenry. This additional chamber of cosmopolitan deliberation may complement state negotiations and help reframe the terms of consent. Although democratic governance in international institutions may be an ideal goal, there is room for mixed regimes that may reinforce the cosmopolitan legitimacy of state consent, like population weights, consultative chambers, and further parliamentarization.

The forceful imposition of an emissions-reduction regime through the club model implies that, if representative states have their sovereign legitimacy undermined for failing to realize global goals, the counterpart is also true, i.e. that representative states become more legitimate according to their instrumental contribution to global goals. Therefore, democratic systems should incorporate instrumental constraints in their intrinsic legitimacy. This means that the legitimacy of its consent depends on a public deliberative system that incorporates de-biasing mechanisms that take into account global duties.

## 4. GLOBAL LEGITIMACY AND COSMOPOLITAN DISAGGREGATION

Climate change presents a hard case due to the difficulty of establishing a fair distribution of burdens. Despite the uncertainty surrounding climate change, most of its unwelcome consequences are worsened by the existing rates of global poverty and human vulnerability. These global disasters are the recurrent subject of official declarations, specific agendas, and global programs. Let's take for example the case of an established normative consensus, like the international agreement to contribute 0.7% of GNI to development aid. Let's suppose that this global goal is a fixed reference point legitimized through state consent. This agreement is invested with the intrinsic legitimacy of the consenting parties, but once established, it also becomes an objective standard for the evaluation of the parties' performance. Year after year, every state deliberates about its budget allocations and the weight given to the fulfillment of its global duties. With some exceptions, the trend is consistently disappointing. Democratic

regimes systematically neglect their aid duties because, as they are not given an equal stake in the deliberation, or sufficient representation in electoral campaigns, public opinion, or the media, their interests are easily overshadow by the electorate's more parochial concerns. But if we agree that global duties constitute external standards of legitimacy, then representative systems that are intrinsically biased against the fulfillment of these obligations cannot be fully legitimate.

Global duties related to subsidiary responsibilities regarding basic human rights and development belong to the proto-constitutional architecture of global legitimacy. They can be justified as contributions to the consolidation of representative communities in which the affected individuals can see their interests realized as members of their common world. Additionally, aided states would become members of the international community and would contribute as *bona fide* members to a global architecture of cooperation. When states systematically neglect the duties of global contribution they also undermine the very concept of state consent as an intrinsic source of international legitimacy. Consequently, we can no longer sustain that a plurality of representative states is the best incarnation of the democratic value of moral cosmopolitanism. The systematic infra-realization of the global duties of their citizens undermines the egalitarian moral standing that is the foundational value of the democratic conception of public equality.

Christiano concedes that some of the most decisive international organizations publicly show unequal concern for the interests of the developing countries and that this consistent feature would support some preferential treatment for them in their institutional design (Christiano 2012a: 385). This diagnosis assumes that there are limits to voluntary agreement (hard bargain). If there are independent moral red-lines that frame the deliberations of the basic international organizations, then they should be embedded in the global institutional structure. Consistently, these red-lines should constrain and reflexively reconstitute the internal architecture of the *bona fide* members of the global community. Global duties of development aid are constitutive imperatives of a global community which their ultimate constitutive members are individuals with an equal moral status. Therefore, common worlds and institutional political designs that are intrinsically biased against the realization of these global duties cannot be compatible with the global framework of legitimization.

If we hold with Christiano that an international system of democracies is the best incarnation of moral cosmopolitanism, then we will need to revisit the idealized independence of the multiple common-worlds and

their intrinsic conceptions of legitimacy. The ideal of democratic self-determination must be conceived within the institutional constrains of global justice. Therefore, it is necessary to evaluate the legitimacy of a political system also in accordance with its capacity to progressively implement more demanding standards of justice and, at least, not to block the reform efforts. These minimal conditions of gradual perfectibility, generally applied to the precarious legitimacy of international institutions, should also be reflexively incorporated into their state members. Otherwise, the conception of public equality isolated from this external evaluation would be more appropriately defended as a republican-communitarian expression of thick social equality, and not as a cosmopolitan value. It justifies allegiance to the institutions that create conditions of public equality and freedom, but it does not face its intrinsic limitations to make these conditions available for all.

If the democratic system embraces the normative ideal of moral cosmopolitanism as the foundational conception for the "pooling of individual rights and interests", but its representative system repeatedly neglects the counterpart global duties linked to this conception, then individual members are being accomplices in the systematic neglect of the duties owned to their foreign equals. Individual citizens are therefore participants in a system of political authority that publically contributes to the global subordination of the legitimate interests of outsiders. Even those citizens aware of the depth of this institutional violation of the equal moral status of outsiders know that the articulation of the domestic space of public opinion and political deliberation is designed in a way that normalizes the disregard of global duties and over-represents the domestic electoral interests. Claims for internal reform of the system in line with an effective accountability for global duties also face similar hurdles. Therefore, the condition of progressive perfectibility is not realized for domestic representative systems and their claims to full political legitimacy must be qualified.

Why should a citizen then comply with a political order that undermines the claims of moral equality? From the previous account we could derive that it is *prima facie* justified to question the legitimacy of the national taxation authority. Taxation is, after all, one of the main aggregative systems that fail to pool and represent the cosmopolitan dimension of national membership. Under these current conditions of undermined international legitimacy, citizens may be justified in transferring their share of tax contributions to those international institutions that embed and realize the commonly agreed global goals. Otherwise, full compliance with democratic authority constitutes a violation of the moral cosmopolitan

status of insiders and outsiders alike. Because, "being at home in an unjust world cannot be a contribution to one's wellbeing" (Cf. Christiano 2008: 63).

## 5. CONCLUSION

The Fair Voluntary Association model articulates the transmission of political legitimacy through a double aggregation of political consent. First, it "pools" its authority from the foundational cosmopolitan claims of the individuals co-implicated in a deeply interdependent social world; then it translates this initial legitimacy to the collective membership in an international organization through state consent. However, as we have seen, this model fails to meet global standards of legitimation. It has an original sin related to the historical conditions of development of the modern territorial system of nation states and to its idealization as isolated common worlds.

Christiano's strategy is to compare two extensions of the value of moral cosmopolitanism that underpins democratic legitimacy, from the modern state to international organizations. One attempt is the direct translation of individual representation to democratic governance of the global institutions; the alternative is treaty-building through state consent. But the distinction is not exhaustive. None of the alternatives are perfect but there are intermediate and perfectible models that perform better when translating legitimacy and global justice: dual chambers with a popular parliament and a state senate, or a system of population-weighted double majority. The point is that a democratic state's consent is no guaranty of international legitimacy, especially when dealing with claims from outsiders in contexts of low enforceability.

Global standards of legitimacy operate as criteria of instrumental legitimacy for the reflective evaluation of democratic states. The demand of consistent compliance with these cosmopolitan goals imposes external constraints on the institutions of domestic democratic deliberation. If reforms in this direction are not implemented, then democratic citizens have the legitimate prerogative of disaggregating their participation in the national "pool" and discharging heir cosmopolitan fair share through the global institutions that officially realize these goals.

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# Democracy, Legitimacy, and Global Governance

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## ABSTRACT

What property (or properties) render international institutions and law legitimate, such that those over whom they claim jurisdiction ought to defer to their directives rather than acting on their own judgment? In this essay I critically examine Tom Christiano's treatment of two possible answers to this question: global democracy, and an institution's or legal regime's capacity to enhance its subjects' responsiveness to the reasons for action that apply to them. While Christiano rightly rejects the inference from affected interests to global democracy, his argument elides the fundamental reason we ought to do so, namely that at present the degree of cross-border interdependence does not rise to the level where it is possible for citizens of different states to treat one another justly only by submitting to a common legal order that substantially erodes state sovereignty. International law and institutions can enjoy some legitimacy on instrumental grounds, however, even if they are neither democratic nor the product of agreement in free and fair conditions.

**Keywords:** democracy, international law, legitimacy, authority, republicanism

## INTRODUCTION

What property (or properties) render international institutions and law legitimate, such that those over whom they claim jurisdiction ought to defer to their directives rather than acting on their own judgment? In this essay I critically examine Tom Christiano's treatment of two possible answers to this question: global democracy, and an institution's or legal regime's capacity to enhance its subjects' responsiveness to the reasons for action that apply to them (Christiano 2010, 2011). With respect to the former, I argue that while Christiano rightly rejects the inference from

affected interests to global democracy, his argument elides the fundamental reason we ought to do so, namely that at present the degree of cross-border interdependence does not rise to the level where it is possible for citizens of different states to treat one another justly *only* by submitting to a common legal order that substantially erodes state sovereignty. With respect to the latter, I argue that international law and institutions can enjoy some legitimacy on instrumental grounds, that their doing so does not depend on their being either democratic or the product of agreement in free and fair conditions, and that we can reliably identify legislative and judicial mechanisms that satisfy the instrumental standard for law's legitimacy.

## 1. AGAINST GLOBAL DEMOCRACY

A common argument for global democracy infers that from the fact that the conduct of people in one state affects the interests (or, more narrowly, those interests that ground human rights) of those living in other states that the former can treat the latter justly only by submitting to a common legal order whose laws are enacted by a directly elected global parliament (see, e.g. Archibuigi and Held 1995). While Christiano is right to reject this inference, the arguments he offers to support this conclusion mask what I contend is its fundamental error, namely that if it is possible for agents to treat one another justly by limiting their interactions so that they do not threaten to setback one another's fundamental interests, then they are not morally required to submit to a common set of rules that govern these interactions. Instead, the decision to do so is one over which agents exercise moral discretion. This position is simply the converse of Kant's well-known argument for the moral necessity of the state, which holds that where agents cannot avoid interacting with one another justice requires that they submit to a common legal order.

Consider Christiano's unequal stakes argument against global democracy. He asserts that a far greater level of interdependence of interests obtains for those who are citizens of the same state than for those who are citizens of different states (Christiano 2010: 132-33; Christiano 2011: 74-5). The former share a common world, while the latter do not. But what exactly should we infer from this, supposing it is true? One possibility is that absent their sharing a common world democratic government will fail to publicly treat all subject to the resulting laws equally. A second possibility, though, is that absent a common world the level of interdependence of interests among a set of agents does not rise to the level where it is impossible for them to treat one another justly except by submitting to the same legal order. Though the two possibilities are not

mutually exclusive, the second provides the more fundamental objection. This is so because the question of whether agents are morally required to submit to a common set of rules regulating some type of conduct is prior to the question of how the rules of such an order ought to be made if they are to be legitimate. The principle of public equality provides an answer to the latter question, but to answer the former Christiano needs a version of the affected interests principle, namely one that holds that agents have a duty to submit to a common legal order if and only if doing so is necessary to avoid setbacks to their own and/or to others' fundamental interest in judgment.

Christiano's assessment of the advantages the Fair Democratic Association (FDA) model of global governance has over global democracy lends further support to the claim that it is the possibility of treating others justly without submitting to a common set of rules that blocks the inference from affected interests to global democracy. For example, Christiano maintains that a FDA is better able to mitigate the problem of persistent minorities "because states can refuse to enter into negotiations and agreements" (Christiano 2011: 81; Christiano 2010: 136). This claim implies, however, that the model of global democracy fails because it compels groups or states to submit to a particular legal regime when they need not do so in order to treat others justly. While it's bad enough to be a persistent minority within a governing institution, it is even worse to be needlessly compelled to be a persistent minority within such an institution.

With respect to the different stakes states may have in a particular system of international legal rules, e.g. those governing trade, Christiano alleges a FDA will be superior to global democracy because "states with high stakes in an agreement can invest a lot of time and energy in it, while states with lesser stakes presumably will invest less time and energy" (Christiano 2011: 81; Christiano 2010: 136). Yet the focus on time and energy seems misguided for two reasons. First, a global democracy might serve equally well as a mechanism whereby those with greater stakes, such as representatives of districts heavily involved in international trade, invest greater time and energy in the development of, e.g., international trade rules, while those with less at stake (or their representatives) devote less time and energy. Second, what is most important is not how much time and energy different agents devote to the development of international legal norms but how the authority to make those norms is distributed. If votes are equally distributed, despite unequal stakes, then Christiano is committed to the resulting law being illegitimate. The FDA's true advantage over global democracy *vis-à-vis* the existence of unequal stakes is that states enjoy moral discretion over whether to enter into international

agreements, and the terms on which they are willing to do so. The FDA model conceives of much new international law not as a set of impartial rules that aim to promote the common good but as mutually advantageous arrangements agreed to under free and fair conditions by parties pursuing their own interests on the basis of their relative bargaining power. The upshot is that those states with greater stakes will likely exercise a greater say in the construction of this kind of international law than will states with lesser stakes, since those are the terms on which it will be rational for both parties to converge. And as long as the resulting legal regimes are both genuinely morally optional (i.e. not required for the just treatment of others) and entered into under free and fair conditions, the resulting norms will be consistent with the publicly equal treatment of all.

One final advantage Christiano attributes to the FDA model of global governance over global democracy is that the former is less vulnerable to the problem of citizenship than the latter. Note, first, that even if this is true it is not clear that the FDA model of global governance mitigates the problem of citizenship to a degree sufficient to render the resulting norms legitimate. The extent to which individuals are informed about and take responsibility for the content of international law may still be so slight that it does not warrant the belief that international law publicly treats them all as equals. Second, global democracy may offer avenues for representation the FDA does not that serve to galvanize a more informed and invested citizenry. For example, global democracy might facilitate a greater voice for views that are in the minority domestically, whereas negotiations between democratic states might well present only the views of the domestic majority. In addition, by increasing the number of institutions that might assert a right to govern a particular domain of conduct, global democracy could also foster the kind of forum shopping that can both lead to creative solutions to conflicts over the demands of justice and enhance agents' belief that the overall system of governance exemplifies a commitment to the equal advancement of interests (see, e.g. Berman 2014). Third, and most importantly, when viewed through the lens of the problem of citizenship the key distinction between a FDA and global democracy appears to be whether international legislators are to be directly elected or indirectly elected; for example, appointed by domestic legislators who are themselves directly elected, as was originally the method for selecting United States Senators. But which of these two models of representation we should adopt is a separate matter from the question of whether states and the individuals they represent have a duty to submit to a common legal order. Thus we might argue that becoming a party to a particular legal regime, e.g. one governing trade in a particular class of goods, is morally optional, while also maintaining that if the regime creates a somewhat

independent institution charged with developing this body of law its officials ought to be directly elected rather than appointed by the domestic legislatures of its member states.

A possible response to the foregoing argument would be to contend that: (1) in certain circumstances, which presently obtain internationally, parties have a moral duty to submit to a common legal order governing some specified type of activity; but (2) because the parties do not have roughly equal stakes in the activity governed by the legal regime in question, its norms should not be made by a democratic decision-procedure that accords them all an equal voice. Though Christiano appears to believe that at present the first of the aforementioned conditions is rarely met, Laura Valentini has recently defended this position, arguing explicitly against Christiano that democratic legitimacy does not require an equal say but only a say proportional to the stakes individuals have in the resulting law (Valentini 2014; see also Brighouse and Fleurbaey 2010). As I will now demonstrate, however, the examples she gives to illustrate the joint satisfaction of the two conditions specified above fail to do so. Thus it remains unclear whether once we have limited the scope of democratic authority to important interests (as Valentini maintains we should) it will still be the case that the parties in question have different stakes in the decision.

Valentini asserts: "it is unreasonable to deny that, say, the inhabitants of Bangladesh have a greater stake in decisions about how to deal with anthropogenic climate change than the residents of the United Kingdom" (Valentini 2014: 795). Presumably that is because climate change poses a greater threat of harm to them than it does to the lives of UK residents. In the short term that is likely true, but in the long term it is not. British and Bangladeshis have equal interests in the adoption of climate policies that cap the increase in the Earth's average global temperature, but they may well differ with respect to what the optimal increase is. Claiming that Bangladeshis have a greater interest in a lower peak average global temperature than do residents of the UK is not the same as maintaining that they have a greater interest in the question of what the optimal level of climate emissions are, or what policies ought to be adopted in pursuit of that optimum. Climate policy, then, looks like a matter (one of very few, perhaps) in which all people on Earth have a significant and roughly equal stake.

Valentini's second example concerns laws aimed at facilitating access to public spaces for the disabled. "Legislation about disabled access to public spaces has greater impact on people with disabilities than on the

rest of a country's population", which, she implies, entails that the disabled ought to have proportionally greater say in the crafting of such legislation than do the able (Valentini 2014: 795). Like the example of climate policy this argument begins in the wrong place, namely with the effects of the legislation rather than the interests in the activity it regulates. Access to public spaces is something in which all individuals have an equal interest (or so I shall assume), and so all ought to have an equal say in the crafting of legal regulations that specify what those who maintain public spaces must do to advance these interests. Deviation from a procedure that does so is called for only if the disabled turn out to be a persistent minority (as, in fact, has often been the case); that is, where an individual-majoritarian decision-procedure has persistently failed to correct the cognitive biases of the able regarding what the equal advancement of the interest in access to public spaces requires, and left the disabled feeling both alienated from society and not recognized as moral equals. While this argument sanctions an unequal say in making law, the rationale for doing so does not rest on unequal interests in the issue regulated by the law in question but the persistent failure of a process that accords an equal say to all entitled to it to generate just law.

Of course, these criticisms of Valentini do not demonstrate the impossibility of satisfying both of the conditions set out above. Absent a successful illustration, however, we have no reason to believe there are any cases in which a given type of conduct affects a set of individuals' important interests in ways that morally require them to submit to a common legal order governing that conduct, but where those individuals have significantly different stakes in what the content of those legal rules turns out to be.

At present, the common legal rules to which all agents, or the political communities of which they are members, have a moral duty to submit are largely those that serve to preserve the independence (or non-domination) of the distinct common worlds that exist and are partly constructed by their domestic legal orders. These are the core rules of Westphalian International Law, e.g. those that ban aggressive war and intervention in the domestic affairs of other states, or that internalize externalities by, for instance, allocating responsibility for cross-border pollution. A world in which such rules were respected would be one in which no individual's fundamental interests were setback by the conduct of agents who reside in other states. Again, that is not to say that in such a world the activities of individuals in one state would not impact the lives of those living in others, nor does it deny that all might stand to gain by the adoption of a common set of legal norms that eroded sovereignty for the purpose of creating a

partial common world (e.g. a common market in certain goods). Neither of these facts, however, entails that individuals can treat people in other states justly *only* by submitting to common legal rules that take the place of or circumscribes existing domestic law.

## 2. AN INSTRUMENTAL ARGUMENT FOR INTERNATIONAL LAW'S LEGITIMACY

Might international law enjoy some legitimacy even if it is the product of a legislative procedure that fails to fully conform to the principle of public equality? Though he sometimes appears to think otherwise, in this final section I argue that Christiano ought to give an affirmative answer to this question.

Recall that to characterize law as legitimate is to maintain that when they deliberate its subjects have a moral reason to defer to its judgment regarding what they may, must, or must not do even in a range of cases in which the law's judgment conflicts with their own. For Christiano law is fully (and inherently) legitimate if and only if it is the product of a law-making process that satisfies the principle of public equality: specifically, a democratic decision-making process in the case of a common world, and free and fair agreement where submission to a common rule is morally optional. At least in circumstances characterized by the facts of judgment, it is only by guiding their conduct according to law made in a way that satisfies the principle of public equality that individuals can advance or honor one another's fundamental interests in judgment. These include the interest in correcting for others' cognitive biases, the interest in being at home in the world, and the interest in being treated by one's fellows as a person with equal moral standing. The value of the first of these interests appears to be largely instrumental; that is, the ability and opportunity to correct others' cognitive biases is valuable primarily because – and to the extent that – it makes it more likely that individuals will treat one another justly. Or perhaps the point would be better put in terms of reducing the incidence and severity of unjust treatment. Regardless, suppose we concede *arguendo* that law made democratically or agreed to in free and fair conditions best serves the aim of advancing justice (or reducing injustice) by combatting cognitive bias. Nevertheless, other legislative procedures that perform less well in this respect may perform well enough that their subjects do better at treating one another justly by obeying the law than by acting on their own judgment, even in a range of cases where they think it substantively mistaken. If so, the law produced by such procedures will enjoy some legitimacy in virtue of its advancing individuals'

fundamental interests in having others, and their own, cognitive biases corrected.

The form of the foregoing argument is most closely associated with Joseph Raz's service conception of legitimate authority. Raz maintains that A enjoys legitimate authority over B if the following two conditions are met (Raz 2006: 1014):

(1) The Normal Justification Condition (NJC): The subject would better conform to reasons that apply to him anyway (that is, to reasons other than the directives of the authority) if he intends to be guided by the authority's directives than if he does not.

(2) The Independence Condition (IC): The matters regarding which the first condition is met are such that with respect to them it is better to conform to reason than to decide for oneself, unaided by authority.

Where the NJC and IC are met, B has a duty to defer to A's judgment; that is, to act as A directs him to act even if B believes he has an undefeated reason to act otherwise. As I understand it, the service conception provides a formal analysis of legitimate authority, by which I mean it tells us the kind of argument we must offer if we are to substantiate or successfully contest the claim that a putative authority, such as international law generally or WTO law in particular, enjoys legitimacy. But the service conception itself tells us neither what reasons apply to agents independently of the law, nor how obedience to law serves to advance our conformity to those reasons. For example, the service conception does not rule out the possibility that individuals have fundamental interests in being at home in an egalitarian world and in recognition as a moral equal that all agents have reason to advance, nor the possibility that obedience to law can facilitate their doing so by constituting the advancement of those interests.[1] Theorists may dispute the existence or the importance of these interests, or the ways in which law may enhance its subjects' responsiveness to them, without disagreeing over the general account of legitimate authority provided by the service conception.[2]

Our concern, however, is whether law can enjoy legitimacy solely in virtue of its content reflecting less cognitive bias than does the judgment of its subjects. It seems obvious to me that it can, and that where the law's judgment regarding the demands of justice suffer from less cognitive bias

1 On Christiano's account, law serves to advance those interests in this way if it is the product of a process that satisfies the principle of public equality.

2 Christiano acknowledges as much; see Christiano (2008: 55).

than do the judgments of its subjects, they have a duty to obey it.[3] But Christiano's admonition that justice must not only be done, but be seen to be done, rings true even where we are concerned only with law as a means to realizing justice (or mitigating injustice). While the service conception tells us when, as an objective matter, a legal subject has a duty to obey the law, we also need an account of how we are to identify when a putative authority satisfies the service conception. In the case of democratically enacted law, the right to an equal say serves both to correct cognitive bias *and* to provide subjects with reason to believe that the resulting law reflects a good faith effort to equally advance the interests of all (enfranchised citizens) even where the content of the law strikes some subjects as at odds with that aim. Might legislative processes that are neither democratic nor voluntary agreements reached under free and fair conditions satisfy this evidential demand as well, so that they not only satisfy the NJC by, at a minimum, reducing some of the injustice individuals' cognitive biases can cause, but can be reliably identified as doing so? I think the answer is yes, and at least with respect to the law of international organizations such as the WTO, Allen Buchanan and Robert Keohane's standard of complex legitimacy provides one example of an institutional design that would do so.

The complex standard of legitimacy consists of a set of substantive and procedural requirements that, when met, provide evidence for the legitimacy of a global governance institution's attempt to rule (Buchanan and Keohane 2006). The former include not persistently violating the least controversial human rights, and not intentionally or knowingly engaging in conduct at odds with the global governance institutions' purported aims and commitments. The latter include mechanisms for holding global governance institutions accountable for meeting the aforementioned substantive requirements, as well as mechanisms for contesting the terms of accountability. To be effective, these mechanisms must be broadly transparent; e.g. information about how the institution works must be not only available but also accessible to both internal and external actors, such as inspectors general and non-governmental organizations.

What unifies the various elements of the complex standard is that they all provide the legal subjects of global governance institutions with reason to believe that officials in these institutions are making a good faith effort to determine what justice requires. In the absence of one or more elements of the complex standard those subject to a global governance institution's rule may (rightly) suspect that governance is being exercised in pursuit of

3 For descriptions of some of the ways in which international law can serve as a check on judgments of justice distorted by international actors' predictable cognitive biases, see Tasioulas (2010); Lefkowitz (2016).

other goals, such as the national interests of powerful states. Consider, for example, the substantive elements of the complex standard: no attempt at international governance by either global governance institutions or by states that persistently violated "the least controversial human rights", or that systematically discriminated in the application and enforcement of international legal norms, could plausibly claim to be making a good faith effort to enhance its subjects' conformity to the demands of justice. Similarly, the procedural elements that compose the complex standard evidence a good faith effort to determine what right reason requires because they militate against efforts to deploy international law for private interest rather than the public good.

Christiano acknowledges the value of reforming global governance institutions so that they satisfy the complex standard of legitimacy, but denies that such reforms could render their rule legitimate. Something like complex legitimacy, he writes,

> may give us reason to think that the institutions will produce minimally desirable outcomes. We may often have reason, therefore, to go along with those outcomes. But it does not give us the kind of moral legitimacy that implies reasons to go along with them even when we disagree with the outcomes (Christiano 2011: 94).

It seems to me that Christiano makes the perfect enemy of the good, and in doing so downplays two crucial considerations. The first is that our own judgments regarding the justice of the outcomes of global governance institutions that satisfy the complex standard necessarily, and predictably, reflect our biases and fallibility. In acting on those judgments, therefore, we may be less likely to treat others justly than if we obey the law. The second is that the law's legitimacy requires only that its subjects be *more likely* to "get it right" by deferring to it than by acting on their own judgment. In circumstances where domestic political officeholders generally know very little about the interests of people living in other states and act within an institutional structure that provides them with a strong incentive to be unjustifiably biased toward the interests of citizens and against the interests of foreigners, the bar for international law's legitimacy may be set quite low. Indeed the complex standard suggests as much. Thus I maintain that satisfaction of the complex standard of legitimacy does provide those subject to the resulting law with a duty to defer to it, a presumption in favor of doing so sufficiently weighty to warrant conformity to the law even in some range of cases in which agents believe the law is mistaken on its merits.

In *The Constitution of Equality* Christiano maintains that the mere fact that one is more likely to act as one has most reason to act by obeying the

law than by acting on one's own judgment cannot provide a sufficient condition for the legitimacy of domestic law.[4] If it did then individuals could have a duty to obey (some of) the law of deeply unjust states, but that is absurd. Such states often "implicitly threaten morally terrible consequences if their subjects do not comply with commands that require them to participate in evil activities" (Christiano 2008: 234). Christiano maintains, however, that: "even if complying without question is the right thing to do, the authority that issues the directives is clearly not legitimate" (Christiano 2008: 234). Might a version of this argument apply to international law, either in general or *vis-à-vis* specific international legal regimes? Note, first, that the complex standard of legitimacy may well satisfy Christiano's demand that a political institution "have some reasonable degree of justice" in order to be legitimate. But second and more importantly, as I argued above, the significance for a political institution's legitimacy of its satisfying certain minimal demands of justice is partly epistemic. Where the institution fails to do so, its subjects have no reason to believe that it meets the NJC. As Christiano notes, they may still judge that they will do best by conforming to the unjust state's laws, or even treating its laws *as if* they were authoritative. Their operative reason for doing so, however, likely will not (and should not) be the belief that the unjust state is more likely than they to determine what justice truly requires of them. Moreover, this conclusion holds even in those cases where, as a matter of fact, the unjust state *is* more likely than its subjects to discern what justice truly requires of them.[5] Where the NJC is satisfied those whose just treatment is at issue have a claim against the law's subjects that they obey it rather than act on their own judgment. Those who are subject to the rule of a deeply unjust state are unlikely to be at fault for failing to discharge this duty, however; after all, they have little or no reason to believe they have it.

As noted above, the foregoing argument rests on a distinction between what it is for A to enjoy legitimate authority over B, namely that B ought to act as A directs rather than on her own judgment, and the reasons that justify A's legitimate authority over B; that is, the reasons why B ought to

4 Christiano develops this argument as an objection to the NJC, but in light of the earlier discussion in the text I think it better to construe it as an objection to a specific way in which law can serve to enhance its subjects just conduct (or at least reduce the injustice they commit).

5 One source of hesitation to embrace this conclusion may be the thought that no one can owe obedience to a political institution that perpetrates grave injustices. Where law's legitimacy is a matter of it increasing the likelihood that its subjects will act justly, however, the duty to obey is owed not to the law (or legal officials) but to those the law's subjects are more likely to treat justly by obeying the law than by acting on their own judgment. See Lefkowitz (2016) for discussion of this point.

act as A directs. One advantage to drawing this distinction is that it allows us to focus on the most prominent *substantive* divide among theorists of legitimate authority, i.e. whether the exercise of moral judgment warrants respect *per se*, independent of its veracity, rather than getting bogged down in definitional battles.[6] A second advantage to foregrounding the distinction drawn above is that it enables the concept of legitimacy to play a role in both ideal and non-ideal theories of global governance. Christiano's FDA may model legitimate authority in an ideal moral community, and as such it may provide a lodestone for long-term reforms to the global political order. In the near and medium-term, however, the extent to which the current world order deviates from that ideal may render the purely instrumental accounts of international law's legitimacy more important, both for rebutting those who deny that international law enjoys any legitimate authority and as a guide to feasible reforms that can begin to mitigate the extent to which international law and institutions serve merely as tools for the powerful.

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6 "It is not a useful aim of philosophers or political thinkers to determine which one of these conceptual accounts of political authority is the right one" (Christiano 2013).

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# Migration, Legitimacy, and International Society: A Reply to Thomas Christiano[1]

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## ABSTRACT

Thomas Christiano's vision of international migration asserts that democratic states are morally required to work together with other democratic states to create transnational institutions that can develop appropriate principles to govern such migration. I argue that Christiano's analysis faces two key difficulties: first, it ascribes legitimate content-independent authority to transnational bodies, and we have no reason to think that such bodies actually possess such authority; and, second, it asserts that such bodies would be likely to arrive at justifiable principles to govern migration, and we have no reason to think that these bodies will actually do so.

**Keywords:** Migration, justice, Christiano, legitimacy, authority, international law.

## INTRODUCTION

I sometimes think that philosophy, not nationalism, is the real home of the narcissism of small differences. Thomas Christiano's analysis of migration has all the virtues I most prize: it is philosophically rigorous, informed by empirical reality without being unduly deferential to current circumstance, and most of all it seems largely *right*. It starts from where we are – in a world carved up into separate states – and asks where we ought to go from here; the answers it gives us seem, to me, *almost* perfect. So, naturally, I am going to spend my time discussing that *almost*. I want, in this commentary, to make it clear why someone who accepts so much of Christiano's view can disagree with one central bit of that view. Christiano's analysis places the authority for migration decision-making in the collective institutional

1 This is a commentary on Thomas Christiano's "Democracy, Migration and International Institutions" (Christiano 2017). I am grateful to José Martí, as well as two anonymous reviewers for this journal, for helpful suggestions and criticisms.

dialogue of democratic states speaking with (and building treaties with) one another, rather than within the individual decision-making of a single state. On his view, a state is not morally permitted to go it alone, working out the migration policy it thinks best reflects justice. The legitimate agent to be charged with migration policy is collective, not individual, and a state does wrong when it fails to recognize the content-independent authority of a transnational community of like-minded states to work out together those specific treaties that might fulfill the cosmopolitan duties of each individual state. I think this isn't right – or, rather, that it isn't quite right; treaties and collective decision-making can be useful tools, and perhaps correctives to the blindness of individual states, but they are no more than that.

Why, though, does Christiano think that this international society has legitimate authority to determine the contours of a global migration regime? The argument begins with the simple thought that there are some global goals that any individual state is morally bound to promote. Christiano's example is migration – he imagines a situation in which one state has great labor-force needs, while another has an ample supply of laborers who suffer from relatively impoverished economic circumstances. These circumstances, he argues, do not look like an opportunity for beneficence or charity; they look like a global problem, one whose solution places moral demands on both state parties. These state parties are, in other words, morally required to work together to solve this global problem – a fact that is not limited to this particular sort of one-off problem. Instead, there are a great many moral obligations whose best solution involves some form of collective reasoning about how to work together at the global level. This fact, for Christiano, demands that states regard the process of working together as a moral imperative. This means, though, that the proper agent setting the terms of cooperation cannot be an individual state; it must, instead, be the global community itself. There is, then, no right for an individual state to break away, and rely upon its own sense of how to respond to the challenge of global justice; the right to determine final responses to global problems is held by the collective of like-minded states, rather than by any individual global agent.

This description, of course, flattens a great deal in Christiano's complex and subtle reasoning, but I do not think it is a wholly unjust description. Christiano is, in particular, emphatic that states do not have the right to "go it alone" in international politics; they are obliged to enter into agreements with other states, and to live up to the demands placed on them by the bodies created by those treaties – even when they think those demands are wrong-headed or inefficient. It is with this last part, though, that I want to begin my disagreement. I want to make two particular claims

against Christiano's view: the first is that we have comparatively less reason than he thinks to ascribe content-independent authority to international bodies. The second is that we have less reason than he believes to think that the decision-making of such bodies is likely to lead to good results. I will discuss these claims in order.

We can start with this central question, then: why should we regard some other agent than ourselves as having the right to determine our moral duties? What makes some other agent, in other words, rightly understood to legitimate authority over us? I can think of three possibilities:

(1) **Elucidation.** The dialogue produced by some discursive body might enable us to better understand our own pre-existing moral obligations.

(2) **Efficiency.** The dialogue produced by some discursive body might enable us to more effectively pursue our own pre-existing moral obligations.

(3) **Establishment.** The dialogue produced by some discursive body might, in itself, produce novel moral obligations (whose normative force may, of course, be dependent upon some pre-existing form of moral obligation).

I think that *elucidation* and *efficiency* should strike us as radically different sorts of things than *establishment*. For an example of *elucidation* and *efficiency*, we might look to the Sierra Club. I accept that we have some moral duty to protect the natural spaces of the planet, although I have some difficulty in explaining how that duty is to be defended. That duty, though, is best pursued with other agents; it's comparatively difficult to preserve wetlands as a single agent, after all, and the Sierra Club acts as a sort of force multiplier to my own meager efforts. That seems, to me, to say that there is some moral force in the *efficiency* of pursuing my pre-existing obligation to preserve wetlands by means of a membership in the Sierra Club. The Sierra Club, too, has people who have thought more about wetlands than I have, and they focus the attention of the Sierra Club on those places and policies where it would do the most good. That, of course, is *elucidation*. I don't know much about wetlands, apart from the fact that they should be wet and that there should be more of them. The Sierra Club allows me to fulfill my pre-existing duty in an efficient, informed way.

My duty to pay taxes, in contrast, seems somewhat different. I think the creation of the political society of the United States gave rise to novel obligations – including, notably, the obligation to pay my taxes to the federal government of the United States. It is not as if I had a pre-existing duty to pay taxes, and the good people of the Internal Revenue Service

sprang up to help me live a more dutiful life. They are, instead, insisting upon their *authority* to determine the appropriate level of taxation – a duty that *would not exist*, but for the creation of the institutions of government that demand resources. If we want to translate this into discursive terms, I think the dialogue of the United States Congress when it determines the marginal tax rate is simply a different animal than the dialogue between the Sierra Club and the various stakeholders working together to preserve wetlands. I am obligated, I think, to regard the dialogue of the United States Congress as imposing moral duties on me. (If I insist upon the moral right to determine the proper level of income tax, I am wrong at both the moral and legal levels.) These duties might have, lurking in the background, something like the Kantian duty to leave the state of nature and join political society; nevertheless, they are genuinely novel duties, established simply because the United States Congress has created (and the President signed) a Constitutionally-valid law. The Sierra Club, in contrast, simply offers me a home within which I can best pursue duties that were not created by the Sierra Club. It offers efficiency and elucidation; it does not, in itself establish any particular duty.

This is important, I think, because it shows that the "legitimacy" of the Sierra Club is rather unlike the legitimacy of the United States. The Sierra Club might be a good thing to belong to – but I do not think I do anything particularly wrong if I cease to become a member of that society, and focus my attention on the plight of the homeless, or nuclear disarmament, or some other worthy cause. I might, indeed, decide that the Sierra Club has lost its way, and withdraw for reasons of policy. I have, in short, no content-independent reasons to think that I *have* to listen to the Sierra Club, even if it does help me do the things I believe are morally valuable for me to do. It is useful; it is not legitimate, in the manner of a legitimate government.

Which of these, though, should we take as the best analogue to international society? Christiano wants international society to have content-independent authority; states have some limited freedom to withdraw, but in most cases states are bound to listen to the determinations and conclusions of multilateral decision-making, even when they think those bodies have made moral mistakes. International society, on this analysis, should be able to create new duties for us, simply because international society decides that we ought to do (or refrain from doing) a particular thing. I do not think, though, that we have any reason to think that international society does anything like that at all. At most, international society as a discursive site provides a given state with the ability to *elucidate* its pre-existing moral duties, and an *efficient* means of pursuing these duties. It does not, however, create new duties itself.

One way of seeing this is to imagine what would happen were the institutions in question to disappear. If the Sierra Club were to go out of business, I take it my moral duties would be unchanged; I would have the same reason to value wetlands I always did. If the United States Government were to go out of business, though, I do not think I would have any reason to pay my taxes. The United States Government does not simply offer us a means through which pre-existing duties might be fulfilled; it generates new duties, and the Government has legitimate authority to insist that those duties ought to be fulfilled. International society, to my eyes, looks more like the Sierra Club than anything state-like. If the rest of the world, except for one lonely democracy, were to tip over into fascism or terror, the duty of that democracy to promote a just world through its migration policy would not disappear.[2] It did not begin with the world's institutions, and the end of those institutions would not be the end of the duty. If anything, the duty would be felt more keenly in that benighted world.

There is, of course, a good response to this, which I think Christiano finds plausible: we might simply say that there is a duty to pursue one's mandatory aims in the best way possible. Where something offers an effective and intelligible means to a mandatory end, perhaps that means is itself mandatory. This idea, though, should be resisted. In the first place, it is not clear that we are required – as people or as polities – to maximize efficiency in our pursuit of mandatory goals. I take it as being true, for instance, that we are obligated to give up some of our treasure and some of our time to ensure the survival of needy people living abroad. I do not believe, though, that this goal demands that we choose that form of life most effective at the maximal pursuit of this goal. Some do, of course; Peter Singer's "effective altruism" begins precisely with the thought that one ought to develop that course of life that is best positioned to save as many human lives as possible. Most of us, though, recoil from this conclusion; those of us with a Kantian disposition might argue that we are entitled to build lives for ourselves that we find meaningful, even if the lives of others might be made vastly less horrifying were we to become

2 An anonymous referee for this journal has suggested to me that, if we interpret the United States as simply interpreting pre-existing moral duties, then the distinction between global and domestic political institutions is exaggerated. I agree with this; I do not, though, think that any domestic political agency is best understood only as offering interpretations of pre-existing moral duties. To take one simple example: the United States has rules, as does every society, about how to run a fair election – how, for instance, to balance fairness and formal freedom in the rules of electoral communication. It is perhaps possible to interpret these rules as specifying pre-existing moral duties, but I think it is best to understand the authority of these rules as emerging from the content-independent authority of the political community itself.

altruistically-minded financiers. The duty of beneficence, we might say, does not demand that we live on the Pareto frontier. If this is true for individuals, though, then why should it not be similarly true for societies? Christiano presents a series of considerations, in which the ability of a state to promote the interests of its members is weighed against the needs of prospective migrants. Many of us, though, think that this is a bit premature; why, exactly, must a state regard itself as obligated to take only that pathway which would be most justifiable at the global level? Is there no national equivalent to the agent-centered prerogative?

This is made more complex, I think, from the fact that the world has no shortage of morally obligatory goals – many of which, it seems, live in tension with the others. Take, for example, the goals of economic development, the preservation of cultural heritage, and global environmental protection. That these do not all point in the same direction should be obvious; a society that focuses on economic development will likely cause some damage to the environment along the way, and will likely undermine some parts of its cultural heritage; we can see both of these, for instance, in the process of South Korea's industrialization in the 1980s. A society that focuses on cultural heritage, though, will have to forego some forms of economic development, and might find itself unable to accept some innovations that might reduce the overall environmental footprint of its form of life. (A traditionalist society that bans wind energy and solar farms is likely going to end up stuck with some carbon-intensive forms of transportation infrastructure.) I raise these points not just to be depressing, but because I think we might accept that there is something like value pluralism at the collective level as well as the individual one. There are some things, Christiano and I agree, that a society cannot do. Within these bounds, though, I think I am more worried than he is that there is a plurality of valuable goals, each of which might justify some forms of state action – and which cannot be pursued simultaneously. This means, though, that there is something lost in the sacrifice of national sovereignty to a transnational body. A state that wants to do something "idiosyncratic", I think, might not always be simply selfish; it might simply disagree with its fellow members of international society about which good ought to be foremost, here and now, for it.[3]

3 An anonymous reviewer for this journal has suggested that there is no space for states to be "idiosyncratic" in this way, since agent-centered prerogatives apply (if at all) to individuals, not to states. For my part, I am not sure that something like such prerogatives could not apply to collections of persons, as much as to individual persons; there is nothing in liberalism, I believe, that prevents a state from identifying some particular good as having particular importance in the history and self-understanding of a particular society.

Of course, sometimes the state might not be doing anything so noble; it might just be selfish. Christiano suggests that the need to justify state action to international society might undermine this sort of selfishness, as democratic societies get in the practice of justifying themselves to fellow democracies. I think, though, that even the best transnational body will probably not do anything this beneficial; instead, for structural reasons, I think Christiano's international society will probably be considerably less benevolent than he imagines. The problem, in brief, is that the elites of each society gain their power by appealing to the citizens of their own societies, who – we can imagine – are ordinary humans of limited benevolence and compassion. This means, though, that the success of democratic peace offers us no reason to think that the collective decision-making of international society will be anything other than selfish and xenophobic. Democratic peace is comprehensible; states in which the elites gain power from the consent of (some of) the voters are less able to throw those voters into an unwanted war. Why, though, should we think that the discussions of democratic states will tend towards benevolence towards *non-citizens?* This is one of the striking facts about democracy as a procedure: it offers no voice *at all* to those outside the ambit of the domestic law. It offers the alien, at best, some procedural safeguards in the application of law against his person; it offers him, though, no voice in the creation of that law. That means, in other words, that the elites of any given society have no reason at all, apart from virtue, to care about the interests of the destitute who are non-members; these impoverished people are not voters, and existing voters can be counted on to be frequently hostile to the interests of these impoverished newcomers. The result, though, is that a dialogue between the elites of a set of democratic states will often end up defending justice for current citizens, whose voting power gives them enough power to make things awkward for elites – and an iron bar placed against the outsider, who has no voice or power with which to contest. Having a group of democratic states in negotiation with one another, in short, is likely to produce some morally defensible treaties between these democracies, but it is also likely to be vicious and cruel towards out-group members. The Schengen accords, for instance, made travel within the Schengen Area easier – but also mandated crackdowns on asylum and refugee law for those coming from outside that Area. Democracies, in short, are not necessarily inclined to be friendly towards those who cannot already vote, and having those democracies in conversation with one another may not produce any more defensible results than those that would have emerged from individual state agency. The recent history of the European Union in face of African migration, finally, offers us a sobering reminder that even the most internally just democracies are not

inclined to be gentle to outsiders; as I write this, over three thousand would-be migrants to the European Union have perished in the Mediterranean. These deaths are not a result of natural facts; they result from the choices of the European Union, in the 2000s, to institute carrier sanctions on air carriers, which pushed undocumented migrants towards boats, rather than aircraft. When democracies come together to build treaties, they are as likely to reinforce vice as virtue.

It is, of course, also true that Christiano intends his argument as an ideal theory, building on but not reducible to current global reality. This makes it difficult for us to conclude that any of what I have just said would necessarily be true of a world run on Christiano's principles. Nevertheless, I am skeptical. Virtue, as Kant said very long ago, is an unstable basis for political right. To the extent that Christiano's view demands that democracies spontaneously exhibit virtue, it might be true that the view is unstable in the long run. If what I have said is true, then, we might have occasion to rethink how we ought to evaluate the legitimacy of migration policy. On my view, we need not think that multilateral institutions are the rightful home for legitimate policy; individual states have more freedom, to define and pursue their goals, than that. The world, I think, is messier than Christiano would allow. I have argued that Christiano's multilateralism might not give us the results we desire; I have not, of course, said anything at all about what sort of institutions could do the job. I cannot, of course, hope to remedy this lack here. I would end, instead, by reiterating that all this disagreement must be placed against a backdrop of deep admiration and agreement; if I depart from Christiano, it is only with a due recognition that these few small differences pale before the wider spaces within which I believe his view to be elegant, defensible, and right.

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# Replies to David Alvarez, David Lefkowitz, and Michael Blake

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I am grateful for, and honored by, the papers by David Alvarez, David Lefkowitz, and Michael Blake on my recent work on the legitimacy of international institutions.

I will give a brief introduction to some of the main ideas of the project before I respond to the criticisms. The basic project is animated by two basic concerns. The first concern is to try to devise a normative conception of the international political system under the guidance of cosmopolitan and democratic principles. The second is to see how far we can go in realizing cosmopolitan and democratic principles in the international political community while recognizing the centrality of states and the necessity of state consent to the legitimation of the international political community. The corollary to this project is to ask what kinds of modifications of the contemporary system of state consent would be necessary to realize the democratic and cosmopolitan concerns. What would a system of state consent have to look like in order for it to realize cosmopolitan and democratic ideals? What changes would have to be made relative to the one that we already see present.

For many people, this project seems doomed from the start if not outright incoherent. Many might ask, how can a theory that is devoted to cosmopolitan and democratic aims be compatible with a theory that says that states ought to play a central role in international decision making? Surely we need to have global political institutions that are democratically organized in a way that is analogous to the democratic organization of modern states. To be sure, there are many flaws in these democratic states and they must be overcome, but some form of centralized collective decision making in which all adult persons can participate as equals is required to satisfy the cosmopolitan and democratic concern. And some of the criticisms offered in the papers suggest this.

But I am not convinced that the project is incoherent and so I will lay out some of the reasons for engaging in this project and give a sketch of how I think the project must go. Just as a quick response, it is not obvious why a system that relies on a qualified requirement of voluntary agreement

among a small number of groups is inherently disabled from making decisions in an egalitarian way that are designed to advance the common good among all the members of those groups.

As I understand it, a political community is essentially constituted by three basic facts: one, there is a set of morally mandatory aims that each member has reason to see, and mostly does see, must be pursued through the cooperation of the members of the community. Two, though there are commonly accepted mandatory aims, there is substantial disagreement about how to specify the aims and how to pursue those mandatory aims effectively and fairly. Three, there is also a substantial diversity of interests with regard to how to pursue those aims. As a consequence of these facts, a community must have some kind of decision process by which to negotiate the disagreements and conflicts of interests in choosing how to cooperate in realizing the aims.

I characterize the position that I am defending as a kind of progressive cosmopolitanism. What this means is that there is a cosmopolitan political community but that its aims are limited initially to what can be taken to be reasonable aims for the community. The progressive element is that as the community becomes capable of achieving the aims to some significant degree, the aims become more demanding over time. Modern states pursue at the moment the most ambitious aims political communities can pursue, which are public justice and the common good. This involves basic liberties, distributive justice, retributive justice, a highly integrated system of economic activities constrained by considerations of fairness and efficiency, as well as basic public goods such as education and pollution control. The international political system is much less ambitious. It pursues international peace and security, the protection of persons from the most serious human rights violations, the avoidance of global environmental disaster, the alleviation of severe global poverty, and a decent system of international trade and finance. The vast majority of states have signed on to each one of these aims and it is generally recognized that cooperation among states is necessary to achieve these aims. But relative to the aims pursued internally by states, these aims are modest. My thought is that once we can fulfill these aims reasonably well, more fine grained aims will become important for the international community. The more refined the aims become, the more like the aims that states pursue, the more pressure there will be to make the international community more like a state. The more the international community becomes like a state the more it takes over the functions that states have fulfilled. But this is pretty far off still.

For the moment we have states as by far and away the most capable and the most accountable institutions in the international system. The reasons for staying with states for the time being as the building blocks of the international order, at this relatively early stage in the development of international institutions, are three: one, states are still by far the most effective systems for making power accountable to persons in the international system. Many have developed egalitarian practices of accountability over the last five hundred years and have achieved a great deal in this respect. Admittedly, the modern democratic state leaves much to be desired in terms of basic democratic norms and economic justice, yet it is a great achievement all the same; it ought to be preserved as long as we have little else to replace it with.

Second states are highly integrated systems for achieving justice and the common good that have developed over long periods of time. The integrity of the system of rights and justice and the democratic system by which this is preserved is complex. The social conditions that have arisen for sustaining this integrated system have taken a long time to develop and are essential to the proper functioning of the institution. We can look at the world as a whole as a geographically determined division of labor in which the basic interests and rights of persons are advanced in geographically defined areas by institutions that are highly accountable to the persons in them. This division of labor is highly imperfect, and in some places works hardly at all, but it is still the best we have for advancing the interests of persons. And we can see that, I think, from a morally cosmopolitan standpoint. We do not want to do violence to the integrity of states at this point, since that is likely to damage their capacities to carry out the basic functions they perform. Hence we want international law and institutions to be compatible with the states and for that reason we want a qualified requirement of consent to those institutions or laws before states are obligated to comply with them, at least at the most fundamental level.

Furthermore, third, these states are in a position to represent their members to the larger community. Because of the development of democratic accountability they not only are capable of making the internal systems responsive to the interests of their members, they are also capable of making their contributions to the larger world responsive to the members. The development of democratic institutions over the past century or so is a hard won and very difficult achievement that must not be tossed out. The development of international institutions and law must make use of these democratic institutions in order to give those institutions democratic legitimacy. To be sure, as David Alvarez rightly notes, the citizenry in most of these states is not yet sufficiently oriented to the

important roles their states play in the international system. This is a problem that must be rectified if we are to make progress in solving the global problems the modern international system must solve.

Here we have one set of reasons for thinking that the pursuit of the mandatory aims of the international political system ought to be through the mechanisms of voluntary associations of states. These are reasons for preferring a decentralized consent based process of decision making among states and not having a centralized majoritarian collective decision making process among states or persons across the world. Such decision making would threaten to breach the integrity of the states that remain essential elements of the division of labor. A second kind of reason has to do with the pursuit of mandatory aims in the international system. The idea is that states have a qualified immunity from having obligations imposed upon them that they do not consent to because it is important for the international community to allow a significant amount of experimentation in the making of international law, especially when it comes to the pursuit of the mandatory aims. The reason for this is that there is a great deal of uncertainty as to how the mandatory aims ought to be pursued. For example, there is a great deal of reasonable disagreement on how to end global poverty. It seems that under these circumstances, a state may in good faith refuse to enter into an agreement on the grounds that the arrangement is not likely to achieve the goal of lessening poverty. As long as the refusal is in good faith and on the basis of a reasonable disagreement, the refusal of consent makes the state immune to the imposition of obligation in this instance. States must, however, propose some alternative method of resolving the problem, which is feasible in the circumstances. So refusal of consent is permissible and undercuts the imposition of an obligation.

But the immunity is only a qualified immunity. A state may not refuse consent on the basis of irrational, unscrupulous, or self-defeating grounds. That is, if a state refuses consent on the basis of beliefs that, say, ninety-seven percent of well-informed scientists regard as mistaken (as in the case of denial of anthropogenic climate change [Anderegg, Prall, Harold and Schneider 2010]) the refusal ought to be treated as impermissible. In addition, if a state refuses consent because it wants to free ride on the efforts of others or simply does not want to shoulder any burdens in realizing the mandatory aims, or on the basis of self-defeating considerations, the refusal is to be regarded as impermissible. The consequence of this impermissible refusal is that the state in question loses its immunity from obligation and may be pressured, or perhaps even coerced, to join the arrangement it is not consenting to, depending on what is proportional and prudent in the situation.

The requirement of a good reason does not entail that the consideration offered be the correct reason but only that the consideration is one that reasonable persons can disagree on. Reasonable disagreement is disagreement that reflects an epistemically serious approach to understanding the issues involved in pursuing the mandatory aims and reflects a good faith effort to find a way to cooperate in pursuit of the mandatory aim. This openness of the system to reasonable disagreement is one concession to the character of the international community as a political community. In these situations, the community of states must judge whether the refusal to cooperate on the part of a particular state is unreasonable or not. The requirement of a good reason for refusal of consent and the consequence of failing to give a good reason are both generated because the aims are morally mandatory. But these requirements still leave a great deal of space for states to refuse consent to arrangements and to remain immune to the imposition of obligations by others. We should expect that different rival associations of states might arise in this context. Regional associations and as well as competing global organizations may arise as a consequence of differing views about how best to solve a problem in pursuing a mandatory aim. To be sure, the requirement of reasonableness constrains here as well. When a state or group of states refuses to coordinate with another group on the grounds that they wish to establish their own distinctive international association and the failure of overall coordination would straightforwardly undermine the pursuit of the mandatory aims, this too would be unreasonable. The reason why is that the refusal to coordinate in this instance would be self-defeating from the standpoint of the pursuit of mandatory aims. A mundane example of this kind of self-defeat would occur if a group in a society decided it was better to have a different set of rules of the road than the one that is currently in place. While it may be true that the alternative rules would be better were they universally adopted, they would create havoc were they to be only partially adopted. In the international realm, a uniform and universal set of standards for determining the borders of states is superior to the adoption by different groups of different sets of standards, even if one of these would be superior to the actual one were it universally adopted. The confusion generated by the diversity of set of standards might trip the system into war.

Here we see the significance of the mandatory aims for the international political system as well as the significance of reasonable disagreement on how to specify or pursue the mandatory aims. Here we see the importance of consent as well. States may refuse consent and when they do consent, the power to consent gives them a say over the content of the agreements

they enter into, which implies that the people who are ultimately subjected to the agreements have a say in their content. Here we have a political system that pursues mandatory aims but that does so in a manner that respects the different reasonable views of persons and that attempts to give people a say in the contents of agreements their societies enter into. Furthermore, the system respects the integrity of the most important and efficacious political unit in the international order, the state. But it does so in a way that allows progressive change through state consent and in some cases is open to the imposition of obligations on states when they unreasonably refuse consent. In this way, international law and institutions can acquire a basic legitimacy from the agreements of states to them (Christiano 2017).

There are a number of other features of this conception of legitimate institutions that have a cosmopolitan and democratic grounding that are worth discussing, such as the relation of international institutions which have some independence from the states that create them, but I want to mention one feature in particular, which is the focus of some of the papers. This is an implication of the democratic aspirations of the system I am discussing. The idea is that the process of consent and agreement making must be one that treats the persons as equals. The basic requirement this implies for state consent is a requirement of fair negotiation among states. It is not enough that the states' agreements to treaties or conventions be voluntary in the sense that they are uncoerced and undeceived. They must also arise from a process of fair agreement making. This is the most demanding feature of the conception I am suggesting here and it is not one that can be fully realized. For, on the one hand, a fair process of negotiation implies that states ought to have a kind of equal bargaining power in the process of negotiating arrangements (or at least power in proportion to population and major stakes). The ideal of fairness is a reasonably straightforward implication of the democratic ideal of persons having an equal say in deciding arrangements they share as it applies to a decentralized decision making system. On the other hand, the power of states in negotiating is often a function of wealth. So developing states normally have a significant deficit of power relative to developed states. And this matches the ordering of states as historically colonized or dominated states and colonizing or dominating states. The only way to rectify this fully would be to have some kind of redistribution of wealth, but this itself would require the creation of very ambitious international arrangements, which we are not in a position to realize yet. What we are required politically to do at the moment towards this aim is to contribute to the development of poor societies in pursuit of the mandatory aim of poverty alleviation as is required by the Millennium Development

Declaration. In the meantime, there may be lesser ways of neutralizing the power relations among wealthy and poor states. Treaties created through highly transparent multilateral treaty conferences may help rectify some of the imbalance, since, one, wealthy states prefer not to be seen as sticking it to the poor countries (Albin); and, two, the one source of power developing countries can make use of is through the creation of strong coalitions of countries that may be able to counter the bargaining strength that wealthy countries have (Narlikar and Odell). Here we might be able to learn a lesson from the creation of trade unions as ways of countering the relative bargaining strength of capital in capitalist societies.

I want to make a brief remark about issues of feasibility here. In my view, in the long run, we must hope that the world will come under the jurisdiction of significantly more centralized democratic political institutions. Perhaps there will be something like a world federal state or perhaps we will have learned by then how to construct better institutions than states. What animates the search for an alternative conception of the international political community at the moment is a kind of feasibility constraint. The thought is that it would be self-defeating from the standpoint of the cosmopolitan concerns to try to realize a global federal state now or even in the next couple hundred years. Despite this, I am thinking of the view I am elaborating as a kind of ideal theory. And the reason why is that the current infeasibility of more ambitious global institutions is not based on an assessment of the bad moral motivations of the persons in the system. There is, to be sure, xenophobia, indifference to the plight of others, and naked self-interest among the peoples of the world. But I am not convinced these are the main obstacles to more ambitious global institutions. In my view, the obstacles are primarily informational and transactional. The information needed to integrate the many states of the world into a unified effective, accountable, and just system is enormous and currently overwhelming. But this is also why the view I am espousing is progressive. The thought is that the obstacles to greater integration are not permanent ones but ones that will slowly be overcome. In the meantime, we still have reason to see whether there is a way that democratic and cosmopolitan standards can be satisfied in the decentralized system we have. I think they can.

With these remarks in mind, I want to discuss some of the main points in the three papers. I agree with David Alvarez that my account of the legitimacy of international institutions is missing a significant piece, which is necessary to a fully adequate account of legitimacy. And I am grateful to Alvarez for pressing me on this issue. But I am not entirely convinced of Alvarez's thesis that this piece cannot be supplied for the

account I have offered. The problem, as he describes it, is that modern democratic societies are inherently biased towards the welfares of their own citizens and away from the welfares of non-citizens. And this bias makes it nearly impossible for contemporary democratic states to live up to their obligations to the global community. This is, of course, particularly the case for arrangements that may require some significant element of redistribution such as the alleviation of global poverty or the mitigation of climate change or efforts to adapt to it. It seems even to hold in the case of the failure of wealthy states to diminish the subsidies they give to their agriculture, which subsidies damage the abilities of poor countries to participate in international trade since agriculture is the area in which they have a comparative advantage. In addition, wealthy states have systematically fallen short of the targets they themselves have set for global development aid. They have tended to fall short in establishing and implementing carbon emissions targets. One could also add that modern democratic states have fallen short in their purported efforts to include developing countries fully in the world trading system.

I agree with Alvarez that many developed societies have failed in these ways and that these failures are morally very egregious. I also agree that the reason for the failures is the bias of these societies' democratic institutions towards the interests of their members. But I am not sure of his thesis that the democratic institutions are *inherently* biased and incapable of pursuing in good faith the morally mandatory aims that constitute the global political community. I am not sure that we are looking at a fundamental truth about these institutions. The question, in my mind, is whether the citizens of these democratic societies must necessarily be devoted only (or almost only) to the interests of their fellow citizens. I don't see in principle why the citizens of representative democracies cannot be concerned with the interests of those who are not in their societies. After all, citizens are concerned with the interests of distant other fellow citizens, partly because they must negotiate with them in the making of domestic law; I don't think it is true that representatives merely represent the interests of citizens, they do represent those but they also represent the other regarding views of citizens as well, which views citizens are duty bound to promote in this context. Furthermore, there have been some important examples of such concern on the global level. Protests against the Vietnam War were partly motivated by these concerns. Additionally, there is a general consensus among citizens of wealthy states that development aid is a duty wealthy countries owe to poor countries. And there is some significant variety among developed countries in how much concern their peoples show for poverty outside their societies. Some countries give significantly above the .7 percent of GDP that is prescribed

by the Millennium Development Goals but most do not and the average is lower than the .7 percent (Center for Global Development 2013). There seems to be a correlation between the strength of the welfare state and the proportion of official development aid given. Some of this may reflect skepticism about the effectiveness of aid. The idea that there is an inherent bias is not born out by what we see.

Still, the amount of development assistance is low, and there are many other indicators that the concerns citizens show for their fellow human beings is on average low, so we must wonder how that can be increased. Part of the problem may be rectified if the international community puts more pressure on recalcitrant states. And part of the problem may be resolved if greater fairness in the process of negotiation among states is achieved. If we think that part of the explanation for why citizens care about other distant fellow citizens is that they are forced to deal with them in a democratic system, the same may hold between persons of wealthy states and those of developing states when developed states are required to deal with developing states in a fairer way.

Some argue that a global education program could play a useful role. Alvarez suggests that there ought to be global deliberative assemblies that can bring these issues to the fore. But it seems to me that we already have these in the United Nations. There are a variety of UN institutions that engage in deliberation regarding the duties of states. The General Assembly, the Security Council, the various human rights treaty bodies, the conference of parties of the United Nations Framework Convention on Climate Change are some of the deliberative bodies that give directives to states and put soft pressure on them to do more to cooperate in pursuit of the mandatory aims. I am open to the idea that these can be improved. And there is no reason why the deliberative bodies must be confined to the United Nations bodies. The conferences of the World Trade Organization also play a role. And I think global civil society can play a role here in enhancing the deliberative activities of these bodies. And, of course, states can attempt by themselves or with others to persuade and pressure other states into playing more positive roles in cooperation. Though here there is a danger of a kind of neo-imperial imposition on the part of powerful states. I have not developed a complete account of the necessary institutional structures necessary to promote effective deliberation in this regard and I think this is an important avenue for the development of international cooperation. However, I do think that the system is likely to remain fragmented as it is now.

Alvarez suggests that there ought to be devices that correct for excessively low support for development assistance in the world as a whole, much like there are constitutional limits on what democratic assemblies can do. I agree with this and this is part of the conception of the international political system that I have proposed. I have argued that certain kinds of refusal of consent may be countered by pressure or even coercion when the refusal of consent is based on unscrupulous or irrational grounds. I think this serves roughly the same kind of function in the international system as a kind of constitutional limitation in a domestic system. We may hope that global concern will grow over time and that what we are observing is a lag effect of the fact that societies have not been focused on international relations other than war until relatively recently. But I have not made any recommendations about what kinds of institutions would be desirable here. This is an area that is very important but it is not one that I am prepared to make clear recommendations on at the moment.

David Lefkowitz's comments press a number of important points. He argues that global democracy is not required because the conditions in the world at present do not require peoples to submit to a common legal order in order to treat each other justly. I am not sure how we are to evaluate that claim, but I have argued that the present global system already presents us with a distinctive type of political system. It is a political system whose decision making is primarily decentralized for reasons I have given above. But it is a political system because there are certain morally mandatory aims (such as the maintenance of international peace and security, the protection of persons from widespread human rights abuses, the alleviation of global poverty, the avoidance of global environmental disaster as well as the creation of a decent trade regime), which all, or nearly all, states recognize as requiring cooperation to pursue and which all states are duty bound to pursue. Questions of how to pursue these aims effectively and fairly together arise because there is uncertainty, disagreement, and conflict over how these should be pursued. The states need then to have a method for decision making in order to resolve these differences in trying to determine how to cooperate in pursuing the mandatory aims. Thus we have a political system. Not all the mandatory aims need be seen as concerns of justice and not all concerns of justice are taken as mandatory for this political system. There are many inequalities, which I regard as unjust, that cannot be dealt with by the global system at present and won't be soluble by the system for a long time. The aims that I have posited are ones that almost all states have signed on to but are themselves very difficult to bring about as it is. They present a pretty thin but nevertheless quite challenging set of aims for the international community.

So there are moral reasons for cooperation but I have argued that the decision making leading to that cooperation ought to be a decentralized process of decision making with a qualified requirement of state consent. This is because of the centrality of states in bringing about the most basic goods for people and the consequent need to respect the integrity of those states. It is also because states have developed sophisticated and reasonably successful social systems for making power accountable to people and it is important to build on these systems that we should continue to use states as pillars of the system. Also the need for experimentation with different methods of achieving the aims gives us reason to think that states should be permitted to refuse consent to arrangements if they reasonably dissent from them and they have reasonable alternatives to offer. I also think that given the greatly different stakes states have in the decision making, the usual centralized egalitarian methods of decision making seem inappropriate since power ought to be proportionate to stakes.

Lefkowitz takes me to task for neglecting instrumental grounds of legitimate authority but I have generally argued that there can be instrumental grounds of legitimate authority as well as legitimate authority that is grounded in considerations of intrinsic justice. Indeed, I think that in order to explain the authority of courts and bureaucracies in domestic democratic societies we have to appeal in part to their instrumental importance in realizing democratically chosen aims. And I agree that political institutions may have instrumentally grounded legitimate authority even if there is no inherent political authority to back it up. I simply think this is a more weakly grounded and tenuous form of authority. I focus on issues of democratic legitimacy because I think that it is an interesting question to determine if a system of state consent can, when suitably modified, live up to cosmopolitan and democratic norms. My only concern with the very interesting discussion of Keohane and Buchanan (2006) is that they do not explain how content independent reasons for action are generated by the institutions that satisfy the kinds of desirable properties they describe. The fact that an institution realizes or brings about desirable states of affairs does not help us determine whether we have content independent reasons to do as it tells us or merely just content dependent reasons to do as they tell us to do. If the institution tends to do good things, what is wrong with only acting as it tells us when it tells us to do good things? This is the central question that a theory of authority must answer and they do not answer it. But I do not reject the idea that some institutions may have some form of instrumentally grounded legitimate authority.

The one instrumental approach that directly takes on this challenge is the normal justification thesis defended by Joseph Raz. According to this thesis, the normal and primary way to show that A has justified authority over B involves showing that when B *takes* A's directives as authoritative (as content independent and exclusionary reasons for action) B acts better in accordance with the reasons that apply directly to her, that is, reasons independent of the authority's directive (Raz 1990). So I act better in accordance with the reasons of justice and fairness that apply to me, say, when I take the taxing authority's directives as giving me content independent and exclusionary reasons. If I were not to so take the directives, in other words if I were to just follow my own judgment in each case, I would often act mistakenly and not do my fair share in supporting the relevant institution. This account does give us the right kind of idea but it is notoriously subject to counterexamples. The example I have used in the past is Bernard Williams's case of a chemical scientist, George, who is an active opponent of the Nazi regime (Williams 1973). He is asked by the Nazis to run a chemical weapons factory. George is deeply opposed to the Nazis having these weapons but he also knows that he is not nearly as good a scientist as other more committed Nazis. He agrees to run the factory and then takes the directives the Nazis give him as content independent and exclusionary reasons. The consequence of his doing so is that this slows down production. And he must take the directives as authoritative because only then will he effectively be able to remain in his position. So he acts better in accordance with the reasons that apply to him (slowing down the production of chemical weapons) by doing this. Nevertheless, the Nazi leaders are not justified authorities over George. Hence, the conditions of the normal justification thesis are satisfied but the authority is not justified (Christiano 2008; see also Darwall 2010). I do not mean to reject instrumentalist accounts generally with this counterexample. It is meant to show the difficulty of constructing a good instrumentalist account.

There is another reason why I think it is of some significance to focus on the kind of high grade legitimacy that I do focus on. It is that a political system that satisfies this property is a moral community of equals in which each is treating the others as equals in a highly public way by taking the directives of that community as content independent and weighty reasons because they derive from their fellow citizens. Instrumentally grounded authority has an opacity and tenuousness to it since it is not grounded in the right of the authority but in the expected effects, about which there is significant controversy. The inherent democratic authority I attempt to explicate is grounded in the right of each to be treated publicly as an equal. When I obey it, I am directly and publicly treating my fellow citizens as

equals. And I owe this even when I disagree with the content of the directives. Hence the nature of the authority realizes the kind of moral community of equals that is not clearly present in instrumentally grounded authority.

Michael Blake's comments go to the heart of what I am arguing. I am arguing that the international community constitutes a distinctive type of political community. I think Blake wants to argue that this is not so, which is why he wants to say that the obligations in the international community are more like the obligations I have in relation to the Sierra Club than in relation to the state. We also disagree on the nature of a political community. The picture of a political community that I am suggesting is that people are required to pursue certain mandatory aims in cooperation with each other. And in order to do this they have to make decisions in a way that negotiates a great deal of disagreement on how to do this as well as conflicts of interest on these issues. There are, in other words, certain moral aims that are given independent of the political community but which require cooperation among the members to achieve.

A state is a community concerned with a particularly thick set of aims, centered around justice and the common good, where a great deal of coordination and cooperation are required to achieve these. In this sense, the duty to pay taxes is a kind of instantiation of the more general duty to do one's fair share in pursuing the basic aims but this requires a bit more theorizing. There are moral requirements that determine how one is to decide how to pursue these aims and this is where democratic norms come into the picture. And so the idea is that in a just political community persons have rights to participate as equals in deciding on how to pursue the aims and what fair shares each must contribute to the pursuit of these aims. So the particular legal requirements of contribution that are chosen by a just political society are going to involve some kind of compromise among the participants to the extent that they disagree. Hence the duties to pay taxes will be determined by a shared sense of the basic aims of the community and compromises between the members to the extent that they have different views about how to pursue the aims fairly.

I have argued that the international society is a kind of political society. It is not merely a society of voluntary participants. And the reason is that there are mandatory aims that everyone must pursue in cooperation with others, despite disagreement and conflict of interests. A world of voluntary societies is one in which it is not required to cooperate with others on a fixed set of aims. I regard the Sierra Club as pursuing desirable aims but I do not think that I am required to help them out. There are a lot of other goods that I may cooperate in producing and I have a significant amount of

discretion as to which goods I want to help promote. Voluntary associations tend to be composed of reasonably like minded people concerned to pursue aims they all recognize and they all agree on. Of course, as a citizen of a state I am required to do my part in achieving the mandatory aims the state must pursue. Political associations pursue moral aims but since cooperation is required, they experience the clash of different opinions and interests.

International society is a budding political society since all (or nearly all) the states in it recognize the necessity of cooperation in pursuit of certain morally mandatory aims such as peace and security, development, basic human rights protection, environmental protection, and decent trade. These aims are articulated in the major treaty bodies such as the Charter of the United Nations, the World Trade Organization, the United Nations Framework Convention on Climate Change, and the Millennium Development Goals. These are not merely voluntary clubs, they are organizations of states that self-consciously assert the moral necessity of cooperation and that are willing to engage in pressuring and even coercion of those who are failing to make any kind of good faith contribution. They derive their political authority from the fact that they have the consent of members to particular ways of pursuing mandatory aims. The decision making concerning these goals is decentralized to some significant degree so that consent is an important component but the requirement of consent is qualified, I think, in ways I outlined above.

I don't think that the picture I am outlining requires that contributing political societies maximize the extent to which the morally mandatory aims are achieved. The extent to which a political society is required to contribute will itself be a matter of controversy. The Millennium Development declaration requires societies to give .7 percent of their GDP towards poverty alleviation. This is not the kind of requirement that involves maximization, though most states fail to achieve even this.

Furthermore, I take it that the view I have defended implies a solution to the assurance problem Blake outlines. There is a remedy to the problem of societies being taken advantage of by free riders in the scheme I am proposing. First, the account asserts that pressure and sometimes even coercion can be applied on a recalcitrant state that is unscrupulous, irrational, self-defeating or otherwise fails to make a good faith effort to pursue the mandatory aims in cooperation with others. Second, societies are supposed to solve these problems by entering into explicit agreements with other societies, compliance with which can be monitored if the agreements provide for it.

I do agree with Blake that when all other societies are acting badly generally, there may be a permission to go it alone. I am not convinced we are in that situation now. The situation we are in now is that states recognize the requirement to cooperate to pursue mandatory aims but they are still falling short of the behavior they recognize as required. I take it as a kind of support for the approach I am proposing that it can be seen as a kind of moral and rational reconstruction of what states are already committed to, though they are clearly coming up short on these commitments.

Furthermore, I think that the international community has made some serious progress in the development of international institutions. For all its flaws, the development of a more open system of international trade has played a role in lessening inequality and bringing people out of poverty. The climate change regime has been making some progress towards limiting carbon emissions. The respect for the territorial integrity of societies has become an increasingly powerful norm of the international community. There has been some progress in realizing democracy throughout the world. I think that there is at least a reasonable hope that the peoples of the world will continue to make progress on these issues through the modern system of state consent.

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