Immigration Ethics and the Context of Justice

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Strangers in Our Midst: The Political Philosophy of Immigration, David Miller (Cambridge, Mass.: Harvard University Press, 2016), 240 pp., $35 cloth.

By now one might hope that the robust body of theoretical work recently published on immigration ethics would have taken general political philosophy a long way from the prevailing Rawlsian-style insularity premise, according to which society is "a closed system isolated from other societies" into which persons "enter only by birth and exit only by death."[1] But there are still a great many political theorists whose focus is unreflectively endogenous and who assume away questions of states' constitutive scope and boundaries. One of the signal merits of David Miller's new book, *Strangers in Our Midst*, is that it lucidly demonstrates why ignoring state boundary constitution is untenable for political theory. Miller shows that foundational debates in political philosophy are inescapably related, both as premise and entailment, to many normative immigration questions.

For one thing, Miller makes clear how abiding questions about the proper scope of ethical priority end up fundamentally structuring our immigration discussions. These questions often manifest as debates about the legitimacy of states' prioritization of the interests of their own members over those of outsiders when making policy choices. Certainly, debates over the ethics of immigration control are not *reducible* to differences over ethical universalism and particularism: in some cases, more open immigration policies are justified precisely on grounds of national self-interest. But in practice, there tends to be a fairly tight alignment between positions on borders and positions on ethical priority. When, as in

Henry Shue's famous locution, "compatriots take priority,"[2] justifications for border restrictions often follow. In turn, ethical cosmopolitans are more likely to promote policies of greater border openness.

Miller also situates the immigration debates within streams of broader disagreement over the relative descriptive salience, and the ethical importance, of individuals and collectivities. Once again, disputes over immigration policy do not line up neatly along these various (internally complex) divides. Still, more often than not, border-critical positions tend to emphasize the descriptive primacy and ethical inviolability of individuals, while border-justifying positions tend to focus on the sociological and ethical preeminence of (usually nation-state) collectivities or associations.

The book's early chapters, in short, help the reader appreciate the intersecting axial relations between immigration policy and other, more abstract questions in political ethics. The analysis is useful for both dedicated immigration scholars and for general political theorists. Simply put, Miller demonstrates that the advancement of theoretical work in both settings depends on fuller mutual engagement.

But this is only part of Miller's project. After laying this foundation, Miller goes on to develop his own affirmative ethical argument about immigration policy. All told, his proffered approach is more collectivist than individualist, more nationalist and particularist than cosmopolitan, and more border-justifying than border-critical—though it is absolutist on none of these. The book's stated purpose is to "defend a qualified right on the part of states to close their borders and propose principles for selecting immigrants for admission" (p. 167). "Qualified" means that state discretion, while substantial, is subject to certain human rights and humanitarian constraints, mostly pertaining to refugees.[3] Thus, Miller defends rigorous territorial borders, but he makes clear that their purpose should be to enable and sustain a robust and inclusive interior—one that is communitarian, social-democratic, and, possibly (he hedges slightly here), protective of national identity.

Strangers in Our Midst invites commentary on many levels. The book's substantive scope is wide; it includes chapters on admission policies, labor migration, immigrant rights, refugees, and integration policy. It concludes with a brief, urgent postscript on the "European Migration Crisis of 2015," in which Miller expresses deep ambivalence about destination-state responsibility. Much will be said elsewhere about Miller's treatment of all of these questions. This essay will address an analytically orthogonal theme—one, however, that shapes his discussion

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throughout. The topic is Miller's methodological approach to normative theory development, and the relationship between this methodological approach and his substantive ethical conclusions on immigration.

How to Think About Immigration

Miller opens the book by saying that his subject is not only "what to do" about immigration but also "how to think about it" (p. 1). His approach on "how to think" begins with the same methodological commitment he maintains in all of his work on political theory—one he has called "contextualism."[4] Contextualism rejects the notion that norms of political justice can be derived from abstract reason or universal moral law. To this extent, Miller's approach aligns with the work of thinkers such as Bernard Williams, Raymond Geuss, and Michael Walzer, who in various terms reject the premise that political ethics is reducible to moral theory, and who urge political philosophers to recognize a distinctly political domain of practical ethics.

But while Miller likewise embraces a politics-first approach (p. 17),[5] what is distinctive to him is the emphasis he places on the mode of reasoning the theorist must employ to develop normative theory out of politics. Miller holds that normative political theory, by its nature, can only be empirically derived and informed. It is necessarily embedded and grounded in worldly facts and evidence—facts and evidence about human beings in general and especially, given his methodological anti-atomism, about collectives of people in particular societies. Foremost among these facts are those concerning collectively held values and norms. As Miller put it in another recent book, *Justice for Earthlings*, normative theory inevitably depends on a people's "beliefs or judgments about justice."[6]

This is not to say that Miller views theory development as entailing an entirely unmediated reportage of already existing norms. Rather, his prescribed mode of doing contextual theory purports to work, when successful, as a kind of virtuous circle. In such a process the philosopher should first use empirical means to discern what the "everyday moral judgments" of the people are. Next, she must refract these judgments through a process of "due reflection" to determine when and whether these shared understandings represent "our considered judgment." Finally, once satisfied, the theorist articulates normative prescriptions that are helpful and responsive and "fitting" (or, feasible) with the particular political setting.[7] Miller sums up the approach in *Strangers* this way: "Looking at immigration through the lens of political philosophy involves asking how the principles

and values we collectively endorse can be pursued consistently with one another in the light of the best available evidence, including evidence about how far it is possible to change individual behavior and the beliefs and attitudes that lie behind it" (p. 18). In short, Miller's contextualism is a theory-making system with moments of empirical input, reflective processing, and pragmatic output.

So, what of this methodology? Miller's starting premise seems crucially right: Norms of political justice can only emerge from the experienced realities of our political lives. Political moralities are historically constructed, contingent, and socially embedded. As Miller himself notes elsewhere, such an understanding has long been a cornerstone of most social theory and the critical social sciences, even if it is still controversial in mainstream political philosophy.[8] My difficulty, however, is with the particular way Miller goes about deriving, or saying he is deriving, protonorms from our political world. In this case, these are norms about immigration. I have several concerns.

Shared and Contested Understandings

First, what sort of data or evidence about a people's "shared understandings" (a Walzerian term, which Miller deploys) is the political philosopher to draw on to ground and inform normative theory? Miller's approach, it seems to me, reduces to a kind of attitudinalism. *Strangers in Our Midst* is full of references to "popular attitudes," "commonly accepted attitudes," and "attitudes toward" as well as "anxieties about" immigration, which he then takes to reflect "collective understandings." As it happens, in this book Miller mostly asks us to take his word for what people's attitudes and anxieties about immigration actually *are*; he is fairly casual about characterizing them. But if we could look under the argument's hood, we would want to know exactly how the content of these posited attitudes was ascertained. By consulting polling and survey data? Miller does briefly cite some. By trying to identify what he calls "collective preferences emerg[ing] through free exchange of opinions in the media" (p. 13)? He does some of this, too. But while surveys, experiments, and the media can provide certain data about people's views, they have notorious weaknesses. Among other things, there are framing effects and other cognitive distortions that severely undercut their utility. Moreover, how do we ensure against prejudice and inequality of voice and structural bias? Where is the moment for ideology critique?

Maybe the plan is that in the second, "due reflection" phase the philosopher can screen out what Miller has elsewhere called the "mistaken beliefs" that come

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through in the data.[9] Yet the philosopher is granted a very big job here in deciding which reflections are "due" or "considered," and which are "mistaken" or "intolerable." Personally, I worry that the notion of "due reflection"—closely linked to Rawls's "considered judgment," which entails appealing to "our intuitive beliefs"[10]—raises its own red flags. It seems too likely to embody what political theorist Judith Shklar called conventions of "normal justice"—by which she meant those conventionally held norms that function to reify a community's received wisdom and to filter out subversive critiques of injustice and the perspectives of the least advantaged.[11]

This problem aside, let us return to the empirical input phase. Even if we *could* somehow find a reliable way to identify popular attitudes or collective preferences about immigration, these attitudes and preferences are certain to be much more divided and contested than Miller allows. To my mind, his method is informed by a wishful metaphysics of consensus. Political and social norms are not fundamentally coherent among themselves, and, with rare exceptions, they are always contested. Ethical agonism is more clearly apparent if, instead of referencing polling data or trying to intuit the zeitgeist, we engage in a focused reading of practices and discourses embodied by law, by which I mean legal ideas, legal institutions, legal practices. Why law? Because in liberal democratic states, law is a social formation comprised not merely of coercive power but of embedded norms and normative argumentation. At stake are conceptions of the substance and the subjects, the locations and temporalities, the shape and purposes of justice. When we analyze law across both official and informal settings, we see that "our" normative assumptions and commitments—about immigration and most everything else—are divided, conflicted, and clashing, even if often in fairly structured ways.

In many liberal immigration destination states, legal controversies are currently raging over a host of immigration questions, some of which Miller touches on or more fully considers in *Strangers*. Here I will mention just a few. Must the norms of nondiscrimination and due process that formally apply internally to liberal states apply also when states exercise power at the border? Should irregular entry be regarded as a criminal or noncriminal violation of law? Must local police share with immigration authorities information about individuals they come into contact with during routine law enforcement activity, or may they maintain policies of nondisclosure? Where is "the border" properly enforced? Is it just to deport a person from the state after he or she has been criminally punished and completed a prison sentence? All of these are live, bitterly fought legal issues

in various national settings. They reflect divisions not merely over specific policies but over broader conceptions of fairness, wrongdoing, fault, jurisdictional authority, public safety, and so forth.

Given the intensity and implacability of these divides, it seems facile for Miller to present some of his substantive ethical conclusions—about rights for undocumented immigrants, say—as if they issue relatively unproblematically from the encounter between people's everyday moral judgments and the philosopher's "due reflection" process. Indeed, attending closely to legal battles over immigration in many destination states powerfully demonstrates that our normative contexts are, more often than not, scenes of self-wrestling and embattlement. I think that any methodological contextualism needs to specifically address this: it must attend not merely to normative pluralism *between* contexts—which Miller does do—but also to pervasive normative discordance *within* them. One benefit of doing this, I would add, is that the output or "guidance" phase of normative political theory would not be as hemmed in by feasibility and uptake concerns—by concerns that theory must be broadly "acceptable" to "present-day citizens"—as Miller makes it out to be.[12] Precisely because liberal democratic contexts are characterized by deep normative discordance, both deeply critical and seemingly avant-garde prescriptions will often have firm contextual ground.

The Context Itself

I want to highlight a second point about Miller's contextualist method for normative theory development, one that addresses the relationship in *Strangers* between his method and the specific object of his substantive normative theorizing. This substantive object is, of course, none other than the political drawing and policing of the composition and scope of the political context itself. This is what immigration questions are about, after all: they are questions of who gets to be in and of a given context, as well as how such decisions are to be made. But if, as Miller maintains, justice is in significant part a function of what justice is "taken to be,"[13] then we must ask a further question: taken to be *by whom*? Do we presume the answer is "those already in and of the political context"? Clearly this is problematic, since this is the same context whose proper scope and boundaries are precisely at issue. There is a danger here of circular reasoning.

In an attempt to avoid that, it would be useful to dig deeper and inquire what it means for a person to be in and of the context for methodological purposes. At

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what point does a person count as enough of a part of the context that her perspective must be consulted as relevant normative input for theorizing? Some cases seem easy: a given state's status-citizens are routinely understood to be its political context's flag-bearers. Its permanent resident aliens will often count as well. Conversely, on Miller's account foreigners geographically located outside the state are clearly *off* the political-contextual map (although he also argues that those turned away at the border are owed at least an explanation—thus treating the border zone as part of the context to this extent). But what about everyone in between?

It is interesting to think about the position of irregular or unauthorized immigrants in this regard. In his discussion of the subject, Miller underlines the significance of states' human rights obligations to these immigrants on the grounds that "the state's very legitimacy depends upon its ability to protect the human rights of all those who are present on its territory" (p. 61). He also makes the familiar liberal argument that democratic states have obligations to regularize the status of some deserving (that is, noncriminal, long-residing) irregular migrants in some circumstances (pp. 121–27). Presumably, once regularized those immigrants' "attitudes" about immigration (and everything else) would become (at least eventually) a properly cognizable part of the polity's normative context. Yet since, in practical terms, regularization is only sometimes made available to some unauthorized immigrants; and since, under the laws of most states, most unauthorized immigrants will remain in such status, we must ask: In absence of or prior to, any possible regularization, are irregular immigrants (or some of them) already on the relevant map for the methodologically contextualist political philosopher?

Miller himself suggests they are not. He writes that the unauthorized are "physically present on the state's territory but not enlisted members of the political community" (p. 120). Add to this that, precisely by virtue of that irregularity, these immigrants are always potentially subject to expulsion, which is often preceded by detention and, increasingly, criminal prosecution and attendant penalties. Regrettably, Miller hardly touches the subject of deportation and the criminalization of irregular status in *Strangers*, other than to remark that states "may of course remove people without residence rights from the territory so long as the methods employed do not themselves violate human rights by virtue of their brutality" (p. 117). However, it seems fair to conclude that, when coupling his stance on the state's "right to control its borders" (p. 62) with his notion that only some irregular immigrants are entitled to regularization, he would regard

states as possessing legitimate authority to deport other irregular immigrants in some circumstances by virtue of that irregularity. Thus the question: What is the ethical significance of the immigrants' actual territorial presence, now and over time?[14] Is the fact of living and working in a given state enough to qualify irregular migrants as part of the context? Or does the fact that persons may be theoretically deportable under extant rules, even if not (yet) removed, disqualify them for recognition as context-embedded individuals?

The challenge posed by these questions can be brought into focus by examining the wave of recent activism undertaken by undocumented immigrant youth in the United States. These young people, sometimes called "Dreamers" due to their promotion of the hard-fought but ultimately unsuccessful DREAM Act,[15] have been demanding to be allowed to stay in the country and to regularize their status. But many have been going further, insisting not merely on a path to formal incorporation but on recognition as members of the political and social community *as they are now*, as undocumented persons. Many have been publicly "coming out" as undocumented and, moreover, they are specifically asserting they are "unapologetic" about that status[16]—unapologetic for themselves and also for their undocumented parents who, it is commonly asserted, "brought them to this country" as young children, and are thus the truly culpable parties.[17] In this respect, these young people are denying that there is a wrong to be justified or excused, forgiven or forgotten, or otherwise overcome. In alignment with a growing transnational anti-deportation movement, they have lambasted current national policies of deportation. Some have taken on a utopian political slogan that is widely promoted among Canadian immigrants' rights advocates: "No One Is Illegal."[18] In short, they are seizing and implanting themselves into the political context to protest the legitimacy of the community's boundary rules—the very same rules that the state claims are necessary to enable the context's existence in the first place. One might call it an "immigrant-occupy-the-context movement."

What would a methodological contextualist like Miller say if he were to address this burgeoning political movement? Should not he, and we, recognize these voices as a vital part of our normative context as we theorize justice in immigration? Some will respond that being *physically* here does not mean being *contextually* here: contextual "hereness" is up to the political community and, moreover, cannot be unilaterally foisted upon it—via what Miller calls "queue-jumping" (p. 117). Setting aside for now debates over the ultimate locus of responsibility

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for—as well as causes of—irregular migration,[19] the point is this: These immigrants' very acts of public protest—their justice-based demands for equal recognition and incorporation—are remaking this same context in such a way that they are now inextricably part of it. Reading things this way seems natural to a true ethical contextualism.

In short, it is precisely in the immigration setting that Miller's mode of doing contextualist political theory encounters a complicating case. Methodological contextualism has an embedded "boundary problem" at its core. Critically analyzing standard presuppositions about the source-context's scope, nature, and constituency is indispensable for further development of a contextual political theory of immigration.

NOTES

[1] John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), pp. 8, 135–36.
[2] Henry Shue, *Basic Rights* (Princeton: Princeton University Press, 1980).
[3] Miller's summary of his position is perhaps more pointed in his 2015 article "Justice in Immigration": "(Legitimate) states have a general right to control their borders and decide who to admit as future citizens," subject to some human rights constraints. David Miller, "Justice In Immigration," *European Journal of Political Theory* 14, no. 4 (2015), p. 391.
[4] For an extensive discussion, see David Miller, *Justice for Earthlings: Essays in Political Philosophy* (New York: Cambridge University Press, 2013).
[5] This commitment distinguishes Miller's normative work on immigration from that of many theorists who address the subject in squarely moral terms. See, for example, the arguments developed in Christopher Heath Wellman and Phillip Cole, *Debating the Ethics of Immigration: Is There a Right to Exclude?* (New York: Oxford University Press, 2011).
[6] Ibid., p. 29.
[7] Ibid., generally.
[8] Ibid., p. 45.
[9] Ibid., p. 44.
[10] Ibid., p. 41.
[11] Judith N. Shklar, *The Faces of Injustice* (New Haven: Yale University Press, 1990), pp. 15–50.
[12] Miller, *Justice for Earthlings*, pp. 31, 34.
[13] For example, David Miller, "A Response," in Daniel A. Bell and Avner de-Shalit, eds., *Forms of Justice: Critical Perspectives on David Miller's Political Philosophy* (Lanham, Md.: Rowman and Littlefield, 2003), p. 351: "The question what justice is cannot be radically separated from the question what people in general take justice to be."
[14] See Linda Bosniak, "Being Here: Ethical Territoriality and the Rights of Immigrants," *Theoretical Inquiries in Law* 8, no. 2 (2007), pp. 389–410.
[15] Development, Relief, and Education for Alien Minors. This legislation was introduced in the U.S. Congress several times between 2001 and 2011, ultimately without success.
[16] Cristina Beltrán, "'Undocumented, Unafraid, and Unapologetic': DREAM Activists, Immigrant Politics, and the Queering of Democracy," in Danielle Allen and Jennifer S. Light, eds., *From Voice to Influence: Understanding Citizenship in a Digital Age* (Chicago: University of Chicago Press, 2015).
[17] Editorial: "Dream Time," *New York Times*, September 19, 2010, www.nytimes.com/2010/09/20/opinion/20mon2.html. ("The Dream Act opens the door to military service and higher education for young people whose parents brought them to this country as children without proper documentation . . . . Those who might qualify . . . are blameless for their illegal status.")
[18] Peter Nyers, "No One is Illegal Between City and Nation," *Studies in Social Justice* 4, no. 2 (2010), pp. 127–43.
[19] I address these issues in Linda Bosniak, "Wrongs, Rights and Regularization," *Moral Philosophy and Politics* 3, no. 2 (2016).