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THE RIGHTS OF MIGRATION

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This paper argues that neither a general right to exclude migrants nor a general right to migrate freely exists. The extent of the right to exclude or the right to migrate freely must instead, in the majority of cases, be determined indirectly by examining whether a given immigration law or policy would result in the violation of migrants' basic rights. Therefore states' right to exclude migrants is constrained by what the author calls the indirect principle of freedom of migration. Under this principle, if an immigration law or policy cannot be imposed without violating a migrant's basic rights, then the law or policy cannot be legitimately implemented. The argument for this principle is undertaken both conceptually and substantively. It is then defended against the objections that on the one hand, it may not have enough critical force, and on the other, it may be overly restrictive of states' power to exclude migrants.

I. INTRODUCTION

Things do not often end well for migrants[1] who contravene immigration laws. They are detained, expelled, and sometimes killed. The unwanted who manage to remain live in the shadows, under threat of government enforcement or private exploitation and abuse. One response to these, some of the distinctive vulnerabilities of migrants, has been to argue for a universal moral right to move freely across borders. A countervailing response has been to defend the right claimed by states or their members to exclude all migrants. Given the diversity of goods associated with states

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1. A note on terminology: a "member," as used here, is someone who "belongs" to a state in some morally relevant way. A "migrant" or "immigrant" is someone who seeks to move from a state where he or she belongs (i.e., is a member) into another where he or she does not belong (i.e., is not a member). Thus "immigration" here broadly encompasses all movement, temporary and indefinite, into states where one is not a member. On my usage here, members will usually be citizens, but citizens can also be migrants, because they may not "belong" to their state of formal citizenship in a morally relevant sense, perhaps because they were born or have lived a large part of their life in another state. These stipulative definitions are employed to avoid having the moral argument determined by formal legal categories.

and the many reasons for which people migrate, it is unlikely that either of these rights exists.

In this paper I argue instead for the following three-part picture of the rights of migration: a small segment of the world's migrants have a clear right to migrate; states or their members have a clear right to exclude another small segment; but in most cases, there is neither a clear right to exclude nor a clear right to migrate. For this majority, the extent of the right to migrate or exclude must be identified indirectly, using what I am calling the indirect principle of freedom of migration. The indirect principle holds that if immigration laws and policies cannot be imposed without resulting in the violation of a migrant's basic rights, such laws and policies are presumptively illegitimate. A migrant who would migrate but for such laws or policies cannot, other than in the exceptional case where the rights violation is justified, be excluded.

Section II provides context for the argument for the indirect principle by setting out a tension between sovereign discretion over immigration control and migrant rights. Sections III to V then take up a conceptual analysis of the rights to exclude and migrate, together with an account of the all-things-considered reasoning needed to establish these rights. This analysis and account allow for a first, formal statement of the argument for the indirect principle. Building on this discussion, Section VI suggests a minimal list of rights that states or migrants can in fact be said to have. These rights are used to provide a second, substantive statement of the indirect principle. Section VII discusses objections.

II. SOVEREIGN DISCRETION AND MIGRANT RIGHTS

Many migrants who come to or find themselves within a state illegally may be taken to believe the immigration laws and policies that would otherwise exclude or remove them are unjustified. Yet debates over the justifiability of such laws and policies are rendered intractable by virtue of two features of the problem of legitimacy in this context. First, it is unclear what standing, if any, migrants ought to have in debates over the immigration laws and policies of a state that is not their own.[2] Second, even if they enjoyed equal

2. Musgrove v. Chung Teeong Toy, [1891] A.C. 272 (P.C.), an early statement of the doctrine of sovereign discretion, was decided on the basis that migrants have no standing to challenge immigration laws:

> Their Lordships cannot assent to the proposition that an alien refused permission to enter British territory can, in an action in a British Court, compel the decision of such matters as these, involving delicate and difficult constitutional questions affecting the respective rights of the Crown and Parliament, and the relations of this government and her self-governing colonies.

The issue of standing comes out in debates over whether migrants have any democratic rights; *see* Arash Abizadeh, *Democratic Theory and Border Coercion: No Right to Unilaterally Control Your*

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standing, it is unclear how to weigh their interests relative to members'.[3] Conventional liberal theories of legitimacy within the state presume equal standing and weight. Such theories must confront the possibility of justified departure from these presumptions when the activity governed is immigration.

As a matter of law and practice, states' immigration regimes settle disagreement over immigration governance with scant attention to the voice and interests of migrants. In this they are sanctioned by the foundational legal doctrine that grants states broad discretion over immigration matters.[4] This discretion is sometimes said to be absolute, as it was in the 1906 Privy Council decision Canada (Attorney General) v. Cain:

> One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests.[5]

Most striking in this passage is the "especially," an adverbial reservation suggesting what is claimed is a discretion whose exercise will be legitimate even absent the potential justifications mentioned. Another way to put this is to say that when the Privy Council writes "at pleasure," it means it.

Absolutist statements of the doctrine of sovereign discretion originated in a handful of nineteenth- and early-twentieth-century Anglo-American cases.[6] The enduring legal validity of such pronouncements is a matter of

Own Borders, 36 POL. THEORY 37 (2008); David Miller, *Democracy's Domain*, 37 PHIL. & PUB. AFF. 201 (2009).

3. The possibility that the interests of migrants might be given less weight is a result of the debate over global justice; *see* Samuel Scheffler, *The Conflict between Justice and Responsibility*, *in* NOMOS XLI: GLOBAL JUSTICE 86 (Ian Shapiro & Lea Brilmayer eds., 1999); *see, more generally*, SAMUEL SCHEFFLER, BOUNDARIES AND ALLEGIANCES: PROBLEMS OF JUSTICE AND RESPONSIBILITY IN LIBERAL THOUGHT (2001).

4. "Classically states have been considered to have complete sovereign authority over a defined territory and population. International human rights law and other treaty obligations, both bilateral and multilateral, have made inroads into the sweep of this sovereign authority. . .. The underlying principle or default rule remains, and the restrictions on state authority arise by way of exception." David A. Martin, *The Authority and Responsibility of States*, *in* MIGRATION AND INTERNATIONAL LEGAL NORMS 31–32 (Vincent Chetail & T. Alexander Aleinikoff eds., 2003).

5. Can. (Att'y Gen.) v. Cain, [1906] A.C. 92 (P.C.), [¶6]. *Cain* continues to be cited; *see* R v. Immigr. Officer at Prague Airport and Another, [2004] UKHL 55, [¶12] (Lord Bingham); R (on the application of Bancoult) v. Sec'y of State for Foreign and Commonwealth Aff., [2008] UKHL 61, [¶152] (Lord Mance); *Chu Kheng Lim v Minister for Immigr., Local Gov't & Ethnic Aff.* [1992] HCA 64, ¶27 (Austl.) (Brennan, Deane, and Dawson, J.J.); *Re Minister for Immigr. and Multicultural Aff.; Ex Parte Te* [2002] HCA 48, ¶21 (Austl.) (Gleeson, C.J.); Kindler v. Can. (Minister of Justice), [1991] 2 S.C.R. 779, ¶133 (Can.) (Binnie J, concurring); Mitchell v. Can. (Minister of Nat'l Revenue), [2001] 1 S.C.R. 911, ¶¶108–109 and 160 (Can.) (La Forest, J., concurring).

6. Other cases include *Musgrove*, *supra* note 2. In the United States context, the triumvirate of cases most often cited are Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889)

debate. I am concerned, however, not with the staying power of the legal doctrine but with the underlying legitimacy claim.[7] This claim may be seen as relying on a purely procedural account of legitimacy. That is, because a given immigration law emanated from within a state following the legislative, judicial, or other procedures in place to resolve disagreements among members, it is said to be legitimate with respect to nonmembers who might wish to immigrate. An alternative understanding is as a substantive claim that there are no limits to what a state can do in governing immigration. These understandings simply bring out different dimensions of the same claim. The first, procedural account is consistent with affording migrants no standing; the second, substantive account, with affording their interests no weight.

However one best describes the underlying legitimacy claim, the doctrine of sovereign discretion has difficulty accounting for the more recent idea that migrants may have rights they can hold up against a state of destination. Implicit in the assertion that an immigration law or policy violates migrants' rights is the claim that such laws or policies are presumptively illegitimate. It is hard to understand where such rights claims could come from if migrants had no standing to assert them or if their interests were given no weight. To give an example so obvious as to seem absurd but which nonetheless is on its face denied by *Cain*, today few would accept that a state could condition entry on renunciation of the right to life.[8] One can recognize that migrants

(the Chinese Exclusion Case) ("The power of exclusion of foreigners being an incident of sovereignty . . ., the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one."); Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) ("It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."); Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893) ("The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country."). For the foundational nature of these cases, *see* RICHARD PLENDER, INTERNATIONAL MIGRATION LAW (2d ed. 1988), at 2.

7. I use the law in two ways in this paper. Here, I draw on certain statements in the case law to exemplify a legitimacy claim that, I believe, still underlies aspects of immigration law and policy in many, if not all, states. Below, in Section VI, I draw on cases and other legal instruments to exemplify considered judgments about which rights states or migrants have. To the extent I may be understood to defend a particular view of the law, it is not that pronouncements like those in *Cain* continue to provide an accurate statement of the law, although I do believe that the demise of this doctrine is overstated. Rather, my view is that if this doctrine *has* been replaced or undermined—as the proliferation of rights claims available to migrants may suggest—then we are faced with puzzles on two normative planes: legal and moral. The legal puzzle is to describe the doctrine that has replaced absolute discretion. The moral puzzle is to describe the legitimacy claim underlying this alternative doctrine. The indirect principle is directed at this second, moral puzzle. I am grateful to Michael Blake and the anonymous reviewer for urging me to clarify this point.

8. The example is not, however, so absurd as to have been overlooked by the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 9, *opened for signature* Dec. 18, 1990, A/RES/45/158 (entered into force Jul. 1, 2003), which protects the right to life of migrant workers and their families.

have such a right against a state of destination even if they do not share equal status with members of that state but not if their interests count for nil. Proponents of strong or absolute state discretion might wish to resist such troubling implications, but it is not obvious that they can.[9]

The greatest plausible challenge to the doctrine of sovereign discretion would come from a universal right to move freely across borders.[10] But all rights claims made on behalf of migrants introduce a similar, if weaker, tension, with each such right fractionally reducing the extent of sovereign control.[11] This tension presents a challenge because, while it is not clear how the troubling implications of the absolutist doctrine can be limited, it is also not obvious that respect for migrants' basic rights will not unduly limit states' control over immigration. So on one hand, migrants' rights might unduly limit discretion; on the other, jealousy of that discretion might lead to laws and policies that violate too many rights. In the following three sections, I address the challenge of defining the legitimate scope of control over immigration within a rights framework by investigating the logical structure and justification of rights claims made on behalf of states and migrants.

III. THE TOOLBOX

It is helpful first to say a few things about the approach to the logical structure and justification of rights employed, although I do not have space to

9. The troubling implications of the absolutist doctrine are, surprisingly, pointed out by Justice Stephen Field in *Fong Yue Ting, supra* note 6, at 756 (Field, J., dissenting):

> According to this theory, Congress might have ordered executive officers to take the Chinese laborers to the ocean and put them into a boat and set them adrift; or to take them to the borders of Mexico and turn them loose there; and in both cases without any means of support; indeed, it might have sanctioned towards these laborers the most shocking brutality conceivable.

This is surprising, because Justice Field wrote the majority in the Chinese Exclusion Case, *supra* note 6. *See also* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 226–227 (1953) (Jackson, J., dissenting):

> Because the respondent has no right of entry, does it follow that he has no rights at all? Does the power to exclude mean that exclusion may be continued or effectuated by any means which happen to seem appropriate to the authorities? It would effectuate his exclusion to eject him bodily into the sea or to set him adrift in a rowboat. Would not such measures be condemned judicially as a deprivation of life without due process of law? Suppose the authorities decide to disable an alien from entry by confiscating his valuables and money. Would we not hold this a taking of property without due process of law? Here we have a case that lies between the taking of life and the taking of property; it is the taking of liberty. It seems to me that this, occurring within the United States or its territorial waters, may be done only by proceedings which meet the test of due process of law.

10. The greatest conceivable, though not plausible, challenge would be one that afforded members' interests no weight compared to those of migrants, as in some invasions.

11. For the idea that there is a trade-off between rights and control, *see* Martin Ruhs & Philip Martin, *Numbers versus Rights: Trade-Offs and Guest Worker Programs*, 42 INT'L MIGRATION REV. 249 (2008).

defend it. Under the heading of logical structure, I translate various claims to migration-related rights into the terms of Wesley Hohfeld's well-known analytic breakdown of rights. Hohfeld's view is that "rights" are complex combinations of eight kinds of entitlements—claim-rights and duties, liberties and no-rights, powers and liabilities, and immunities and disabilities—each of which exists in a relationship of logical entailment with two others, correlating to a second and opposing a third.[12] In the deconstruction of the rights of migrants and states that follows, three kinds of entitlement are relied on: claim-rights, liberties, and powers. I refer also to duties, no-rights, and liabilities, which correlate respectively to claim-rights, liberties, and powers, but only for occasional clarification.

A claim-right held by one person is an entitlement that some other person act or not act in some way; that is, it correlates to a duty on the part of that second person to act or not act in that way. A liberty, for its part, is an entitlement to act in a certain way; it correlates to a no-right on the part of someone else (that is, that person has no claim-right) that you not act that way. At the same time, it opposes the possibility that the liberty bearer has a duty not to act. These first-order entitlements are sufficient to describe static deontic relationships between persons. They are not sufficient to describe how such relationships might change over time. To render the deontic picture dynamic, second-order entitlements are needed. In the Hohfeldian scheme, a power is such a second-order entitlement[13] allowing the power holder, through some action, to alter the claim-rights or liberties of oneself and others, who are correlatively liable to the exercise of the power. A power is a form of authority.[14]

The logical relationships set out by Hohfeld do not imply that when we speak loosely of a right to do or not do something, or to have someone else do or not do it, we can include only entitlements that entail one another. Rights, spoken of loosely, can be modeled with precision by laying out a series of entitlements whose relationship is justificatory, not logical. That is, to claim a certain bundle of Hohfeldian entitlements adds up to a right

12. For ease of reference, I reproduce Hohfeld's table of jural relations:

Jural opposites	right	liberty	power	immunity
	no-right	duty	disability	liability
Jural correlatives	right	liberty	power	immunity
	duty	no-right	liability	disability

See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913), at 30. Although Hohfeld referred to privileges, I substitute "liberty," as most do; *see, e.g.*, L.W. SUMNER, THE MORAL FOUNDATION OF RIGHTS (1987), at 25 n15.

13. Hohfeld does not use the term "second-order," but, again, many of his interpreters do: *see* SUMNER, *supra* note 12, at 27ff; MATTHEW H. KRAMER, *Rights without Trimmings*, *in* M.H. KRAMER, N.E. SIMMONDS & HILLEL STEINER, A DEBATE OVER RIGHTS: PHILOSOPHICAL ENQUIRIES 20 (2000); Leif Wenar, *The Nature of Rights*, 33 PHIL. & PUB. AFF. 223 (2005).

14. Wenar, *supra* note 13, at 231. One can have power or authority to change the normative situation of others in ways other than by altering their rights, but these other forms of power or authority are not the concern here.

is to make a claim that they hang together;[15] that they exist in a mutually supportive relationship with a shared justificatory end. A useful metaphor is a machine with many distinct parts, each with a distinct function but necessary to the overall purpose. On this picture, the justification of each constituent entitlement relates to the overall purpose of the broader right. Two further points need to be made. The first is that the justification of each constituent entitlement may differ in detail from that of others, both in their grounds and in the form of justifying argument. One would expect a power, if part of a broad right, to be justified by one or another familiar account of authority; claim-rights or liberties part of the same right would have related but distinct justifications. The second point is that the justification of each entitlement within a given right might differ from the justification of the same entitlement in another deontic context. The at-large claim-right against being threatened is one thing; it is something else when those threats are intended to stop you speaking out.

One could undertake the descriptive task of setting out the entitlements that make up a right. Or one could undertake the justificatory task of showing why a collection of entitlements should be seen as working together as a right. The argument for the indirect principle requires both undertakings. To the extent there is a right of exclusion held by states, I argue it consists in a collection of entitlements whose shared point is to exercise control over immigration for reasons having to do with the preservation of valuable goods associated with states. To the extent migrants may have a right to migrate, it comprises a collection of entitlements justified by recourse to reasons they might have to migrate, as well as more basic interests. But I also argue that the reasons to which states might resort to justify a right of exclusion or its constituent entitlements and the reasons to which migrants might resort to justify a right to migrate or its constituent entitlements are indeterminate and overlapping. The indeterminacy is what makes defining the legitimate limits of immigration control so challenging. The overlap of reasons, together with the logical structure of these rights, provides the opportunity for an indirect solution.

IV. THE POWER TO ADMIT OR EXCLUDE MIGRANTS

When the doctrine of sovereign control over immigration is set out in absolute terms, as in *Cain*, what is asserted, most obviously, is the claim-right that migrants not immigrate to a state. But this cannot be a static claim-right to exclude all migrants and a correlative static duty on the part of all migrants not to enter. Stasis would represent a complete loss of sovereign

15. I take "hang together" from JEREMY WALDRON, DIGNITY, RANK, AND RIGHTS (2012), at 73 n34; Waldron is discussing legal status, not rights. The idea described in this paragraph of how various entitlements unite to form a right is similar to that developed in CARL WELLMAN, REAL RIGHTS (1995).

control. A better view is that states claim three further entitlements or kinds of entitlements allowing for such control, in addition to a general claim-right against the immigration of migrants. These are the powers to waive or reinstate the claim-right with respect to particular migrants or categories of migrants; the power to annex conditions to entry or to lift those conditions; and various liberties of implementation, which will include liberties to take enforcement action to prevent unsanctioned entry through expulsion, deportation, or other means and liberties to protect, or not, migrants' rights against members. For the sake of a label, I call this four-part complex of entitlements the *absolute-discretion model*. If each entitlement is unlimited, this model provides states absolute deontic control over immigration.

The legitimacy of this model requires investigation by examining the reasons that might be offered in its defense. As a point of departure, we might say the goods providing migrants with reasons to immigrate or not into a given state might collectively be labeled *the value of migration*. The goods that furnish states with reasons to exclude or admit migrants might together be called *the value of states*. Although it is generally easiest to conceptualize such goods in consequentialist terms and, in particular, in terms of the well-being of migrants or the members of states, the account that follows is intended neither to be consequentialist nor to exclude reasons normally associated with consequentialism. Rather, I want to allow for the broadest possible set of reasons within each value, which may include reasons rooted in some objective conception of well-being but also reasons of other kinds.[16] The

16. The all-things-considered scheme of reasoning is a resource for the justification of the individual entitlements contained in the rights of migration, broadly speaking, as well as a way of understanding how those individual entitlements hang together. I am influenced here by the approach to the justification of rights set out in T.M. SCANLON, *Rights, Goals, and Fairness*, *in* THE DIFFICULTY OF TOLERANCE 26 (2003). Under Scanlon's approach, the justification of a right involves:

> (i) An empirical claim about how individuals would behave or how institutions would work in the absence of this particular assignment of rights (claim-rights, liberties, etc.). (ii) A claim that this result would be unacceptable. . . . (iii) A further empirical claim about how the envisaged assignment of rights will produce a different outcome.

Id. at 35. Scanlon initially described his approach to the justification of rights as consequentialist because "it holds rights to be justified by appeal to the states of affairs they promote"; *id.* Another clear statement is found in T.M. SCANLON, *Human Rights as a Neutral Concern*, *in* THE DIFFICULTY OF TOLERANCE 115–117 (2003). Scanlon later recharacterized his approach in contractualist rather than consequentialist terms:

> In order to decide what rights people have, we need to consider both the costs of being constrained in certain ways and what things would be like in the absence of such constraints, and we need to ask what objections people could reasonably raise on either of these grounds. But the fact that claims about rights, like other moral claims, need to be justified in this way, does not make rights morally derivative, or mere instruments for the production of morally valuable states of affairs.

T.M. SCANLON, *Introduction*, in THE DIFFICULTY OF TOLERANCE 4 (2003). Although I refrain from committing myself to Scanlon's contractualist formula of reasonable rejection, my aim is to set out a general scheme that allows for the justification of migration-related rights in terms of the

conclusion as to the permissibility of migration in a given case will depend on a comparative judgment of the potential value of migration against the resulting diminishment of the value of states.

That there must be a reckoning between the value of migration and the value of states suggests two more considerations. Empirical theories and data will be needed to support claims regarding the value of migration and the beneficial or harmful impact of immigration on the value of states. Further, a normative account is needed of how to weigh the value of states and the value of migration against one another. In particular, it must be resolved whether members of one state may permissibly evince moral priority, or partiality, toward fellow members; to return to the language of Section II, it must be resolved how much weight members ought to give the interests of migrants that underlie the value of migration compared to the weight given the interests of fellow members.

Most philosophical accounts defending immigration restrictions identify various goods associated with receiving states to justify the exclusion of some or all migrants. These accounts bring out state-associated goods that may be considered in deciding whether immigration policy is all-things-considered justified, such as democracy and democratic institutions;[17] the welfare state or, more abstractly, distributive justice;[18] culture or political culture;[19]

reasons that might be offered for or against such rights. These reasons may include some that would be considered consequentialist, such as the well-being of all those involved, but may include other kinds of reasons as well. Even if one relied on some nonconsequentialist reason, such as autonomy or human dignity, when seeking to justify a claim to a right of migration, it would have to be explained why this reason could vindicate a right in the face of countervailing concerns. Note that one effect of casting Scanlon's account of the justification of rights in nonconsequentialist terms is that the third step in his account of rights justification will not necessarily require a showing that a given right leads to a better overall state of affairs, in terms of, say an increase in overall well-being. I note also that in a recent essay, Leif Wenar criticizes Scanlon's conception of rights as unduly limited to important rights that constrain others, when some rights are unimportant and some do not constrain; *see* Leif Wenar, *Rights and What We Owe to Each Other*, J. MORAL PHIL. (forthcoming). I agree with Wenar. Scanlon's approach to the justification of rights, particularly by attention to how institutions would behave absent some entitlement, seems more suited to claim-rights than liberties or powers. In Section VI, I seek to follow Scanlon's approach to the justification of claim-rights. Elsewhere, the justification of powers and liberties, while relying on the same scheme of all-things-considered reasoning, does not follow Scanlon.

17. BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980). Ackerman is generally considered an advocate of open borders, yet he argues that states can restrict immigration in order to preserve "the *entire* liberal conversation that guarantees the rights of *all* existing citizens"; *see id.* at 95. I am grateful to LEGAL THEORY's anonymous reviewer for urging clarification.

18. Stephen Macedo, *The Moral Dilemma of U.S. Immigration Policy: Open Borders vs. Social Justice?*, *in* DEBATING IMMIGRATION (Carol Swain ed., 2007); John Isbister, *A Liberal Argument for Border Controls: Reply to Carens*, 34 INT'L MIGRATION REV. 629 (2000).

19. MICHAEL WALZER, *Membership*, *in* SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983); Will Kymlicka, *Territorial Boundaries: A Liberal Egalitarian Perspective*, *in* BOUNDARIES AND JUSTICE: DIVERSE ETHICAL PERSPECTIVES 259 (David Miller & Sohail H. Hashmi eds., 2001).

self-determination;[20] population control;[21] or public health, safety, and security.[22] However, none of these can provide the basis for determinate decisions on admission or exclusion for any but a very small number of individual cases. This indeterminacy is aggravated by the fact that states probably have many valuable goods associated with them that may be affected in various cross-cutting ways, requiring cross-cutting empirical accounts.

An important objection here might be that immigration laws and policies are not established case by case. To an extent, this is true.[23] Immigration laws themselves, like all law, are written in general terms. Moreover, the all-things-considered permissibility of an individual's immigration depends on everyone else who may or may not enter, and so policy is set according to categories of migrants, with an eye to some overall ceiling. After all, from the beginning, the concern regarding immigration has not been individual migrants but the fear of "vast hordes of people crowding in upon us," as the U.S. Supreme Court put it in the unfortunately named *Chinese Exclusion* case.[24]

The effect of this objection about overall numbers and the categorical nature of immigration policy-making is only to add further complexity by pointing to the need for principles of distribution beneath any defensible ceiling that will be sensitive to the comparative judgments that would be made in individual cases.[25] The requirement of sensitivity to the individual case flows from the basic liberal commitment to individual justification.[26]

20. Christopher Heath Wellman, *Immigration and Freedom of Association*, 119 ETHICS 109 (2008). Wellman argues that states enjoy a right to exclude as an incident of citizens' association rights, which he grounds on the value of self-determination. But as Joseph Raz writes, "[a]ssertions of rights are typically intermediate conclusions in arguments from ultimate values to duties." JOSEPH RAZ, THE MORALITY OF FREEDOM (1986), at 181. Although Wellman's argument is novel, he is ultimately pitting the underlying value of self-determination, which is said to underlie citizens' right of association, against the value of migration in asserting that there is a power to exclude.

21. David Miller, *Immigration: The Case for Limits*, *in* CONTEMPORARY DEBATES IN APPLIED ETHICS 201–202 (Andrew I. Cohen & Christopher Heath Wellman eds., 2005).

22. Joseph Carens, *Migration and Morality: A Liberal Egalitarian Perspective*, *in* FREE MOVEMENT: ETHICAL ISSUES IN THE TRANSNATIONAL MIGRATION OF PEOPLE AND OF MONEY 28–30 (Brian Barry & Robert E. Goodin eds., 1992); Joseph Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251 (1987), at 268. Like Ackerman (*see* ACKERMAN, *supra* note 17), Carens is seen as a defender of open borders; indeed, he is often held up as their chief advocate. Also like Ackerman, however, Carens makes concessions allowing for certain restrictions. Again, I am grateful to the anonymous LEGAL THEORY reviewer for urging clarification.

23. But not unreservedly true. The immigration regimes of most states include elaborate bureaucracies for individual adjudication as well as discretionary provisions allowing for exceptions to general rules of admissibility or exclusion. (For a discussion in the U.S. context, *see* Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703 (1997).) It would be most accurate to say that most immigration regimes in some way combine categorical policy-making and individual decision-making. The argument is that the categories created by immigration policies must be sensitive to the value of migration to the individual.

24. *Chae Chan Ping*, *supra* note 6, at 606.

25. Colin Strang, *What If Everyone Did That?*, *in* ETHICS 151 (Judith J. Thomson & Gerald Dworkin eds., 1968).

26. Jeremy Waldron, *Theoretical Foundations of Liberalism*, 37 PHIL. Q. 127 (1987), at 135:

This complexity further aggravates the indeterminacy of legitimate immigration governance because the necessary interdependence of decisions made about the limits and distribution of admissions and exclusion decisions means there will be no single legitimate immigration policy and also that it will be yet harder to distinguish legitimate from illegitimate policies.

Even with all this, maybe the inevitability of indeterminacy and disagreement has been overstated. One way to arrive at determinate outcomes is through the absolute-discretion model. But the general claim-right of exclusion that lies at the core[27] of the absolute-discretion model is plausible only if the balance of reasons always permits the exclusion of all migrants.[28] How could this be so? First, it may be that the value of migration can be assumed to be nil or minimal. It is, however, highly unlikely that migration will be without morally significant value for all migrants. In many cases, the value of migration will obviously carry moral weight. Second, the absolutist stance may rest on the view that members of a state are permitted to give no weight to migrants' interests. But this supposition would lead to clearly unacceptable results both in immigration and other domains of international governance or relations.[29] Third, the absolutist stance might rest on the premise that immigration would, as an empirical matter, destroy the value of states. Such a view, however, is incompatible with the power to waive this claim-right. Moreover, it is, I think, plausible only if one were to assert that the value of a state lay wholly in the maintenance of either racial homogeneity or a particular racial equilibrium upon which all other valuable goods associated with the state depended.[30] To avoid a lengthy digression, I do no more than express skepticism that this aim could be defended in today's world of pluralist states.

> [T]he liberal insists that intelligible justifications in social and political life must be available in principle for everyone, for society is to be understood by the individual mind, not by the tradition or sense of a community. Its legitimacy and the basis of social obligation must be made out to each individual, for once the mantle of mystery has been lifted, *everybody* is going to want an answer.

JOHN RAWLS, LECTURES ON THE HISTORY OF POLITICAL PHILOSOPHY (2007), at 13:

> A legitimate regime is such that its political and social institutions are justifiable to all citizens—to each and every one—by addressing their reason, theoretical and practical. Again: a justification of the institutions of the social world must be, in principle, available to everyone, and so justifiable to all who live under them. The legitimacy of a liberal regime depends on such a justification.

The use of the word "citizens" in the passage from Rawls of course requires scrutiny. I doubt liberalism can be restricted in this way.

27. For the idea that rights have a "core," *see* CARL WELLMAN, supra note 15, at 8.

28. The other components of the power asserted in *Cain* might include (1) the imposition of duties on migrants to obey the exercise of the power; and (2) the power to carry out all enforcement or other related actions to implement a preferred policy.

29. RYAN PEVNICK, IMMIGRATION AND THE CONSTRAINTS OF JUSTICE (2011), at 23.

30. For an argument of this type, *see* Michael Walzer's discussion of the White Australia policy in WALZER, *supra* note 19, at 47.

If all this is accepted, there appears no basis for saying that states have a general claim-right that no migrants immigrate. At least some exclusions are likely to be immoral, and it is unlikely that states can legitimately act immorally in all such cases.[31] We are left, then, with a list of valuable goods associated with states, such as functioning economies, welfare institutions, and political cultures, that can be brought to bear to justify restricting some but not all immigration. The fact that states furnish such goods suggests, even before we have fully considered the value of migration, a need to avoid the realization of what we might call the "vast hordes" anxiety, that is, the destruction or erosion of the value of states by large and uncoordinated influxes.

The absolute-discretion model seems to require amendment. Rather than a general claim-right of exclusion against all migrants, there seems to be a claim-right against the immigration of some small or large subset of migrants, together with the other entitlements mentioned. But if the claim-right to exclude applies to some but not all migrants, then decisions need to made about who can rightfully be excluded. Therefore a new model suggests itself, made up of not four but five entitlements: a claim-right of exclusion that is neither general nor determinate in scope, together with a power to judge to whom this claim-right applies, a power of waiver, a power to annex conditions, and the various associated liberties of implementation. This five-part model can be called the *limited-discretion model*. Under the limited-discretion model, the core of the right of exclusion seems more accurately described as the power to judge when immigration to a given state is permissible. In other words, when it is judged that there is a claim-right against the immigration of a given migrant or group of migrants based on some form of all-things-considered reasoning, then the powers to waive/reinstate and annex conditions and the various associated liberties the implementation may attach in some form.

All that has been established is that there is a need for a power to judge when there is a claim-right to exclude. We have not established that states should enjoy this power.[32] We have also not established under what conditions migrants should view the judgments of the receiving state as

31. As a final note on the implausibility of the absolutist stance, it is unlikely that a state would have the power to admit migrants whose immigration would cause great injury to its members. Where immigration's disvalue to the state is significant and clearly outweighs the value of migration to the migrant, a government likely has a duty to its members to exclude. So the absolutist model seems suspect even from the perspective of a state's members.

32. There are obvious alternatives—such as leaving the judgment to individual migrants, downloading the right to substate jurisdictions, or uploading it to international or transnational organizations—and, I am sure, some nonobvious ones as well. Since this is not necessary to my argument, I offer here only two reasons that, it seems to me, must feature in the justification of assigning the power of exclusion to states. The first, epistemic reason is that states, including their members and officials, are likely in the best position to decide how to protect the valuable goods associated with states. A second, motivational reason is that states, including their members and officials, have the most at stake in making such judgments. I make no claim that these reasons provide definitive justification. In particular, they may not be definitive because, as I explain below, states or their officials might be expected systematically

authoritative.[33] These two rather large questions are put aside. The balance of this paper seeks to develop a way to identify the legitimate limits of the power of exclusion and its related entitlements by looking more closely at liberty and value of migration.

V. THE LIBERTY OF MIGRATION

Whereas the core of the right of exclusion asserted by states can be thought of as a power to judge whether there is a claim-right to exclude a given migrant, the core of the right to migrate can be thought of straightforwardly as a liberty. To establish a liberty right, in most cases one must show, first, that there is some activity, like speaking publicly or moving about, that it is deontically permissible to perform; there must not be a duty not to perform the act. Having a bare liberty, though, does not ensure that you will be able to perform the activity. Others may have the liberty to interfere in various ways.[34] One must therefore establish the existence of a series of entitlements, easiest to think of as claim-rights against physical and psychological interference, which protect or support the exercise of the bare liberty.[35]

So the deontic model for the right to migration would comprise a liberty of migration together with a series of protective claim-rights. The relationship between a liberty and any protective claim-right is justificatory and not one of logical entailment.[36] To the extent the liberty and its protective entitlements hang together in service of the value of migration, they may be said broadly to constitute the liberty right of migration. While the

to undervalue migrants' interests. The case for states enjoying the power to say when there is a claim-right to exclude may depend on an argument that the expected biases of state officials will be less damaging than the expected biases of other possible holders of this entitlement.

33. Thus I do not make the further claim that the need for coordination establishes political obligation; *see* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980). The argument in this paper makes no claim regarding what obligations of obedience or otherwise migrants might have toward the immigration regimes of receiving states. I examine only, rather, the limits of legitimate immigration control. I recognize that the extent to which questions of legitimacy and political obligation can be treated separately is a controversial question and that by setting aside the question of political obligation, I leave open the possibility that a state exercising its right to exclude can be owed obedience even if it acts illegitimately. For what it is worth, I believe that this is not the case. Although I cannot pursue the point here, my view is that migrants owe political obligations toward immigration regimes only to the extent that they strive to be just, under suitably defined institutional conditions. For an argument along these lines, *see* BAS SCHOTEL, ON THE RIGHT OF EXCLUSION (2012), ch. 5.

34. KRAMER, *supra* note 13, at 11.

35. The claim-rights may be said to provide a "protective perimeter"; H.L.A. Hart, *Legal Rights*, *in* ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY 171 (1982). For other references to this idea, *see* KRAMER, *supra* note 13, at 12 n3. While the protective claim-rights are most easily conceived as claim-rights against interference, they may also be claim-rights to other forms of protection or indeed other forms of entitlements that may offer protection.

36. As Hohfeld puts it, "Whether there should be such concomitant rights (or claims) is ultimately a question of justice and policy; and it should be considered, as such, on its merits"; Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Juridical Reasoning*, 23 YALE L.J. 16 (1913), at 36. *See also* KRAMER, *supra* note 13, at 10ff; CARL WELLMAN, *supra* note 15, at 13; RAZ, *supra* note 20, at 168–169.

core liberty of migration and its protective claim-rights share a justificatory purpose, however, the grounds for these entitlements are not identical. In general, the set of plausible grounds for a protective claim-right will always include the value of the liberty itself. That the value of the bare liberty serves as a partial ground for each protective entitlement will tend to ensure more numerous and robust protections accompany more valuable liberties. Independent grounds may also come into play in the argument for each protective entitlement, such as the immediate interests protected by the claim-right and the reasons for thinking those interests would be imperiled in its absence. These independent grounds ensure some protection for less valuable liberties.

This discussion suggests two ways, direct and indirect, to come to an understanding of the extent or limits of any such liberty.[37] Direct arguments assert the value of an activity and move outward to specify associated protective entitlements. Arguments for traditional civil and political rights tend to proceed directly, since such rights involve activities whose value can be used to justify manifold protections.[38] Indirect arguments, in contrast to direct ones, begin with protective claim-rights and move inward to describe a residuum of free action that cannot, so long as the protective entitlements are respected, be interfered with.[39] Such arguments are less ambitious. They do not rely on, nor do they seek to establish, comprehensive duties not to interfere with an activity. They ride on the coattails of the justifications for ancillary entitlements, which will in some cases be easier to establish because they implicate interests whose value is more evident.

The value of migration need not be trivial, but it can be. In most cases it is indeterminate, further aggravating the overall indeterminacy of the judgments that must be made in immigration governance. Therefore argument for which migrants' or categories' of migrants liberty of migration deserves protection in most cases best proceeds indirectly.

This can be seen by noticing the shortcomings of the two most plausible arguments for a general right of migration. On the first such argument, the value of migration is said to depend instrumentally on the reasons for which we migrate. Henry Shue argues that freedom of physical movement is a basic right because such freedom is needed for the exercise of any

37. For the distinction between direct and indirect arguments, *see* KRAMER, *supra* note 13, at 12 n3. Carl Wellman proposes a distinction between the "inclusive" and "piecemeal" grounding of rights. A moral right is grounded inclusively when the moral grounds of its core include all the grounds of its associated elements; it is grounded piecemeal when the grounds of its associated elements are distinct; *see* CARL WELLMAN, *supra* note 15, at 79. Wellman's distinction imperfectly maps onto the one I propose.

38. Hart says such liberty-rights may be protected by a "strictly correlative obligation not to interfere by any means with a specific form of activity." HART, *Legal Rights*, *supra* note 35, at 172; *but see also id.* at 190–193. Hart's claim may be misleading if it is meant to suggest that such rights do not ultimately give way to the same kind of analysis that he and Hohfeld apply to less celebrated forms of liberty. It just happens that the most widely accepted civil and political liberties enjoy sufficient protective entitlements that their guarantee can seem complete.

39. KRAMER, *supra* note 13.

other right. The interest one has in free movement rests parasitically on the fact that one will usually have to go somewhere to exercise other rights.[40] Even accepting this premise, it is plain that we also move about for less lofty reasons than to exercise basic rights. The instrumental argument seems to establish at most that freedom of movement for some valuable reasons, such as to worship with coreligionists, would be protected. It does not establish that freedom of movement ought to be protected for less valuable aims, such as nightclubbing.

The second plausible way to argue for a general right to freedom of movement is to proceed from the value of autonomy. Relying on a conception of autonomy as the capacity to form and act on a plan of life, Joseph Carens writes, "one would insist that the right to migrate be included in the system of basic liberties for the same reasons that one would insist that the right to religious freedom be included: it might prove essential to one's plan of life."[41] The conception of autonomy used here may be too heroic,[42] and such strong conclusions may not follow from more modest conceptions.[43] But even under the broader conception, it is unclear why all plans of life ought to be afforded the same weight. Some plans may justify a direct liberty of migration, but not all.[44]

On either an instrumental or autonomy-based argument, it is easy to see why radical restrictions on freedom of movement, such as imprisonment, require the strong form of justification provided by a criminal trial. Argument can proceed directly in such cases. It is less easy to see on what grounds more moderate restrictions, such as most immigration restrictions, which after all do not impact a migrant's ability to move about within his or her own state, might be disallowed.[45] In light of the variable value that

40. *See* HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY (1980), at 78–82. Shue confines his argument to a right of free movement within a society.

41. Carens, *Aliens and Citizens*, *supra* note 22, at 258. More expansively, Carens writes (*Id.*):

> Even in an ideal world people might have powerful reasons to want to migrate from one state to another. Economic opportunities for particular individuals might vary greatly from one state to another even if economic inequalities among states were reduced by an international difference principle. One might fall in love with a citizen from another land, one might belong to a religion which has few followers in one's native land and many in another, one might seek cultural opportunities that are only available in another society. More generally, one has only to ask whether the right to migrate freely within a given society is an important liberty. The same sorts of considerations make migration across state boundaries important.

42. Jeremy Waldron, *Autonomy and Perfectionism in Raz's* Morality of Freedom, 62 S. CAL. L. REV. 1097 (1988–1989), at 1106–1107.

43. David Miller argues, for example, that "[w]hat a person can legitimately demand access to is an *adequate* range of options to choose between—a reasonable choice of occupation, religion, cultural activities, marriage partners, and so forth." On this basis, he concludes there is no general right of migration. *See* Miller, *Immigration*, *supra* note 21, at 196.

44. Can such an argument be made by saying that a general right of migration needs to be guaranteed in order to protect those particular cases where migration is most urgent? I do not think so, because carve-outs for urgent cases seem feasible.

45. Miller, *Immigration*, *supra* note 21, at 194.

might be attached to migration and the possibility that migrants' interests might justifiably be accorded less weight than those of members, together with uncertainties about the effect of migration on the value of states and questions about the appropriate capping and distribution of immigrant admissions, it will often be impossible to arrive directly at an account of who should enjoy the liberty of migration. For this reason, arguments regarding the extent and limitations of either the liberty to migrate or the claim-right to exclude in the majority of cases will often best proceed indirectly, by focusing on whether a given form of regulation results in the infringement of a protective entitlement that is easier to grasp intuitively.

This indirect manner of proceeding in the justification of the liberty to migrate or the claim-right to exclude adds into the mix another set of reasons having to do with more basic human interests. If states enjoy certain liberties to implement the judgment that there is a claim-right to exclude a certain migrant or group of migrants, these liberties must be grounded in both comparative judgments about who should be admitted and the reasons we have for having confidence in those judgments, as well as a further judgment that the harm caused if any by the implementing measure is justified in light of the first two sets of considerations. This third consideration raises the issue of when states' interests in enforcing its judgments about immigration justify harming those immediate interests that serve as the partial grounds for migrants' basic rights.

Here we encounter a further conceptual opposition in addition to the opposition between the claim-right to exclude and the liberty to migrate. The new opposition is between a state's liberty to implement its judgments regarding admission and exclusion and a migrant's claim-rights against certain means of implementation. A state's liberty to implement its judgment in a certain way entails a no-right on the part of migrants against that form of implementation; conversely, a migrant's claim-right against a form implementation entails a duty on the part of states to refrain from such implementation. Moreover, the underlying justification of these ancillary entitlements involves a mix of the all-things-considered reasons that serve as the basis for the state's judgments, together with reasons deriving from the more immediate interests of migrants. If the implementation liberty is justified, migrants' more immediate interests may be overridden, under the circumstances, by the state's judgment of the balance of reasons in favor of exclusion. If the claim-right trumps enforcement, the reverse is true.

The justificatory relationship between ancillary entitlements and either the power of exclusion or the liberty to migrate, together with the conceptual opposition of migrants' protective claim-rights and states' liberties of implementation, now provides the basis for a formal statement of the indirect principle. Under this principle, by identifying those claim-rights that impose a duty on states not to implement the power of exclusion in certain ways, we approximate the legitimate extent of the liberty of migration. If an immigration policy leads to the violation of such claim-rights, we can

be reasonably confident that the policy is illegitimate, not just because it violates basic claim-rights but also because it seeks to exclude migrants who should not be excluded.

VI. THE RIGHTS OF MIGRATION

The goal of this section is to come at the problem of the legitimacy of immigration governance from a substantive direction by suggesting some considered judgments.[46] This exercise yields three broad categories: those migrants who can plausibly be said to have a direct liberty to migrate; those whom the state can permissibly exclude; and those about whom no firm judgments exist. With these categories in place, I suggest some claim-rights that migrants can assert against their states of destination. These basic claim-rights provide the protective perimeter for the liberty of migration, establishing the indirect principle with respect to the third category of migrants.

A direct argument for a liberty to immigrate can be made out for refugees, young children or their parents,[47] and returning citizens. This claim is based on my belief that most people would consider, on reflection, that it

46. Use of the phrase "considered judgments" invokes reflective equilibrium, John Rawls's coherentist method for reaching objective moral judgments. Despite the heated rhetoric that characterizes the politics of immigration, I believe widespread agreement does hold with respect to some issues, as reflected in international legal instruments, in patterns found in the immigration laws or policies of several countries, or simply in what I anticipate will be common reactions to certain actions by governments when enforcing immigration laws. Thus in this section I draw on the law not to demonstrate a certain legitimacy claim, as in Section II, but as evidence of considered judgments. For discussions of reflective equilibrium, *see* JOHN RAWLS, *Outline of a Decision Procedure for Ethics*, *in* COLLECTED PAPERS 1–19 (1999); JOHN RAWLS, A THEORY OF JUSTICE (2d ed. 1999), at 18–19, 42–45; T.M. Scanlon, *Rawls on Justification*, *in* THE CAMBRIDGE COMPANION TO RAWLS 139 (Samuel Freeman ed., 2003). I note that, consistent with reflective equilibrium, these considered judgments are not supposed to be fixed. They, too, are subject to contestation and revision.

47. I employ the "or" here and below because I do not try to resolve the difficult question of who has the liberty right—the child or the parent. It might be thought that this judgment is too narrow, since most liberal democracies allow for admissions based on a wider range of family ties. True. But, first, most of those admissions are subject to strict requirements of inadmissibility that generally do not apply with respect to young children; second, international human rights instruments seem to protect at most only the entry of young children or their parents (*see* CONVENTION ON THE RIGHTS OF THE CHILD, art. 10(1), Nov. 20, 1989, 1577 U.N.T.S. 3); and, third, I am intentionally listing lowest-common-denominator judgments here. For similar reasons, I assume a narrow definition of refugees. The perspicacious reader will notice that I omit spouses from this list and also from the list below, where I discuss other possible family relationships about whom our judgments are indeterminate. That is because I am not confident that we have considered judgments about migrant spouses. On the one hand, most states provide them with rights of conditional admission (usually the conditions have to do with ensuring support and commitment between the spouses). On the other hand, David Miller's argument that "[w]hat a person can legitimately demand access to is an *adequate* range of options to choose between—a reasonable choice of occupation, religion, cultural activities, marriage partners, and so forth" (Miller, *Immigration*, *supra* note 21, at 196; emphasis in the original) disturbs any considered judgment I might have in this regard. I am grateful to the anonymous LEGAL THEORY reviewer for urging clarification.

would be unjustifiable to return refugees to countries where they have a reasonable chance of being tortured or where their life or freedom would be threatened on account of their race, religion, nationality, membership in a particular social group, or political opinion. Similarly, most would consider it unjustifiable if young children were separated from their parents by immigration regimes; although in this case I do not claim necessarily that parents must be let into the country where their children are found, or vice versa. Finally, stepping outside usual categories, most would consider it unjustifiable to bar a person's return to his or her country of citizenship.[48] Those who attempted to come to a considered judgment in these cases would come to believe that the potentially high value of migration outweighs any negative impact their immigration might have on the value of states, even accepting that migrants' interests might justifiably be given less weight than those of a receiving states' members. Therefore immigration policies should, as a general matter, provide for the admission of these categories of migrants. There is at least qualified evidence for this conclusion in all three cases in major international rights instruments.[49]

Although we cannot pursue it in detail, the direct argument for the liberty of migration turns on the claim that in each of these cases the value of migration seemingly connects to interests, including well-being, in a foundational manner. Our judgments about citizens and refugees reflect the fact that access to a state that offers essential protections is a necessary prerequisite to having any sort of life.[50] Access to one's parents is of foundational importance in a different way. Without it, one's life prospects are dramatically diminished. These judgments also reflect, I think, the assessment that the number of migrants with such claims will in general remain small and associated social costs will be minimal.[51] Accordingly questions of placing

48. It may seem idiosyncratic to talk of returning citizens as migrants. It is nonetheless the case that for many returning citizens, the only incident distinguishing them from other would-be immigrants is possession of a formal status, and sometimes states do seek to bar their return. Indeed, international rights instruments protect the right of return for citizens precisely because from time to time such citizens face the arbitrary deprivation of that right. For discussion, *see* ALISON KESBY, THE RIGHT TO HAVE RIGHTS: CITIZENSHIP, HUMANITY, AND INTERNATIONAL LAW (2012), ch. 1. I am again grateful to the anonymous LEGAL THEORY reviewer for urging clarification.

49. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, S. Treaty Doc. No. 100–20 (1988), 1465 U.N.T.S. 85 (no expulsion to torture); Convention Relating to the Status of Refugees, art. 33, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954) (no expulsion to territories where life or freedom would be threatened); Convention on the Rights of the Child, *supra* note 47; Universal Declaration of Human Rights, art. 13(2), G.A. Res 217A, U.N. G.A.O.R., 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948) (right to leave any country and return to your own country) [hereinafter UDHR]; International Covenant on Civil and Political Rights, art. 12(1), Dec. 16, 1966, S. Exec. Doc. E., 95–2 (1978), 999 U.N.T.S. 171, (no arbitrary deprivation of the right to enter his own country) [hereinafter ICCPR]. They are also supported, I think, by the reactions we would have to specific cases.

50. One might call this the Arendtian judgment that there is a right to have rights; HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM (1968), at 290ff.

51. Here it might be objected that the refugee category may not be small if one endorses a broader definition of refugees. Some argue (*see, e.g.*, Andrew Shacknove, *Who Is a Refugee?*, 95

an upper limit on the numbers of such migrants or of choosing between them will not, in the normal course, arise. Therefore, migration is, all things considered, permissible in such cases.

A second category of migrants arises out of judgments that the balance between the value of states and the value of migration, adopting proper weighting, is clearly reversed with respect to some migrants. A direct argument for the claim-right to exclude such migrants is available. Immigration will be, all things considered, impermissible for such migrants, and indeed, states may have a duty to their members to exclude them. Examples of such dangerous migrants might include migrants who pose serious threats to security or public health.[52] Here are cases where a migrant's admission would bring with it the risk of an identifiable, potentially great injury, such as the death of one or more members. In all but the difficult cases where a dangerous migrant is also either a refugee, a child or the parent thereof, or a citizen, it can plausibly be maintained that the value of migration is outweighed by the potential disvalue to the state or even to the individual members who might be threatened or worse.

Far from establishing general rights to migrate or exclude, the first two categories cover only a relatively small subset of possible migrants. We are therefore left with a third category, migrants about whom considered judgments about the all-things-considered permissibility of migration cannot plausibly be said to exist. This third category, regarding which considered judgments are not accessible, will likely include the great majority of family and economic migrants. It is one thing to say young children presumptively have a liberty to migrate to be with their parents, or vice versa. This

ETHICS 274 (1985)) that this category should include not just those who face persecution on account of their race, religion, nationality, political opinion, or membership in a particular social group, as the Convention relating to the Status of Refugees, *supra* note 49, stipulates, but a broader group of people who face general risks brought about by civil wars or climate change. Indeed, some regional instruments, such as the African Charter on Human and Peoples' Rights, Organisation of African Unity, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (entered into force Oct. 21, 1986), and the Cartagena Declaration on Refugees, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena, Colombia, Nov. 19–22, 1984, reflect a broader definition of *refugee*, and some countries offer forms of "complementary" or "subsidiary" protection based on threats to human rights not otherwise covered by the Convention relating to the Status of Refugees, *supra* note 49. If a broader definition of *refugee* is indeed, all things considered, justified, then the intuition that the numbers of refugees will remain small would be suspect. However, the narrower definition of refugees in the Convention relating to the Status of Refugees, *supra* note 49, enjoys far more widespread endorsement, and, again, I am aiming here for lowest-common-denominator judgments. An argument for broadening the refugee category could certainly be made. One way of pursuing such an argument would be through the indirect principle.

52. To the extent that there is disagreement about the just exclusion of dangerous migrants, it tends to focus on migrants who have established some form of residence in a state. I refer here to the migrant who appears at a border and who is uncontroversially dangerous to the receiving country. Even strong supporters of a general right to migrate freely acknowledge the justifiability of restrictions in the case of security. In the classic article defending a right to free migration, Carens says: "National security is a crucial form of public order. So, states are clearly entitled to prevent the entry of people (whether armed invaders or subversives) whose goal is the overthrow of just institutions." Carens, *Aliens and Citizens*, *supra* note 22, at 260.

judgment seems less certain as the relationship becomes more distant and less dependent. Firm judgments about economic migrants will also be elusive. Some migrants might be destitute. Many will simply want to move to wherever they might make more money.

That the value of migration for family and economic migrants will vary does not suggest it will be without value. There can be significant affective value in reuniting even with adult children, elderly parents, siblings, cousins, and so on. The importance of such relationships will be heavily circumstantial, depending on each migrant's background culture, personal history, and other family ties. For its part, economic migration is frequently denigrated as mere profiteering or opportunism, but that, too, is misleading. Wealth and income are in many ways like access to a functioning state or a stable family. They are "all-purpose means"[53] supporting other human interests. Much more could be said about the value of family and economic migration, but the main point is that these connect to individual interests significantly but variably. Any attempt at working out the political morality of immigration regimes must confront this difficulty, the largely unknowable value of migration for most migrants.

What, if anything, then, can we say about this third category of migrants? The indirect approach starts by asking what may or may not be done to migrants in order to implement a judgment that a particular migrant or category of migrant should be admitted or excluded. Once again, we are not without intuitive resources in attempting to make matters concrete. Although we may have exhausted our considered judgments about which migrants enjoy a direct liberty of migration and against which migrants states enjoy a claim-right of exclusion, migrants also have basic claim-rights that bear indirectly upon their liberty to migrate. Thus I believe most would accept the considered judgments that the following are unacceptable: the enforcement of immigration or emigration policy using arbitrary or excessive force, including by killing; the prolonged detention of migrants posing no danger; the enslavement or exploitation of migrants; and the expulsion of longer-term residents without sufficient procedural guarantees. These judgments suggest that migrants hold the following claim-rights against their states of destination: a right to life and security of the person, rights against prolonged and arbitrary detention, rights against exploitation and abuse, and rights of due process when facing expulsion.[54]

This is a list of human rights most would consider universal. Everyone enjoys rights against arbitrary detention or assault against all others. This

53. *See, e.g.*, JOHN RAWLS, POLITICAL LIBERALISM (rev. ed. 1996), at 180.

54. Once again, these rights claims are intentionally minimal and narrow. For example, the list includes only due-process rights with respect to expulsion. This restriction reflects the further judgment that migrants facing expulsion face potentially greater injury, through the rupture of existing ties and other features of their life within a given state, and recognizes that the judgment that those seeking to come to a state also deserve due-process rights is less likely to garner consensus. I discuss the possibility of expanding the list in the next section.

claim, made without context, reflects a judgment that such rights safeguard basic human interests. But the immigration context also provides distinctive grounds. For example, it reflects the judgment that the governments of receiving states, which in practice hold the power of exclusion, will often overstep or be tempted to overstep the bounds of the permissible and that it will be both feasible and desirable to place checks on their ability to do so.[55]

More concretely, what gives these rights added salience for the purposes of my argument is that in the case of immigration governance, there are additional historical and structural reasons for thinking that receiving states will unduly denigrate migrants' interests and, correspondingly, inflate countervailing interests in favor of immigration restriction. The list of claim-rights reflects particular evils that the historical record shows governments have been willing to visit upon migrants in the name of immigration control. Unable to achieve desired policy ends through straightforward means, governments have often restricted due-process rights to expel migrants, heedless of whether such deportation measures are overinclusive.[56] Unwilling permanently to admit migrants whose labor is needed within the receiving state, governments have a long history of seeking to admit "guest workers" under conditions that lead to exploitation and abuse or of tacitly tolerating the presence of illegal immigrants as a cheap form of labor.[57] Unable to

55. *See* T.M. Scanlon, The Difficulty of Tolerance (2003), at 117, where Scanlon notes that to recognize a right against torture is not just to deplore pain and suffering. This right also "reflects the judgment that the temptation to rule in this manner is a recurrent threat and that the power to use torture is a power whose real potential for misuse is so clear as to render it indefensible." *See, generally*, the discussion of Scanlon's approach to justifying claim-rights, *id.*

56. Rather than a detailed historical defense for each claim, examples must suffice. The tendency to achieve immigration aims by restricting due-process rights for deportees is well illustrated by measures adopted during the Chinese exclusion era of U.S. immigration policy. By the Geary Act, the U.S. Congress sought to deport any Chinese residents who did not hold a certificate of residence establishing lawful presence inside the United States since 1892. To get such a certificate required a photograph and the testimony of two (later amended to one) white witnesses. Chinese residents arrested for being uncertified had to prove they were unable to get a certificate because of an "accident, sickness or other unavoidable cause." Further, they also had to establish lawful presence through the testimony of one white witness. By design, the Geary Act caught many Chinese residents lawfully present in the United States since 1892 but who would be unable to prove as much since they were unlikely to be able to procure the testimony of a white witness. In upholding these procedural requirements, the majority of the U.S. Supreme Court said that it was open to Congress to employ any procedures considered necessary to deport resident Chinese aliens and that Congress could, in fact, direct the removal of any Chinese person without judicial trial or examination. The Geary Act was the subject of two landmark immigration cases: *Fong Yue Ting*, *supra* note 6; and Wong Wing v. United States, 163 U.S. 228 (1896). There are large legal and historical bodies of literature on the Chinese exclusion era. A historical work that discusses the role of due-process limits as an instrument of policy is Lucy Salyer, Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law (1995).

57. Cindy Hahamovitch, *Creating Perfect Immigrants: Guestworkers of the World in Historical Perspective*, 44 Lab. Hist. 69 (2003); Kitty Calavita, Inside the State: The Bracero Program, Immigration, and the I.N.S. (1992). The vulnerability of migrant workers, legal and illegal, to exploitation is often recognized and is the subject of much international attention. Apart from the little-ratified International Convention on the Protection of the Rights of All Migrant

prevent unwanted immigration, detention[58] and even killing[59] are relied upon by governments to achieve their aims. Therefore, the claim-rights identified correspond to wrongs against migrants that governments *actually have committed or allowed to be committed* in the name of achieving desired policy aims.

There are also structural reasons to think such wrongs have not been mere accidents but that the governments of receiving states, left unconstrained, *will continue to commit them* or *continue to allow them to be committed*. When creating immigration policies, the governments of receiving states must make a complex judgment, taking into account the interests of their own members but also those of migrants and possibly those of the nonmigrant members of other states as well. They are liable, often, to get this judgment wrong. Besides human fallibility, they will fall prey to undue bias. Governments of receiving states are answerable to their own members. History suggests the members of states have propensities toward anti-immigrant sentiment.[60] Moreover, the interests of migrants will seem more remote to the officials of receiving states. As a result, immigration policies will tend to disregard the interests of migrants, resulting in policies where basic claim-rights are violated. Recognizing and safeguarding these rights holds distinctive, not to say greater, urgency in the context of migration governance.

And so the argument for the indirect principle, in substantive terms, is as follows. For the majority of migrants, the economic and family migrants in

Workers and Members of Their Families, *supra* note 8, there are the specialist protocols aimed at fighting the most coercive forms of migration that result from smuggling and trafficking: *see* Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, GA Res 25, annex II, UN GAOR, 55th Sess, Supp No 49, at 60, UN Doc A/45/49 (vol. I) (2001), Can TS 2002 No 25 (entered into force Sept. 9, 2003); Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Crime, GA Res 55/25, annex III, UN GAOR, 55th Sess, Supp No 49 at 65, UN Doc A/45/49 (vol. I) (2001) (entered into force Jan. 28, 2004).

58. Zadvydas v. Davis, 533 US 678, 696 (2001) ("[A]n alien's liberty interest is, at the least, strong enough to raise a serious question as to whether . . . the Constitution permits detention that is indefinite and potentially permanent.").

59. Here are two examples: (1) In 1937, Rafael Trujillo ordered the *corte* or "mowing down" of Haitian migrants in the Dominican Republic. This was an operation carried out by the Dominican Republic's national constabulary and Trujillo loyalists that resulted in the murder of as many as 25,000 men, women, and children who were Haitian or of Haitian descent and living in the Dominican's frontier region and northern Cibao Valley. Haitians living on sugar estates were spared. "Regardless of the dictator's intentions, no more chilling way could be imagined of conveying to Haitian immigrants that the sugar *bateyes* would thereafter be their only secure place on Dominican soil." *See* SAMUEL MARTINEZ, PERIPHERAL MIGRANTS: HAITIANS AND DOMINICAN REPUBLIC SUGAR PLANTATIONS (1995), at 44–45. (2) In 1988, the Thai Ministry of the Interior issued a "pushback" order, deputizing fishermen in Khong Yai to prevent entry of any boats which might be carrying Vietnamese refugees. "During the first weeks of Thailand's pushback policy, hundreds of asylum seekers were victimized. Those who managed to evade the naval blockade or rammings by Thai fishing boats were abandoned on barren islands without food, water or medicine." *See* Arthur C. Helton, *Asylum and Refugee Protection in Thailand*, 1 INT'L J. REFUGEE L. 20 (1989), at 28.

60. For a historical account, *see* JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860–1925 (1963).

what I am calling the third category, reasonable disagreement is inevitable over whether there is either a liberty to migrate or a claim-right to exclude. What can be said is that no legitimate immigration regime may ordinarily violate the basic claim-rights of such migrants in implementing a law or policy that aims to exclude them. Such basic claim-rights include rights to life and security of the person; rights against prolonged and arbitrary detention; rights against enslavement, exploitation, and abuse; and rights of due process when facing expulsion.

The case for these rights depends on the importance of the personal interests at stake, together with the underlying reasons for or against migration. It also depends on three further claims. First, the historical record of government action in this area is too poor for us to give governments the benefit of the doubt. Second, this record seems a reflection of the fact that the judgments made by national immigration regimes about whether they should respect the liberty of migration in such cases are too complex and too liable to error to ground a justification of such basic rights violations. Further, there are structural reasons for thinking that governments will improperly discount the interests of migrants when making such judgments. Therefore, when a government creates an immigration law or policy that leads to the violation of one of the four rights identified, the government must alter the law or policy on pain of illegitimacy or undertake the difficult task of justifying the rights violation in the particular case.

VII. OBJECTIONS

The indirect principle may seem so straightforward as to be simpleminded. If migrants have basic rights, of course they cannot be violated. This dismissal, at least, is too quick. The point of the argument is not just that migrants' basic rights ought not to be violated. By seeking policies that avoid basic rights violations, states achieve reasonable assurance that their judgments about which migrants they have a claim-right to exclude track proper judgments weighing the value of migration against the value of states. This is so because the reasons that justify either the liberties to implement immigration law or the claim-rights against such implementation include the reasons that would justify either the claim-right to exclude or the liberty to migrate. The result is only approximate, however, because other reasons also come into play, namely, those flowing from the interests protected by migrants' basic rights. If this is so—if we can be relatively confident that respect for migrants' basic rights in immigration policy-making will conduce to a policy that is legitimate in its admissions and exclusions decisions—that would provide officials an additional reason to forbear in most cases from rights-violating implementation in the name of upholding the integrity of an immigration policy. That a policy tends toward basic rights violations suggests it illegitimately excludes some migrants.

Those who believe immigration laws are too restrictive may also find the indirect principle underwhelming. Clearly, the indirect principle does not challenge sovereign control over immigration as thoroughly as would a general right to free migration or an argument for adding to or broadening the categories of migrants who should be seen as having a clear liberty right to migrate. As I seek to show in Section V, however, the two most plausible arguments for a general right to free migration do not succeed. Further, while it may be possible to argue for more or broader direct rights of migration than those provided by the categories I propose in the last section, the effect of such arguments will merely reduce the scope of applicability of the indirect principle, not its validity. Finally, giving up on the claim that there is a general liberty of migration represents less of a loss than might at first seem to be the case.

The force of the challenge to sovereign discretion by the indirect principle depends on two things. The first is the number of basic rights recognized. Whereas in the previous section I name only four, the potential list of basic rights that could be argued for on behalf of migrants is much longer. The UN Committee on Civil and Political Rights writes, "[T]he general rule is that each one of the rights of the [International Covenant on Civil and Political Rights (ICCPR)] must be guaranteed without discrimination between citizens and aliens."[61] So almost every right in the ICCPR could potentially provide a basic right.[62] The possible limits expand once economic and social rights are taken into account. Strikingly, for instance, the Universal Declaration of Human Rights and the International Covenant on Economic, Social, and Cultural Rights both include a right to work and other employment rights that are not, on their face, limited to either citizens or even legal migrants.[63] Other common rights applicable to at least some migrants include rights to social security,[64] to public health services,[65] and to education.[66] There is no argument here that migrants in practice have or ought to have rights to, for example, social security. The point is that as more rights are accepted as basic claim-rights enjoyed by migrants, the critical force of the indirect principle grows.

Beyond the sheer number of rights, the critical force of the principle will depend on the preferences and actions of migrants themselves. Recall that I suggest in Section II that absolutist statements of the legal doctrine of sovereign discretion can be understood to rest upon either a substantive account of legitimacy that affords migrants' interests no weight or a

61. General Comment No. 15: The Position of Aliens under the Covenant, U.N. H.R.C., 27th Sess, U.N. Doc. HRI/GEN/1/Rev.1 (1986) 140, ¶2.
62. *Id.* at ¶7.
63. UDHR, *supra* note 49, art. 23; International Covenant on Economic, Social and Cultural Rights, art 6(1), *opened for signature* Dec. 16 1966, 993 U.N.T.S. 23 (entered into force Jan. 3, 1976) [hereinafter ICESCR].
64. UDHR, *supra* note 49, arts. 22, 25; ICESCR, *supra* note 63, art. 9.
65. UDHR, *supra* note 49, article 25(1); ICESCR, *supra* note 63, art. 12.
66. UDHR, *supra* note 49, article 26; ICESCR, *supra* note 63, arts. 6(2), 13–15.

procedural account that grants migrants no standing. In Section IV, I suggest that the view that we should afford migrants' interests no weight is implausible. However, even once this implausibility is accepted, we must face the double challenge of identifying the proper weight to be given migrants' interests—if not equal, then how unequal?—as well as resisting the systematic bias against such interests that is likely to occur within the immigration regimes of receiving states. The indirect principle can be seen as a means to approximate the proper weight to be afforded migrants' interests when determining the limits of legitimate immigration governance, because the principle redirects argument to a set of interests that seem less susceptible to distorting biases.

The argument, though, seemingly says little about the problem of standing brought out by the procedural interpretation of the absolutist legitimacy claim. This claim is that a state's immigration laws and policies are legitimate because they are the product of its internal political processes. Such a legitimacy claim is on its face problematic since it excludes migrants' own views and potentially sanctions radical disregard of their interests. In both these respects, immigration laws and policies would be arbitrary, and it is hard to reconcile a claim of even potential legitimate arbitrariness with liberal theory's general commitment to individualized justification.[67] One response would be to give migrants a direct say in the immigration laws and policies of their states of destination. Even assuming the desirability of this alternative, it likely faces insuperable obstacles. The indirect principle offers a second-best account of the procedural legitimacy of immigration governance. That is because it incorporates the preferences of migrants, thereby providing evidence of migrants' own comparative judgments of the respective values of states and migration, in the following way.

As more unwanted migrants seek to come to a state contrary to its government's laws and policies, that government will be pulled toward stronger enforcement methods and other policies that violate rights. Carens writes, "Borders have guards and the guards have guns."[68] To this, add that border guards are more likely to use their guns as more immigrants try to cross the border. The greater unwanted migrants' incentives to immigrate contrary to a government's preferred laws and policies, the more likely that a state will pursue stronger disincentives. Among the range of possible disincentives congenitally tempting to immigration policy-makers are those that result in the violation of basic claim-rights. But since those disincentives are presumptively illegitimate, the effect will be a partial shaping of immigration law and policy by migratory pressures. Thus the indirect principle provides a form of standing to migrants.

I am trying to explain why, despite perhaps seeming underwhelming, the indirect principle has considerable critical potential. The opposite

67. Jeremy Waldron, *Theoretical Foundations*, *supra* note 26 at 135.
68. Carens, *Aliens and Citizens*, *supra* note 22, at 251.

objection to the indirect principle is that it excessively limits states' power of exclusion; that it overwhelms. The objection runs that much of the reason for the escalation of rights violations is surely that migrants persist in trying to immigrate in contravention of immigration policies. Indeed, the indirect principle would seemingly permit some migrants to act on their preferences even when the balance of reasons suggests they should not.

So, on the hypothesis that immigration policies should reflect the all-things-considered permissibility of immigration, how can enforcement action designed to deter widespread disobedience render it illegitimate? The answer to this concern is that it is a mistake to consider that we can come to agreement about which policies will be facially legitimate in this sense. The indeterminacy of the available reasons suggests that deep disagreement will always remain. The usual way of ensuring legitimacy in the face of disagreement, that is, the establishment of inclusive decisional procedures, is not available in the case of immigration governance, because migrants in practice have no access to the procedures that determine a receiving country's immigration laws and policies. Such laws and policies suffer from a legitimacy deficit as a result. The indirect principle reduces this deficit. It provides reasons for migrants to accept such policies, among them that such policies do not result in the violation of basic rights. Not incidentally, this same reason is provided to members for their acceptance. That is, the reason for accepting some unwanted migration is the need to respect basic rights.

Perhaps the objection can be restated and gain more traction if put in terms of the value of states. Even if we do not have firm judgments about the permissibility of the immigration of some migrants, might we not acknowledge that past a certain point, the immigration of enough migrants, regardless of any judgment we might form in individual cases, will damage those goods that legitimate states provide to their members? The real worry, as it has been for well over a century, is that the indirect principle will weaken states' ability to preserve their own value. One response, which may seem overly technical but is nonetheless valid, is that such concern is already addressed within the argument for the indirect principle. That is, the third category of migrants, in which case the indirect principle is most useful and most clearly applicable, comprises those migrants about whom we have no clear judgments regarding any such threat. Further, rights, even basic rights, are presumptive and can sometimes be overridden, although such overrides will be rare, given the kinds of interests that underlie the basic rights listed.

Finally, also built into the argument is the idea that the indirect principle will leave a considerable range of basic rights-respecting laws and policies available to states of destination and that the remainder of acceptable policies will provide sufficient flexibility for states to ensure their own value. Rather than leading to "vast hordes," as the *Chinese Exclusion Case* put it, the

indirect principle will allow for a manageable inflow. Since I do not have space to defend this concluding idea, and I am not sure how I would if I did have the space, it might be cast pejoratively as an article of faith. It is, however, no less plausible, and infinitely more attractive, than the pessimistic attitude that it is only by reserving the power to violate basic rights at pleasure that such hordes can be kept at bay.